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International Commercial Courts. A paradigm for the future of adjudication?

Edited by

Albert Henke, Marco Torsello,
and Elena Zucconi Galli Fonseca

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Albert Henke, Marco Torsello, Elena Zucconi Galli Fonseca*

International Commercial Courts: An Introductory Overview

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On July 14th, 2022, the Universities of Bologna, Milan, and Verona jointly organized a webinar on the topic: "*International commercial courts: a paradigm for the future of adjudication?*". The interest aroused by the individual speeches, the numerous ideas that emerged from the debate between the speakers, and the rich exchange of opinions among the participants suggested deepening the analysis of such a topical subject matter in a collective volume, to which further eminent specialists in the field of international litigation and arbitration contributed.

The editors are thus honored to present this volume, which they hope will assist academics and practitioners in navigating the diverse and dynamic world of international commercial courts, with a view to triggering further analysis and insights.

1. *International commercial courts in the European Union*

The first part of the volume addresses the phenomenon of international commercial courts in the EU, with particular attention to the German, French, Dutch, and Italian jurisdictions.

* This introduction reflects the structure of the webinar that led to this publication, which was divided into three sessions, each one chaired by one of the three editors of this book. Accordingly, it is divided into three separate paragraphs, one devoted to international commercial courts in Europe, one to the experience outside of Europe, and one to the relationship between international commercial courts and international arbitration. Although this introduction is jointly authored by the three organizers of the webinar and editors of this book, each one of the three paragraphs can be attributed to the individual author who chaired the corresponding session of the webinar. Accordingly, paragraph 1 can be attributed to Prof. Albert Henke (University of Milan), paragraph 2 can be attributed to Prof. Marco Torsello (University of Verona), and paragraph 3 can be attributed to Prof. Elena Zucconi Galli Fonseca (University of Bologna).

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Elena Alina Ontanu highlights how a number of common features which can be found in the international commercial courts set up (or to be set up) in several European jurisdictions represent a response to some of the main obstacles in national procedural laws and practices (also referred to in recent studies funded by European institutions), which impact on legal certainty for businesses and citizens engaged in cross-border litigation. The reference is to the high specialization of judges in terms of knowledge, expertise, and experience in adjudicating complex international commercial cases; jurisdiction based on parties' express agreement; use of English in most parts of the proceedings; use of technology at various stages (e.g. submission of the claim, consultation of the case file) and for different proceedings (e.g. service of documents, taking of evidence, hearing of witnesses); a better case management and/or strict application of procedural deadlines. These international commercial courts might also be seen as a response to something that was seen as a 'market failure' and a possible alternative, at the time of the Brexit process, to the London Commercial Court, to the extent they combine, in their activity, the flexibility features found in international commercial arbitration proceedings with the interpretative and development function of state courts.

Marco Lamandini and David Ramos Muñoz maintain that the European law of finance may possibly work as an interesting test case for hybrid commercial courts in Europe. In this field, the growing importance not only of expert judgment but also of procedural specialization is shown, for example, by the Financial List in the United Kingdom, a specialized list of judges set up in December 2015 to handle claims related to financial markets. In the authors' opinion, the effectiveness of EU law is increasingly at odds, in its private-law dimension, with Member States' procedural autonomy, since civil remedies for private law disputes in the EU law of finance remain balkanized in a variety of national modes (as shown in a case such as *Genil*, C-604/11). It should therefore be greeted with favor the recent CJEU's case law in decisions such as *Banco di Desio* (C-693/19 and C-831/19), according to which, unlike a consolidated jurisprudence (*Bankia*, C-910/19; *Alfred Hirmann*, C-174/12; *Lies Craeynest*, C-723/17), procedural autonomy has to surrender to the effectiveness of EU law. With particular respect to the EU law of finance, a possible alternative to the establishment of a European court for cross-border commercial disputes (not endorsed by the European Commission) might be a two-step judicial reform, consisting of an interconnected system of (one or a limited number

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per country) specialized commercial courts, established in each Member State and a specialized European court of appeal for appeals of disputes having cross border implications (as an alternative to national generalist courts of appeal).

Michael Stürner reports that, with effect from 1 January 2018, the German legislature introduced mandatory specialized chambers and senates at regional courts and higher regional courts for certain matters (banking and financial transactions, construction and architects' contracts, engineering contracts and similar). Pilot projects with English-language trials have been running in Bonn, Cologne, and Aachen since 2010. Subsequently, regional initiatives were formed, prominently the Frankfurt Justice Initiative (*Justizinitiative Frankfurt*), the Stuttgart and Mannheim Commercial Courts, as well as corresponding chambers in Hamburg, Düsseldorf, and also Berlin, all based on very similar concepts that are supposed to be realizable on the basis of the currently applicable law. On 25 April 2023, the German Federal Ministry of Justice (*Bundesministerium der Justiz - BMJ*) has published a bill relating to the establishment of (international) commercial courts in Germany, aimed at strengthening the German civil justice system for (international) commercial disputes, at offering parties an attractive package for the conduct of civil proceedings in Germany, as well as at improving Germany's position *vis-à-vis* recognized litigation and arbitration venues such as London, Amsterdam, Paris, and Singapore. The author analyzes some structural and procedural issues relating to the designing of the (international) commercial courts (access; language issues; infrastructure; composition of the bench; party autonomy; costs; applicable law; execution), concluding in the sense that the danger of a "two-tier judiciary" should not be feared, to the extent that the handling of large-volume disputes before the commercial courts ultimately leads to a relief of the regular civil chambers, which also serves the smoother handling of "normal" [sic] cases there.

As to France, according to Alexandre Biard, drivers explaining the development of international commercial courts in France are manifold, among which the limited attractiveness for foreign litigants of some procedural practices and aspects in French court proceedings (for example, the idiosyncratic role of experts or the limited involvement of the judge before hearings); the intention to consolidate and boost an already-existing – albeit incomplete – judicial architecture (for example, the *Chambre internationale et européenne*, 'CIE'); the fact that Paris is already an important center for international arbitration. In May 2017, the *Haut Comité Juridique*

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de la Place Financière de Paris (HCJP) published 41 propositions for the creation of specialized courts for international commercial disputes, covering many different topics (appropriate language rules, eligible disputes, judicial organizational rules…). In February 2018, the Paris Court of Appeal inaugurated a new specialized chamber dedicated to international commercial disputes (*Chambre commerciale internationale de la Cour d'appel de Paris*, 'CCIP-CA'). In parallel, the Paris Commercial Court (*Tribunal de commerce de Paris*) also renewed the rules of procedure of its already-existing International and European Chamber (*Chambre internationale et européenne,* 'CIE'). In the author's view one added value (and perhaps key competitive advantage) of the French international business courts might less lie in their ability to attract common law disputes, but rather in the ability to attract those relating to the many civil law systems existing around the world, for example in South America or Africa, provided that French judges and legal professionals are adequately trained and educated.

Xandra Kramer and Georgia Antonopoulou refer that, in the Netherlands, the proposal on the establishment of the Netherlands Commercial Court (NCC) was put on the agenda by the Dutch Council for the Judiciary in 2015 and the court opened its doors as a chamber of the Amsterdam District Court on 1 January 2019. The background and rationale of its setting up are to be found in the need for court specialization to handle complex and often international commercial disputes, in order to ensure a qualitative and efficient dispute resolution service; in the necessity to conduct most of the proceedings in English (including filing of documents, hearings, and drafting of judgments); in the ambition to create an alternative to international commercial arbitration, often too expensive and thus not accessible to small- and medium-sized businesses. The NCC's international jurisdiction is based primarily on choice of court agreements and before it, in contrast to Asian international commercial courts, representation by foreign lawyers is not possible (but EU lawyers may represent clients before the NCC in collaboration with Dutch lawyers, in accordance with the Directive 98/5/EC).

As to Italy, two contributions highlight the recent developments in the field of international commercial litigation.

Michele Angelo Lupoi notes that, while, so far, Italy has not followed suit and still does not offer anything comparable to an ICC, however, the prerequisites exist to begin to conceive the creation of such a court. The structural limits of Italy's judiciary and the slowness in the disposal of hypertrophic civil litigation are well-known: according

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to the most recent CEPEJ reports, the data on pending cases remain among the highest in Europe; in addition, according to the World Bank's 2020 Doing Business report, Italy is ranked 122nd out of 190 for the category "time and cost of litigation". That said, the country is among the main economies in the world (Italian exports generate a positive trade balance of more than Euro 53 billion, while Italy's market share of world exports is stable at 2.84 %, with large margins of improvement) and, also by virtue of its very long juridical tradition, could offer added value to the new dimension of solving cross-border commercial disputes. In turn, a judge specialized in international commercial litigation, with *ad hoc* procedural rules also in terms of linguistic regime, would improve the international image of the Italian civil justice and the competitiveness of Italian business entities. Worth mentioning, in this respect, is the project for the introduction of special procedural rules for transnational disputes, in particular those of international trade, elaborated by an Italian association of international lawyers ("*Camera degli Avvocati Internazionalisti*") and debated in two recent well-attended conferences.

Marco Torsello presents the strange case of the Italian (pre-Brexit) reform, which assigned the adjudication of disputes involving foreign defendants to a limited number of highly specialized courts, located in major cities that are easily accessible from abroad, with a solution that, not contemplating the use of English for the procedure, unlike most other international commercial courts, appears not so appealing. Due to the stratification of multiple legislative interventions, which progressively amended both the subject-matter jurisdiction of the specialized courts and the number of territorial courts with jurisdiction over foreign-defendant cases, the identification of the competent specialized court by foreign operators is at present rather confusing, being subject to a complicated three-step analysis, with a possible fourth variation. Other uncertainties of the current legal regime concern the issue of whether the application of the rules in force may also be invoked in the event of foreign claimants, as well as the issue relating to claims put forward against a foreign company in an action on a warranty or guarantee or other third-party proceedings.

2. *International commercial courts outside the European Union*

Four authors (Georgios Dimitropoulos, Gary F. Bell, Xu Qian, and Salvatore Mancuso) shed light on the experience of extra-European countries with respect to (non-merely arbitral) commercial courts.

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Georgios Dimitropoulos focuses on the institutions existing in the Gulf region, including, in particular, the Dubai International Financial Centre (DIFC) Courts, the Qatar International Court and Dispute Resolution Centre (QICDRC), and the Abu Dhabi Global Market (ADGM) Courts. At the outset, Dimitropoulos illustrates that all the Gulf-region international commercial courts fall into a single category, as they are all courts attached to a Special Economic Zone. Based on this premise, the author moves on to delve into the common features of the aforementioned courts. First, all these courts share a strong connection with the common law legal tradition, not only because the English language is used in all of them, but also due to a strong reliance on English law, both from a procedural and substantive perspective. Notwithstanding such similarities, relevant differences exist, which the paper gives a full account of. Moreover, the paper argues that the Gulf-region international commercial courts have strongly influenced the development of other international courts and they continue to provide a model for institutional innovation.

Gary Bell examines the Singapore International Commercial Court (SICC), which was established in 2015. First, the paper explains the origins of the court, paying special attention to its functions and features, such as its jurisdiction, composition, and the rules on proceedings. In the second part, the author compares the functioning of SICC to traditional arbitral proceedings. In this respect, the author highlights the peculiarities of the SICC, stressing its advantages and disadvantages. The author reaches the conclusion that the new court shows the potential for being an appealing alternative to both arbitration and ordinary courts.

Xu Qian offers an analysis of the relatively new China International Commercial Court (CICC), an innovative and unique court, which embraces the distinctive roles of adjudicating, arbitrating, and mediating international commercial disputes related to the Belt and Road Initiative. The paper describes the salient features and functioning of the court from a political and sociological perspective. Special attention is paid to the challenges awaiting the court with regard to jurisdictional and enforcement issues. The author holds that the peculiarities of the court are not to be seen as flaws of the Chinese legislator but as direct consequences of the Chinese political and economic perspectives underlying the law-making process. The author's conclusion is that, in the long run, the new court is likely to play an important role.

Salvatore Mancuso draws attention to the sub-Saharan African

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backdrop, addressing the role played by the Common Court of Justice and Arbitration (*Cour Commune de Justice et d'Arbitrage* - CCJA) within the Organization for the Harmonization of African Business Law (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires* - OHADA). The author starts by offering an overview of the objectives underlying the creation of the OHADA, the OHADA's institutional organization, and its role in the production of uniform law. Then, he examines the features of the CCJA, which operates as a supranational court exercising jurisdictional functions – as a court of last instance and as an arbitration court for business law cases – and plays an advisory role to ensure the common interpretation and application of the OHADA Treaty and Uniform Acts. The author concludes the paper by commenting on the success of the OHADA project in establishing a legal framework suitable for promoting trade and investment in African countries.

In brief, the analysis of the extra-European landscape reveals the existence of highly diverse and dynamic initiatives, often based on innovative and unique features. The overview of the different experiences suggests that international commercial courts may be assigned different goals and functions, ranging from operating as hybrid institutions combining litigation with ADR, to offering an alternative to arbitration, to operating as a supranational body playing a critical role in ensuring the uniform application of international legislative instruments.

3. *International commercial courts and international arbitration*

The last part of the volume analyzes the role of international commercial court and suggests that, ultimately, the assessment of the role played by such courts requires a comparison between their functioning and the operation of international commercial arbitration. In this regard, the key question is: can international commercial courts be a better alternative to international arbitration? Do they compete or cooperate?

This book cannot give a definitive answer to these questions, but it can help stimulate the debate, already lively among practitioners and scholars of transnational litigation.

First, a proper distinction should be made between commercial arbitration and investment arbitration, having different features and requirements. For this reason, two separate contributions are devoted to the topic. The one by Attila Tanzi deals with investment

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arbitration; the paper by Jacopo Monaci Naldini addresses commercial arbitration.

Second, international commercial courts are not all the same: "historical, sociological, domestic political-economic, and geopolitical lenses"[1] bring to different approaches and thus different rules.

Third, the two icebergs are gradually getting closer: some scholars talk about a trend of "judicialization" of arbitration and "arbitralization" of the international courts.[2]

Speaking in general, arbitration and international commercial courts have in common a high level of specialization in complex transnational litigation, and procedural flexibility. Nevertheless, as to the courts, a procedural control of the State in which they are located cannot be excluded, albeit more or less extensive depending on the case. In this respect, arbitration benefits from a greater role attributed to party autonomy; however, the other side of the coin is that arbitrators do not have powers of *imperium* and some complex matters in arbitration procedures, such as multiparty and multi-contracts disputes, can be difficult to handle in arbitration, especially when the arbitration agreement has not been carefully written to suit those complex matters.

Before the courts, the losing party may have a broader remedy against the judgment; on the other side, the winner cannot benefit from the uniform regime of the New York convention as to the foreign exequatur.

In short, the idea that there is no dispute resolution tool *bon à tout faire* is always valid: it depends on the circumstances and specifics of the parties and of the dispute.

[1] P K Bookman, 'The Adjudication Business' (2020) 45 Yale J Int'l L 227, 262.

[2] W Gu and J Tam, 'The Global Rise of International Commercial Courts: Typology and Power Dynamics' (2021) 22(2) Chicago J Int'l L 443 <https://chicagounbound.uchicago.edu/cjil/vol22/iss2/2> accessed 31 January 2023.

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Elena Alina Ontanu*

Settling International Commercial Disputes within the EU: The European Perspective

Table of Contents: 1. Introduction. – 2. Critical Aspects in Cross-Border Litigation in the EU. – 3. The Procedural Offer of the European International Commercial Courts. – 4. Do the EU-ICCs Procedural Frameworks Answer the Needs of Cross-Border Litigation? – 5. Concluding Remarks.

1. *Introduction*

Cross-border commercial transaction operate in a complex legal environment that is often fragmented between national, European, and international rules. Over the last decades, in seeking to facilitate litigation and dispute resolution within the internal market, the European legislator has adopted a number of legal instruments. These instruments span from regulations determining the law applicable to contractual[1] and non-contractual[2] obligations, jurisdiction and recognition and enforcement[3] to service of documents[4] and taking of evidence,[5]

* Assistant Professor at Tilburg University, Department of Private, Business and Labour Law.

[1] Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.

[2] Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40.

[3] 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) (Brussels I-bis) [2012] OJ L351/1.

[4] Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast) [2020] OJ L405/40.

[5] Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast) [2020] OJ L405/1.

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legal aid,[6] mediation,[7] and alternative disputer solution means with a particular focus on business-to-consumer relations. These instruments were followed by the adoption of special European procedures for facilitating debt collection within the EU.[8] Now, the latest legislative developments seek to support the process of digitalization of judicial cooperation between national judicial authorities and courts.[9]

To this EU legislative process aiming to facilitate access to justice, at national level a number of Member States have established or have been contemplating establishing International Commercial Courts (EU-ICC) as an additional tool to promote an expedite handling of international commercial disputes in business to business-related claims. The process is not new in itself, and it is not only a European development.[10] The model of special commercial courts is much older and was created with the London Commercial Court in 1895.[11] The newer International Commercial Courts (ICCs) established

[6] Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes [2003] OJ L26/41.

[7] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L136/3.

[8] Regulation (EC) 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (EEO) [2004] OJ L143/15; Regulation (EC) 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (EOP) [2006] OJ L399/1; Regulation (EC) 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (ESCP) [2007] OJ L199/1; Regulation (EU) 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters (EAPO) [2014] OJ L189/59.

[9] Regulation (EU) 2022/850 of the European Parliament and of the Council of 30 May 2022 on a computerised system for the cross-border electronic exchange of data in the area of judicial cooperation in civil and criminal matters (e-CODEX system), and amending Regulation (EU) 2018/1726 (e-CODEX Regulation) [2022] OJ L150/1; Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation' (Digitalisation of Judicial Cooperation Proposal) COM/2021/759 final.

[10] See other contributions in this book.

[11] See also M Requejo Isidro, 'International Commercial Courts in the Litigation Market' (2019) MPILux Research Paper Series 2/2019 <www.mpi.lu/research/working-paper-series/2019/wp-2019-2/> accessed 20 December 2022.

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in the Middle Est[12] and Asia[13] are slightly different. The reason for contemplating the creation of such specialised courts has to a certain extent been linked to idea of responding to something that was seen as a 'market failure'.[14] In the EU the proliferation of such initiatives came at the time of the Brexit process and to a certain extent the narrative and debated about these courts was fuelled by the idea of creating alternatives to the London Commercial Court. The establishment of ICCs has been seen as a way of providing more expedite means to settle international disputes in comparison to national procedures that have been often criticised in several countries as being slow and inefficient for the needs of commercial practices.

Several EU Member States have considered or established specialised commercial chambers with certain national courts as International Commercial Courts or have engaged on a national debate for establishing such chambers.[15] This initiative concerns Belgium, France, Germany, Ireland and the Netherlands. While the process was abandoned in Belgium, the other EU Member States have taken steps to create specific procedures deviating from the general procedural rules to expedite the handling of certain type of commercial cases. A study carried out for the European Parliament by Professor Rühl considered even the establishment of a European Commercial Court.[16] However, this recommendation for creating a European Commercial Court has not been endorsed by the European

[12] For example, the Dubai International Financial Centre (DIFC) international commercial courts were officially established in 2004, DIFC LAW No. 10 of 2004 providing for the independent administration of Justice in the DIFC; Qatar Civil and Commercial Court operational since 2010; Abu Dhabi Global Market Courts were established in 2013, ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015.

[13] Singapore International Commercial Court (SICC) was established in 2015. The first and second Chinese International Commercial Courts in Shenzhen and in Xi'an were established in 2018.

[14] K Ramesh, 'International Commercial Courts: Unicorns on a Journey of a Thousand Miles' (Conference on the Rise of International Commercial Courts, Doha, Qatar, 13 May 2018) para 3 <www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/international-commercial-courts-unicorns_23108490-e290-422f-9da8-1e0d1e59ace5.pdf> accessed 20 December 2022.

[15] Within the context of this analysis the reference to International Commercial Courts should be understood to concern judicial bodies (e.g. chambers, divisions) that have been set up as a special chamber or division of an already existing national courts to deal with particular types of international commercial litigation. They are not different legal entities from the court with which they were established.

[16] G Rühl, *Building Competence in Commercial Law in the Member States* (Study for the JURI Committee, European Parliament, PE 604.980, September 2018).

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Commission and there does not seem to be an extensive political support in this direction for the moment either. Thus, for the time being EU-ICC developments rest on Member States initiatives to set national commercial-focused solution. Overall, the EU-ICCs present themselves as an alternative way to litigate international commercial claims that would allow parties to benefit from speedy court proceedings compared to general national proceedings, in English, and at less expense that in an arbitration procedure.

The question that comes up when looking at these EU-ICCs developments is whether the procedural features that these courts propose to businesses are actually providing solutions for identified problematic aspects the parties have to struggle with in cross-border litigation. In order to be able to answer this question, the outcome of various EU studies related to cross-border litigation, free circulation of judgment, and commercial law will be pulled together in order to distil the needs and feature parties and their representatives are looking for or struggling with in such circumstances. This will be subsequently be compared with the procedural features the EU-ICCs propose to their users. These findings will make it possible to assess whether the EU-ICCs are providing the answer businesses are looking for from courts in international commercial disputes, and whether certain points remain to be address or continue to require attention.

2. *Critical Aspects in Cross-Border Litigation in the EU*

For the good functioning of the internal market, trusty and well-functioning courts systems across EU Member States and the possibility for parties to enforce their rights are of outmost importance. Litigation and enforcement hinders can hold back cross-border trade and commercial activities. In this, small and medium-sized enterprises appear particularly at risk.[17]

In seeking to map out and understand the issues encountered by parties litigating cross-border in the EU, a number of studies have been carried out with European financial support. For the purpose of the present analysis, the findings of the following studies will be considered:

– Hess et al. study on ‘An evaluation study of national procedural laws and practices in terms of their impact on the free

[17] ibid 34.

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circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law', Strand 1 on Mutual Trust and Free Circulation of Judgments ('Mutual Trust and Free Circulation of Judgments Study');[18]

– Velicogna et al., 'The existing context: Assessment report on the current situation to connect legal practitioners to e-CODEX in Pro-CODEX participating countries' ('Report on Current Situation to Connect Legal Practitioners to e-CODEX')[19]; and

– Rühl, 'Building Competence in Commercial Law in the Member States' Study ('Building Competence in Commercial Law Study')[20]

2.1. *Methodological Aspects of the Studies*

This section provides an insight into the methodology of the studies used in the gathering of the data – the methods used, the type of respondents who participated, and the Member States involved – and the way these results are used in the present analysis.

The Mutual Trust and Free Circulation of Judgments Study and the Report on Current Situation to Connect Legal Practitioners to e-CODEX are research projects that have investigated the difficulties encountered by practitioners and parties in handling cross-border judicial procedures.[21] The studies take into account the application of the European Private International Law instruments and national procedural rules. The Building Competence in Commercial Law Study

[18] B Hess and others, *An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law - Strand 1: Mutual Trust and Free Circulation of Judgments* (Report prepared by a Consortium of European universities led by the MPI Luxembourg for Procedural Law as commissioned by the European Commission, JUST/2014/RCON/PR/CIVI/0082, June 2017) <https://op.europa.eu/en/publication-detail/-/publication/531ef49a-9768-11e7-b92d-01aa75ed71a1/language-en> accessed 20 December 2022.

[19] M Velicogna and others, *The existing context: Assessment report on the current situation to connect legal practitioners to e-CODEX in Pro-CODEX participating countries, Pro-CODEX project deliverable v.1.0.* (Pro-CODEX Project - Supported by the Justice Programme of the European Union, D1.1, JUST/2014/JCOO/AG/CIVI 4000007757, January 2017).

[20] See (n 16).

[21] It has to be acknowledged that these studies have not focused particularly on the specialisation of courts and consequences of such lack of specialisation, but on cross-border litigation and issues practitioners and parties encounter in such circumstances.

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focused on the cross-border commercial contracts and their operation in theory and practice in relation to choice of law and forum.

The Mutual Trust and Free Circulation of Judgments Study is a study based on mixed research methodologies combining qualitative and quantitative research paradigms. For the empirical research, multilingual surveys and interviews questionnaires were used to gather information from professionals in all 28 EU Member States. Judges, court clerks, lawyers, notaries, bailiffs, national authorities, business organisations, consumer associations, consumer ombudsmen, banks and other financial services providers, and academics participated in the research.[22] A total of 848 online survey were filled in and 279 interviews were carried out for Strand 1 of the Study. In terms of limitations, the study acknowledges that in conducting the research it was sometimes difficult to identify and to measure the extent of the problems 'from an empirical point of view' given that they are based on the personal experiences of participating stakeholders.[23] Thus, the study identifies problematic elements in cross-border litigation, but it is not easy to establish the absolute weight of each of these issues in a quantitative format.

The Report on Current Situation to Connect Legal Practitioners to e-CODEX assessed the situation in four Member States participating in the e-CODEX project – Austria, Greece, Italy, and the Netherlands. The information was collected for the analysis of the technical and legal landscape in the selected countries for their connection to the e-CODEX infrastructure. The data was collected through a multilingual questionnaire. A part of the questionnaire was constructed around issues identified in literature as problematic in cross-border judicial procedures. The questionnaire submits the issues for verification to legal practitioners requesting them to indicate how significant or not an identified problem was. Additionally, participants were required to mention if they encountered also other issues in cross-border proceedings that were not already included in the survey. The research also looked to identify 'what are their [n.n. *professionals*] preferences and needs regarding cross-border dispute resolution methods provided by the EU normative framework'.[24] The data analysed is based on a sample of 260 responses from mainly lawyer participants as well as other legal practitioners, researchers, and consultants.

[22] Mutual Trust and Free Circulation of Judgments Study (n 18) 12-13.

[23] ibid 52.

[24] Report on Current Situation to Connect Legal Practitioners to e-CODEX (n 19) 11-12.

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Building Competence in Commercial Law Study was focused on cross-border commercial relationships and their operation, analysing commercial practices, and uneven distribution of commercial law competence across the EU.[25] The analysis builds on the empirical findings of several previous studies:

– the Oxford European Contract Law Survey that involved 175 small, medium-sized, and big businesses from different industries and eight Member States – France, Germany, Hungary, Italy, The Netherlands, Poland, Spain, and UK;[26]

– the Oxford Civil Justice Study that involved 100 European businesses from various industries and Member States – Belgium, France, Germany, Italy, the Netherlands, Poland, Spain, and UK;[27]

– the Study on Parties' Choice in International Commercial Arbitration carried out on 580 cases filed with the ICC International Court of Arbitration (ICA);[28]

– the Study on the Choice of Law Clauses in International Commercial Arbitration involving 203 lawyers from all over the world;[29]

– the Study on Choice of Law Clauses in International Commercial Arbitration that analysed a number of 4,427 contracts concluded by 12,000 parties who participated in ICC arbitration between 2007-2012;[30] and

– Factors Influencing International Litigants' Decision to Bring Commercial Claims to London Based Courts carried out on 205 respondents in 2015.[31]

Given the diversity of the methodologies used for gathering

[25] Building Competence in Commercial Law in the Member States Study (n 16) 10.

[26] S Vogenauer and S Weatherill, 'The European Community's Competence to Pursue the Harmonisation of Contract Law - An Empirical Contribution to the Debate' in S Vogenauer and S Weatherill (eds), *Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice* (Hart Publishing 2006) 105-148.

[27] S Vogenauer and C Hodges, *Civil Justice Systems in Europe: Implications for Choice of Law and Choice of Forum - A Business Survey* (University of Oxford 2008).

[28] S Voigt, 'Are International Merchants Stupid? Their Choice of Law Sheds Doubt on the Legal Origin Theory' (2008) 5 JELS 1.

[29] Queen Mary School of International Arbitration, *2010 International Arbitration Survey: Choices in International Arbitration* (Queen Mary University of London 2010).

[30] G Cuniberti, 'The International Market for Contracts: The Most Attractive Contract Laws' (2015) 34 Northwest J Int'l L & Bus.

[31] E Lein and others, *Factors Influencing International Litigants' Decision to Bring Commercial Claims to London Based Courts* (UK Ministry of Justice 2015).

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the data from the aforementioned studies and reports, the use of the data coming from these documents is not used to weight in the extent of a certain issue or desired characteristic relevant for cross-border litigation in the EU, but to map the elements that are seen as problematic or important for this type of disputes. The identified issues or points requiring attention when litigating cross-border are then further look into in comparison with the features of the EU-ICCs. This will make it possible to assess whether the needs of cross-border litigation are being answered by the models the EU-ICCs are proposing.

2.2. *Mutual Trust and Free Circulation of Judgments Study*

The Mutual Trust and Free Circulation of Judgments Study examines existing obstacles in national procedural laws and practices, their scale, and their effects on legal certainty for businesses and citizens engaged in cross-border litigation.[32] The empirical research carried out with practitioners in all EU Member States identified 12 main critical issues related to cross-border litigation (see Figure 1).

The six most critical aspects are related to: (1) language differences (68.87%), (2) taking of evidence (60.95%), (3) the service of documents (57.29%), (4) (non-) recovery of legal costs (55.33%), (5) differences in time limits operated to the parties or other actors in the proceedings with regard to certain procedural actions (appeals) (55.33%), and (6) availability and types of provisional relief (42.22%). In addition to these critical aspects, 'the lack of sufficient knowledge of judicial actors regarding the European acquis'.[33] This point came up frequently from stakeholders regardless of their Member State of origin and the period for which their country was a member of the European Union, as well as the lack of judges specialised in cross-border cases. This lack of cross-border specialisation translates into longer proceedings, poorer quality of judgments, and 'decisions that do not meet reasonable expectations of the parties'[34] or not property making application of the foreign elements that leads to decisions in which the EU rules on the merits fail to be applied. From the findings, it is not clear whether the lack of specialisation in cross-border cases is related to theoretical or practical knowledge of private international law

[32] Mutual Trust and Free Circulation of Judgments Study (n 18) 8.
[33] ibid 51.
[34] ibid.

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instruments applicable in such cases or whether it extends also to language competences of judges or comparative law skills.[35] The issue of insufficient specialisation of judges handling cross-border litigation is of particular importance when discussing the choices some Member States made in establishing International Commercial Courts. It remains to be seen whether the establishment of such specialised courts or court chambers is a sufficient response or whether additional policies should accompany these developments in order to address the identified issues that affect companies carrying their businesses cross-border.

2.3. *Report on Current Situation to Connect Legal Practitioners to e-CODEX*

This study carried out in view of the digitalisation of cross-border procedure and of judicial cooperation while the framework of the e-Justice Communication via Online Data Exchange system (e-CODEX) identified a number of nine critical issues that are particularly problematic in cross-border litigation (see Figure 2).

The six most critical issues related to cross-border litigation indicated by this empirical research are related to: (1) the perceived complexity of the procedures for first-time users or non-repetitive users (80.32%), (2) the existing differences between procedures (e.g. forms to use, different definitions) (73.05%), (3) finding practical information on how to carry out the procedure (63.26%), (4) the communication exchange with the courts (e.g. no feedback, no direct channel of communication) (55.62%), (5) service of documents (54.07%), and (6) language barriers (52.66%). The issue of finding practical information on how to carry out a procedure, the differences between procedures, and the complexity of procedures for first-time users are especially relevant in relation to European private international instruments applicable in EU cross-border litigation. Additional problems referred to by the respondents relate to missing a European database for execution procedures, harmonized costs of procedures and simplification of payments, multilingual access to databases, and fully-digital and user-friendly procedures.[36]

[35] ibid 52.

[36] Report on Current Situation to Connect Legal Practitioners to e-CODEX (n 19) 55-59.

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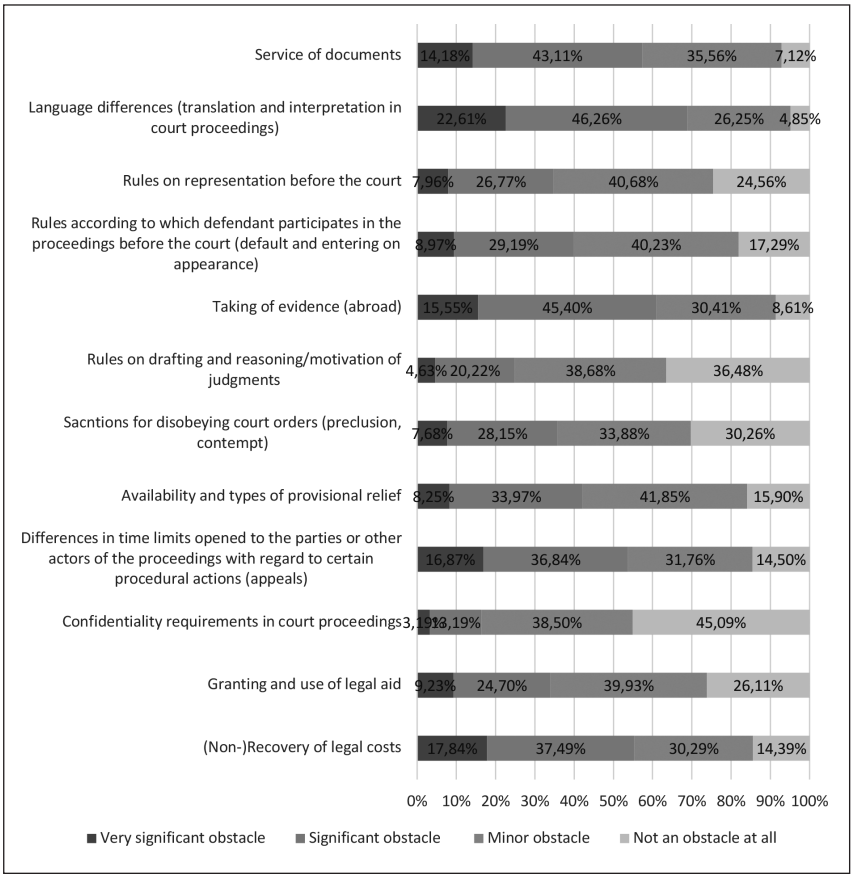

Figure 1. Data collected for the Mutual Trust and Free Circulation of Judgments: Critical issues identified in cross-border judicial proceedings

2.4. *Building Competence in Commercial Law Study*

Building Competence in Commercial Law Study distilled a number of elements that parties in cross-border commercial disputes retain relevant and desirable to find. These concern: (1) the efficiency of court proceedings, with a particular attention to the length of the proceedings and the speed of dispute resolution mechanisms,[37] (2) the fairness and predictability of the outcome,[38]

[37] Building Competence in Commercial Law in the Member States Study (n 16) 50.

[38] ibid 52.

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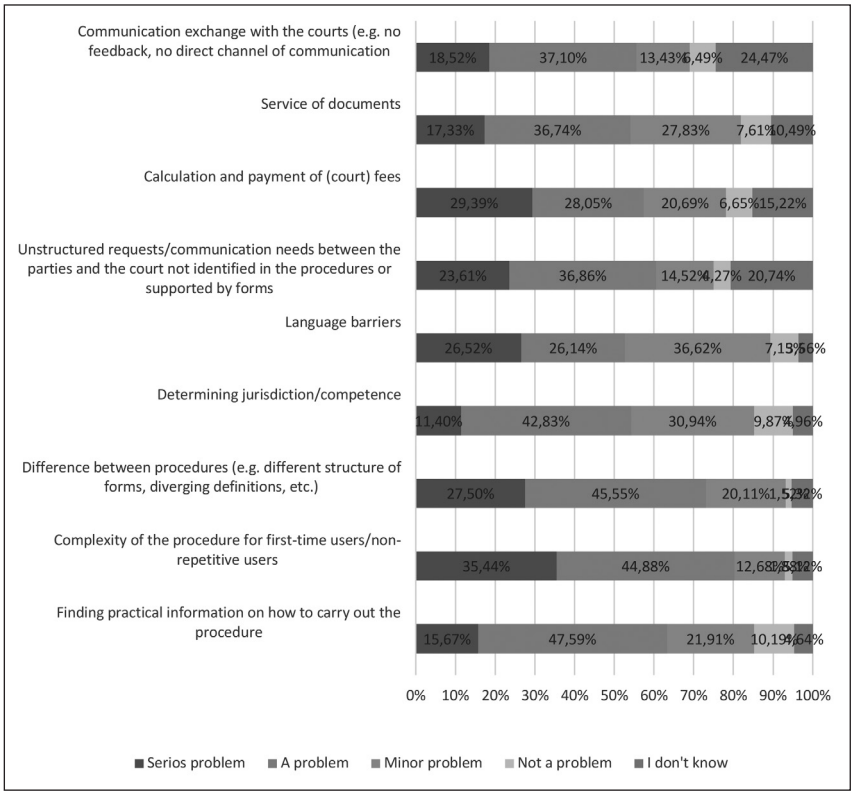

Figure 2: Data collected for the Report on Current Situation to Connect Legal Practitioners to e-CODEX: Critical issues identified in cross-border judicial proceedings

(3) the language, the absence of corruption,[39] (4) the flexibility of the law,[40] (5) jurisdiction, (6) the competence, expertise and experience of the judges, and (6) the specialisation of the courts.[41] Costs of litigation are of particular relevance, especially for small and medium-sized companies and micro-businesses. These parties may not afford to bring their disputes before the best perceived courts for commercial disputes identified by the studies, if the costs of such litigation are high and they are not able to sustain them.[42] Given the fact that these findings are based on data from various

[39] ibid 28, 31.
[40] ibid 29, 31.
[41] ibid 52.
[42] ibid 34.

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studies and reports, it is not possible to numerically quantify these findings in a graphic format comparable to the other of the previously discussed studies.

2.5. *An Overview of the Most Significant Issues Concerning Cross-Border Litigation*

In bringing together the findings of the two first studies for the European Commission and combining them with the desired features parties are looking for in commercial cross-border disputes as presented in the European Parliament study, the following map of elements that play a role in cross-border litigation and shape parties' choice for initiating or not cross-border claims can be created (Figure 3).

In this map, some elements appear to be particularly sensitive for parties in cross-border litigation. These regard the language barriers, jurisdiction rules, service of documents, and court fees. The matter of complexity and differences in the proceedings between jurisdictions may be connected in practice, as well as being related to the elements that are identified as being of particular importance for parties involved in cross-border litigation. Differences and having to deal with various approaches creates complexity. The more difficulties someone has in terms of understanding the differences, applying the rules, and identifying the necessary services or rules, the more complex the procedure becomes. Other elements that require attention concern more substantive aspects of the law such as the availability and types of provisional relief, and the flexibility of the law for commercial relations.

Issues related to complexity of the procedure, different time limits and procedural steps, and communications exchanges between the courts and the parties could be addressed and improved in the future with the help of information and communication technology. Digitalisation of various procedural components in cross-border litigation (e.g. electronic service, direct taking of evidence) and communication, requests, and documents exchanges between national authorities and professionals involved are being developed and put into place in Member States and at EU level at the moment for supporting European cross-border litigation.[43] Other solutions may need to be addressed from an institutional or legislative perspective.

[43] See the e-CODEX Regulation; Digitalisation of Judicial Cooperation Proposal.

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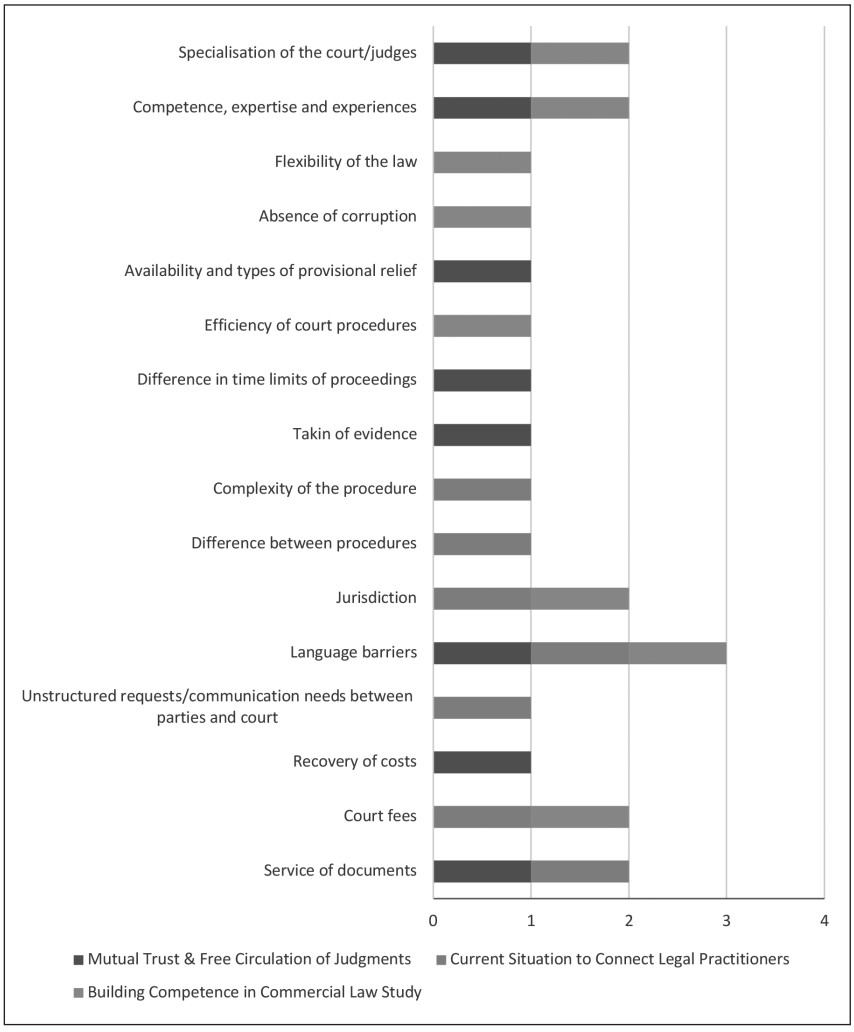

Figure 3. Most Significant Critical Aspects Resulting from the Referenced European Studies

3. *The Procedural Offer of the European International Commercial Courts*

This section looks into the procedural models the special established EU-ICCs in France, Germany, Ireland, and the Netherlands propose to parties from the perspective of the distilled issues of cross-border litigation. The international commercial

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courts as national courts developments in these countries have been established recently. Brexit accelerated the process and made it more dynamic. For international commercial trade, the EU-ICCs present themselves as an alternative to the usual national court proceedings. As a general approach, these courts seek to combine in their activity the flexibility features found in international commercial arbitration proceedings with the interpretative and development function of state courts that are key in creating a clear and steady interpretation of the laws in order to enhance legal certainty for the business environment.

3.1. *France*

The French International Commercial Courts in Paris were established by 'Protocols'[44] signed by the Bar, the Commercial Court, the president of the Court of Appeal and the Ministry of Justice.[45] Their creation is not based on a legislative decree or statute. On 17 January 2011, the President of the Paris Commercial Court (*Tribunal de commerce*) announced the establishment of a new division of the court composed on nine elected lay judges[46] – the International Division of the Paris Commercial Court. The court would accept documents of the proceedings to be submitted in English, German, and Spanish.[47] The hearings could be held in these languages as well.[48] An appeal instance was established on 7 February 2018 with the Paris Court of Appeal – the International Chamber of the Court of Appeal of Paris. However, the second appeal proceedings before the Supreme Court (*Cour de Cassation*) will have to be carried out in French. Thus, the International Commercial Courts of Paris (ICCP or CCIP in French) are composed of two chambers: the

[44] Protocol Paris Commercial Court (CCIP-TC) and Protocol CCIP-CA <www.tribunal-de-commerce-de-paris.fr/fr/protocoles-tribunal-de-commerce-de-paris> accessed 20 December 2022.

[45] E Jeuland, 'The International Chamber of Paris: A Gaul Village' in X Kramer and J Sorabji (eds), *International Business Courts. A European and Global Perspective* (Eleven International Publishing 2019) 68.

[46] French Commercial Courts are specialised courts composed of elected lay judges who are lawyers or merchants. SA Kruisinga, 'Commercial Courts in the Netherlands, Belgium, France and Germany - Salient Features and Challenges' (2019) 39(4) IPRax 280.

[47] G Cuniberti, 'Paris, the Jurisdiction of Choice?' (*Conflict of Laws*, 2 February 2011) <https://conflictoflaws.net/2011/paris-commercial-court-creates-international-division/> accessed 20 December 2022.

[48] Kruisinga (n 46) 280.

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International Chamber of the Commercial Court (CCIP-TC) and the International Chamber of the Court of Appeal (CCIP-CA). The judges composing the CCIP-TC are experienced in international commercial matters. They are often previous international lawyers of long-standing experience. The support judge (*judge d'appui*) in the chamber is a professional judge of the civil High Court. The judges of the CCIP-CA are professional judges.

In establishing jurisdiction for the CCIP-TC, the parties have to agree to assign their case to the CCIP-TC. The Protocol resolves the matter of assigning the cases to this particular chamber of the court. The CCIP-TC has jurisdiction when a commercial or economic case has an international dimension. Furthermore, in such cases foreign or European law will likely have to be applied.[49] The CCIP-CA jurisdiction is a bit better defined. The Chamber has jurisdiction over disputes regarding 'the interests of international trade'.[50]

The CCIPs are 'quasi-autonomous, self-regulated with a hybrid and specific procedure' that 'adapts the French justice system to international cases'.[51] The Protocols for the CCIPs contain rules on the use of English and other languages during the proceedings, the process of submission of evidence, the witness testimony, and organisation of oral proceedings. A Practical Guide to Proceedings Before the CCIP-TC and CCIP-CA is available for interested parties and their lawyers. The guide addresses matters of jurisdiction, applicable rules of procedure, the various stages of the proceedings, the use of a language other than French in the procedure, and the ways of appeal.[52]

The CCIP-CA has two tracks for the appeal procedure: a fast track without a case management judge[53] and a normal track with a cases management judge.[54] The case management judge[55] will draw up a schedule with the parties, establishing the length of the

[49] Article 1.1 Protocol. A non-exhaustive list of fields are provided as examples, namely: commercial contracts, breach of commercial relations, unfair competition, transportation, financial products litigation.

[50] See Jeuland (n 45) 71.

[51] ibid 65. See also A Biard, 'International Commercial Courts in France: Innovation without Revolution?' (2019) 12(1) Erasmus L Rev 25.

[52] <www.cours-appel.justice.fr/paris/guide-pratique-de-procedure-devant-les-ccip-tc-et-ccip-ca-practical-guide-proceedings-iccp-cc> accessed 20 December 2022.

[53] Article 905 Code of Civil Procedure.

[54] Article 908 and Article 910 Code of Civil Procedure. Article 4 CCIP-CA Protocol.

[55] This may be the President of the CCIP-CA.

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proceedings, and the date of the judgment.[56] The schedule will set the date for the hearing of witnesses, parties, and lawyers, the closing date of the examination period, and the dates for depositing the written statements. The evidentiary rules 'are adapted to international and commercial disputes' with significant place left by the Protocols to 'testimonial evidence',[57] and even discovery of precisely determined categories of documents.[58] The evidence gathering and hearing are inspired by the English cross-examination procedure.[59] This makes the tailor-made procedural arrangements in court similar to an arbitration procedure.[60] Article 4.5 CCIP-CA Protocol even provides for a collaborative case management between the lawyers of the parties without the participation of judges.[61]

The parties will have to agree on the language on which the hearing will be held. According to Article 23 Civil Procedure Code the judge is not bound to rely on an interpreter if he understands the language spoken by the parties. In the commercial courts in France, procedures are mostly oral and take place in a hearing. In practice, the pleadings in the hearings are seldom held in French. For example, the foreign parties and third-parties are given permission to express themselves in English, and, if needed, simultaneous interpretation can be arranged by the court.[62] Spanish and German can also be used. Evidence will not need to be translated when submitted in English. Actually, it is possible for all written documents in the case to be submitted English, given the linguistic competences of the judges involved. However, the judgement will have to be issued in French[63] and can be accompanied by a sworn translation in English. The cost of the translation will have to be bore by the parties.[64]

The procedure before the CCIP-CA is digitalised and mainly in writing. The documents have to be submitted through a dedicated network that is available only to professionals; thus, representation by a French lawyer is necessary for the parties. The service of document in the proceedings is to be carried out electronically. The

[56] Article 3 CCIP-TC Protocol, Article 4 CCIP-CA.
[57] Article 5.2.1, Article 5.4.4 CCIP-CA Protocol. Jeuland (n 45) 75.
[58] Article 5.1.1-2 CCIP-CA Protocol, Article 4.1.3 CCIP-TC Protocol.
[59] O Dufour, 'Paris part à la conquête du contentieux commercial international' *Gazette du Palais* (13 February 2018).
[60] Jeuland (n 45) 74.
[61] See Article 1544 and subsequent Civil Procedure Code.
[62] Biard (n 51) 29.
[63] Ordinance of Villes-Cotterêts of 1539.
[64] Article 7 CCIP-CA and Article 7 CCIP-TC.

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same applies for the pleadings. However, the electronic size of the documents should not exceed 5GB.[65]

The court fees for the proceedings before the International Division of the Paris Commercial Court will not differ from fees applicable in regular proceedings handled by the French commercial courts. This is €78 for the TC and €225 for the CA. The other costs incurred for the litigation are more significant, but Article 700 Civil Procedure Code gives the judge the possibility to impose on the losing party the duty to reimburse the legal costs. In practice the judgment rarely covers all the fees paid by the winning party.[66] Therefore, the ability to sustain certain costs of the proceedings is a relevant aspect parties need to consider before initiating cross-border proceedings before the CCIPs in France.

3.2. *Germany*

In Germany several initiatives focusing on international commercial disputes have been considered over the years. One of these developments focused on highly specialised areas of law: patents with courts in Düsseldorf, Mannheim and Munich, and transportation and commercial cases in Hamburg. In 2010, an initiative based on choice of court clauses was created for the courts in Aachen, Cologne, and Bonn giving parties the possibility to litigate partially in English.[67] Over a decade ago the Federal Ministry of Justice, the Bar Association, and the Chambers of Commerce took the initiative to promote the use of German law and German judicial system. This put a special emphasis on the efficiency of the German legal system and judiciary in international commercial cases with a brochure called 'Law Made in Germany'.[68] In 2016 the 'Judicial Initiative Frankfurt' (*Justizinitiative Frankfurt*) was launched as an initiative of the Ministry of Justice of the Federal State of Hesse to attract more litigation to the Frankfurt District Court. The initiative was supported by the academia, the Chamber

[65] On a criticism of the size of documents allowed, see Jeuland (n 45) 74.

[66] Ibid 80.

[67] English could be used during the oral hearings, while the rest of the proceedings were to be conducted in German. See German language requirements in Section 184 German Courts Constitution Act (*Gerichtsverfassungsgesetz* - GVG). See also M Lehmann, 'Law Made in Germany' - The Export Engine Stutters' in Kramer and Sorabji (n 45) 86.

[68] <www.brak.de/fileadmin/05_zur_rechtspolitik/international/140829-broschuere-law_en.pdf> accessed 20 December 2022.

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of Industry and Commerce, the bar association, and the judiciary.[69] A special chamber was established with the Frankfurt District Court. The chamber became operational on 1 January 2018 for international commercial disputes. A similar development of a special chamber for international business cases involved the Regional Court in Hamburg - 'Legal Venue Hamburg' (*Rechtsstandort Hamburg e.V*).[70]

The judges at these courts are set to have extensive experience in commercial litigation – some of them have been previously lawyers. The chamber will have a mixed formation between a magistrate judge presiding and two lay judges from the business sector[71] who have a good command of English language. The same language skills concern the court staff. Additionally, the 'capabilities and knowledge' of German lawyers and judges are recognised as excellent[72] They undergo a long and demanding formation and examination before finalising their training.

The proceedings before the Frankfurt Chamber for International Commercial Disputes are based on the German Code of Civil Procedure (ZPO)[73] to which best practices of commercial litigation used in patent litigation (litigation practices with the Düsseldorf District Court) and arbitration are added.[74] In short, the initiative is based on three key elements: the use of English as procedural language, the possibilities offered by the German legislation to make proceedings effective (e.g. use of principle of accelerating proceedings), and a comprehensive communication strategy.[75] However, the orders of the court, protocols, requests, summons, written pleadings, applications, and motions have to be drafted in German, although there are opinions of some discretion for the court on acceptance of documents submitted in another language.[76]

The jurisdiction of the chamber is based on the choice of court agreement of the parties. The claimant will have to file a written complaint. The judge will carry out a preliminary review

[69] B Hess and T Boerner, 'Chambers for International Commercial Disputes in Germany: The State of Affairs' (2019) 12(1) Erasmus L Rev 34; Requejo Isidro (n 11) 18.

[70] Lehmann (n 67) 87.

[71] They have to be experts in finance, banking, accounting, insurances, transportation etc and a strong legal background. Hess and Boerner (n 69) 37-38.

[72] Lehmann (n 67) 85.

[73] Sections 253-300 ZPO for first instance.

[74] Hess and Boerner (n 69) 36.

[75] Possible based on Section 185(2) GVG exception. Lehmann (n 67) 94; Hess and Boerner (n 69) 35.

[76] Lehmann (n 67) 94-95.

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of this complain to ascertain its compliance with the fundamental requirements for admissibility. After the defendant filed his motion the judge will decide on an advance first hearing[77] or an exchange of written pleadings.[78] With the Frankfurt Chamber for International Commercial Disputes the court is expected to set a 'road map' together with the parties at the beginning of the proceedings. This is meant to structure the litigation in an optimal way for the case.[79] An early first hearing is intended as a case management encounter. Section 139 ZPO gives the court the structure and the possibility to accelerate proceedings where possible. The court can request additional documentary evidence or inspection of evidence from parties and/or third parties. Based on Section 273 ZPO the court is able to structure, clarify, and narrow down the factual, and legal issues to be addressed during the oral hearing. An attempt for settlement will be made by the court. The court will actively engage with the parties also in 'disclosure' of evidence before the hearing based on Sections 142 and 144 ZPO.[80] Sections 142 and 144 ZPO also allow the court to actively support the parties in the production of evidence, and court directions may be issued in this regard for the parties and/or third parties. This can speed up the proceedings.

The use of English in the proceedings is seen as a way to reduce the costs and increase effectiveness as translation is eliminated. However, the judgment will have to be drafted in German. For this chamber, in the drafting of the judgment the judges pay attention to the way they draft the judgments in order to make them more translation-friendly. The translation of the judgment in English is optional, and will be at the parties' expense.

With regard to the overall costs of the proceedings before German courts, these are considered to be cost-effective given the various elements seeking to speed up the proceedings.[81]

3.3. *Ireland*

The Dublin Commercial Court Division within the High Court was created in January 2004 with the idea of responding to the needs of commercial relations, given the country's economic growth and

[77] Section 275 ZPO.
[78] Section 276 ZPO.
[79] Hess and Boerner (n 69) 36; Requejo Isidro (n 11) 18.
[80] Section 139 ZPO.
[81] Lehmann (n 67) 85, 92.

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the desire to consolidate Dublin as a financial hub. Its focus was not directed towards cross-border commercial disputes, but many commercial relations have an international dimension. The division relies on a dedicated panel of experienced judges to provide efficient and effective dispute resolution services in commercial cases.[82] The judicial system struggled at the time to deal with the number of complex commercial litigation cases, while parties had to deal with lengthy and costly procedures. Since 2014, a dedicate appeal possibility was put in place.[83] The Court of Appeal seeks to insure that these appeals are handled within a period of six months since the first instance decision.

The handling of the case by the Commercial Division is discretionary. The parties or one of the parties can apply to entry the claim into the Commercial Court List.[84] The request can be granted or refused by the court. The Commercial Court division would handle cases based on claims in specific commercial law areas that are of a minimum value of one million euros.[85] There are specialist lists dealing also with cases regarding competition disputes, arbitration matters, strategic infrastructure developments, intellectual property, and insolvency. In the near future the court is expected to have a specialist sub-list om Intellectual Property and Technology List with specialist judges.[86]

One of key achievements of the Dublin Commercial Division is considered to be 'the swiftness with which cases progress to trial'.[87] With an average of most cases filled being disposed with within a year.[88] For the cases entered into the Commercial List, the judges have broad powers in the management of the case,[89] giving directions and making orders for the conduct of the proceedings, setting time limits, and 'minimising the costs of (…) proceedings'.[90] The judge in

[82] <www.courts.ie/commercial-court-why-choose-us> accessed 20 December 2022.

[83] For some statutes an appeal can be filed only with leave from the High Court and/or where there is a point of public importance.

[84] Section 4 Order 63A of the Rules of the Superior Courts.

[85] These can concern contract, tort, property, trust, IT disputes, judicial review, corporate mergers, global restructuring, insurance portfolio transfers, International Swaps and Derivatives or other investment disputes, and intellectual property disputes, as well as proceedings which the Judge of the Commercial List considers appropriate for entry in the Commercial List. Section 1 Order 63A of the Rules of the Superior Courts.

[86] <www.courts.ie/commercial-court> accessed 20 December 2022; <www.courts.ie/judges-commercial-court> accessed 20 December 2022.

[87] Requejo Isidro (n 11).

[88] <www.courts.ie/commercial-court-why-choose-us> accessed 20 December 2022.

[89] Sections 14-15 Order 63A of the Rules of the Superior Courts.

[90] Section 5 Order 63A of the Rules of the Superior Courts.

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charge of the Commercial List and the judges assigned for the hearing of the cases make sure that the claims are swiftly ready for hearing. This guarantees a high level of certainty for the parties' expectations. This is also likely to minimise the costs of the proceedings.

Directions for the handling of a case are generally made according to the parties' agreement, but it can also be 'contested or ruled upon by the Court'. Further, a change to direction can only be varied by an application made to the court.[91] The Court will establish the steps to be taken in preparation for the pleadings, discovery, and exchange of witness statements, and the date by which these steps should be completed. Discovery, and often e-discovery, is used in the cases handled by the Commercial Court Division, but this is closely managed by the court.[92] The detailed case management system speeds up preparation for the trial phase. The written submissions must be lodged with the Registrar within strict time limits. Severe sanctions for non-compliance with the set timeframe are applicable. The use of IT solution is available with the court and allows parties and witnesses to give evidence through video-link. Furthermore, with the permission of the President of the High Court the documents of the proceedings may be served or exchanged electronically.[93]

The costs fees for the entry of a case to the Commercial Court amount to €5,000.[94] To this the costs of the proceedings must be added. Overall, the Irish Commercial Court seems to be renowned for its fast disposal of the cases and benefiting from a strong and well prepared professionals in commercial law and multi-jurisdiction matters – judges, barristers, solicitors, and court staff.

3.4. *The Netherlands*

The Netherlands Commercial Court (NCC) as a division of the Amsterdam District Court and the Netherlands Commercial Court of Appeal (NCCA) as a division of the Amsterdam Court of Appeal

[91] <www.courts.ie/how-commercial-court-operates> accessed 20 December 2022.

[92] <www.courts.ie/commercial-court-why-choose-us> accessed 20 December 2022.

[93] Section 31 Order 63A of the Rules of the Superior Courts, Practice Direction HC93, and Practice Direction HC113. 'Paperless' trials with all documents available on a data base have taken place and can be arranged by the Commercial Court Division. See <www.courts.ie/how-commercial-court-operates> accessed 20 December 2022.

[94] See Superior Court Fees Order <www.courts.ie/content/fees-payable-central-office-and-examiners-office> accessed 20 December 2022.

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were established by a bill on 11 December 2018.[95] The bill came into force with a Royal Decree on 1 January 2019.[96] The court is set to deal with large complex international commercial disputes. The initial rational expressed for the creation of such court was that it 'would contribute to a healthy legal infrastructure' and 'improve economy' creating more jobs.[97] In the Explanatory Memorandum of the legislative proposal, the Dutch legislator indicated four reasons: (1) the fact that the Dutch judicial system functions well, it is 'independent and predictable, and its establishment would strengthen the investment climate and economic prosperity';[98] (2) the English-language court proceedings would reflect the needs of international trade; (3) the added value it would bring in relation to arbitration; and (4) centralising complex international cases that require more time from the judges in one specialised court would relieve workload from the other courts and higher court fees could be applied for these cases.

The legislation adopted permits the use of English in the proceedings and for the drafting of the judgments (Article 31r Dutch Code for Civil Procedure).[99] However, a second appeal before the Dutch Supreme Court (*Hoge Raad*) will have to be carried out in Dutch.[100] The applicable court fees are set to cover the costs of the functioning of the NCC and are modulated around this appreciation. The usual court fees for commercial cases in the Netherlands were considered too low to be able to cover the

[95] *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.

[96] Royal Decree of 18 December 2018, Staatsblad 2018, 475.

[97] Speech by chairman Bakker of the Dutch Council for the Judiciary (*Dag van de Rechtspraak*, September 2014) <www.taxlive.nl/media/1647/speech-frits-bakker-dag-van-de-rechtspraak-11-9-2014.pdf> accessed 20 December 2022.

[98] H Schelhaas, 'The Brand New Netherlands Commercial Court: A Positive Development?' in Kramer and Sorabji (n 45) 47.

[99] Possibility of litigating in English is not entirely new in the Netherlands, Dutch judges do not retain translation of court exhibits necessary if they speak English. For example, there was a pilot project on litigating in English at the District Court of Rotterdam, but there was no express legal provisions allowing English to be used as the language of the proceedings and in the drafting of the judgment. See further ibid 49-50; E Bauw, 'Commercial Litigation in Europe in Transformation: The Case of the Netherlands Commercial Court' (2019) 12(1) Erasmus L Rev 17.

[100] On a critical analysis of this situation, see Schelhaas (n 98) 57-58.

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NCC functioning costs.[101] This is why a higher court fee applies for the NCC. This is €15,000 in first instance, and €20,000 in appeal. Interim proceedings[102] will costs €7,000 and respectively €10,000 at the NCC chambers.[103] The NCC court fees may be on the higher side and have been criticized as limiting access to justice for companies not being able to afford them,[104] but the overall costs of litigation is deemed to be lower than in other circumstances (e.g. London) due to lower costs of legal services.[105]

The judges of the NCC chambers are Dutch judges part of a national pool of judges from different courts who are given special training, additionally to their existing expertise.[106]

The parties have to explicitly choose the Amsterdam District Court as the forum for their case and to agree on the proceedings to be governed by the NCC Rules of Procedure.[107] The jurisdiction of the NCC is set for international disputes concerning financial claims above the €25,000 threshold.[108] Claims below this threshold, or cases concerning consumer purchases or financial transactions, rental or labour disputes, or disputes falling within the exclusive jurisdiction of another specialised court cannot be brought before the NCC.

In terms of procedural rules various technology developments are available for these cases. The cases can be filed digitally on a dedicated portal: the eNCC. The electronic file on the eNCC includes the submission of the claim and defence, the evidence, the requests, and

[101] This is based on the estimated number of cases to be expected, the average costs of handling a case (costs consists mainly of estimated hours the judges and support staff spend on a case), and tariffs of other commercial courts. See further Bauw (n 99) 17.

[102] Article 6.3 NCCR.

[103] *Wet griffierecht in burgerlijke zaken*.

[104] Letter of the Council for the Judiciary to the Minister of Justice in response to the Draft Bill on the establishment of the Netherlands Commercial Court (23 February 2017) <https://zoek.officielebekendmakingen.nl/blg-814725.pdf> accessed 20 December 2022; Letter by the Dutch Bar Association in response to the Draft Bill on the NCC (1 February 2017).

[105] NCC-Plan, 17; Bauw (n 99) 21.

[106] ibid 17.

[107] Article 1.3.1 (c)-(d) NCCR (Special Rules of Procedures for proceedings at NCC) and Article 30r Dutch Code of Civil Procedure. Explanatory Notes to Article 1.3.1(d) NCC Rules. On what would qualify as an explicit choice, see further Schelhaas (n 98) 53-54; G Antonopoulou, 'Requirements upon Agreements in Favour of the NCC and the German Chambers - Clasing with the Brussels Ibis Regulation?' (2019) 12(1) Erasmus L Rev 58.

[108] Article 1.3.1 (b) NCCR.

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the notifications.[109] The feature aims to enhance the efficiency of the proceedings by favouring direct electronic communication between the court and the parties and their representatives. The court and the parties may opt for the use of modern communication technology for making recordings instead of the drafted traditional official report of the case, as well as for tele- and videoconferencing. The parties have to be represented by a lawyer member of the Dutch Bar who will make all the submission in the case.[110] The decisions issued are subject to appeal to the NCC division of the Amsterdam Court of Appeal, and second appeal before the Dutch Supreme Court (*Hoge Raad*).

The NCC rules deviate to a certain extent from the procedural rules applicable to other Dutch courts in seeking to promote an efficient and effective handling of international commercial cases. Additionally, the parties can further 'design' the procedure of their case by concluding an agreement regarding the proceedings. This can concern for example the taking of evidence, evidential value of certain documents.[111] Expedient procedures are further promoted by the organisation of a case management conference in which one of the judges verifies whether a settlement can be reached by the parties, and, if not, how should the case proceed, the setting of strict time limits varying between two and six weeks for the different steps of the procedure, and the use of disclosure rules for efficiency and speeding up proceedings.[112] Such arrangements for the handling of the cases are expected to lead to lower litigation costs compared to proceedings with other International Commercial Courts such as the London Commercial Courts.

The quality and attractiveness of the Dutch substantive law is also relevant for the discussion as choice of forum is often combine with choice of law for the same jurisdiction; however, the Dutch substantive law has a 'less established reputation' as remarked by Schelhaas,[113] and it is less often chosen by parties compared to other options (e.g. English law), thus, this may affect the number of cases that will be filed with the NCC over time.

[109] Article 3.2 NCCR.

[110] Article 3.1 NCCR.

[111] Article 153 CCP, Article 164(2) Dutch Code of Conduct, Article 8.3 NCCR, Article 8.5.5 NCCR. See Bauw (n 99) 19.

[112] Article 3.4 NCCR, Article 843a CCR, and Article 8.4 NCCR.

[113] Schelhaas (n 98) 61-62.

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4. *Do the EU-ICCs Procedural Frameworks Answer the Needs of Cross-Border Litigation?*

4.1. *Comparative Overview of the Procedural Framework Proposed by the EU-ICCs*

As pre-determined legislative framework concerning cross-border litigation, all four EU-ICCs benefit from the application of EU private international law legislation regarding choice of court agreements (Brussels I-bis Regulation), applicable law (Rome I and Rome II), taking of evidence, and service of documents.

One of the first common characteristic of the analysed courts is that there are not actually new standalone courts set up to handle complex international commercial litigation, but special chambers with one of the existing national courts. These national courts are also part of legal system recognised as benefiting from a high level of judicial independence.[114]

Further, all International Commercial Courts present themselves as providing judicial services based on high professional knowledge in adjudicating complex international commercial cases. This expertise in adjudicating is expected to attract and generate investment and support trade relations within the internal market to places already recognised as important commercial and financial centers (e.g. Amsterdam, Frankfurt, Paris, Dublin). The judges of these courts are not always all magistrates, but they are experienced professionals, sometimes previous lawyers with expertise in commercial and international litigation. The French and German chambers rely on a mixed approach between lay judges with a commercial background, and magistrates. Their knowledge and skills, and that of the court staff are recognised as top level in their legal systems. The expertise of all members of the EU-ICCs contributes to the efficient management of the complex international cases they receive. Additionally, they are able to handle the case, the procedural requests, and communication related to the case in English.

As to applicable procedural rules, each of the EU-ICC initiatives, with the exception of Germany, are relying on special procedural rules or amendments of the ordinary national procedural rules to enable them to swiftly handle the case or make case management arrangements together with the parties for an efficient handling of the case.

[114] WJP Rule of Law Index <https://worldjusticeproject.org/rule-of-law-index/> accessed 20 December 2022.

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Figure 4 provides a visual overview of the procedural features the analysed courts propose. The jurisdiction of these courts is based on the parties express agreement. The procedural rules on the basis of which these special courts function allow different degrees of openness as to parties' autonomy in designing and/or managing their procedure. The first instance judgment is subject to an appeal right within certain limitations depending on the national procedural rules (e.g. to appeal a judgment issued by the Dublin Commercial Court Division a leave from the High Court needs to be obtained).

Time limits of the proceedings before these courts are most often strict, and the proceedings are speedier than in other national proceedings. The special procedural rules or agreements applicable to these chambers provide them with the legal basis to prioritise the swift handling of these cases. The use of ICT and technology for the proceedings is an element that can contribute to speeding the handling of the proceedings and simplify the case management; however, the availability of such means differs to a significant extent between the analysed jurisdiction. The Dublin Commercial Court and the Netherlands Commercial Court appear to be making more extensive use of technology for the handling of this type of proceedings. This concerns the submission of the claim and documents of the proceedings, the communication exchanges, the use of videoconferencing for hearing witnesses, and the service of documents. The representation of the parties is necessary – the electronic submissions services are available for professional representatives – in all these proceedings and this is generally carried out by local lawyers.In terms of language of the proceedings, the Dublin Commercial Court Division of the High Court carries out the proceedings in English, as this is the language of the proceedings. The other EU-ICCs allow the use of English as an exception from the usual language of the proceedings. The Netherlands Commercial Court allows the most extensive use of English in the proceedings, including for the drafting of the judgment. The use of English before the French and German commercial chambers has more limitations due to national legislation. This is why English can be used in the proceedings but the judgement needs to be drafted in the national official language, with the possibility of obtaining a translation into English of the decision.

With regard to court fees, the approaches and amounts differ between the analysed courts. For some EU-ICCs – France, Germany – the generally national court fees apply also for these international commercial proceedings, for others, a special amount has been

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	Germany International Chamber - Frankfurt Regional Court	**France International Chamber – TC Paris & CA Paris**	**Ireland Dublin Commercial Division – High Court**	**Netherlands Nederland Commercial Court**
Object of activity	International commercial dispute	International economic & commercial case	Commercial proceedings	International civil & commercial dispute
Specialised chamber of national court	Professional judges & lay judges from business sector	Professional judges & lay judges	Professional judges	Professional judges
Jurisdiction	Choice agreement	Depends	Discretionary claims above €1 mil.	Agreement (claim higher than €25,000)
Language	Hearing, Proceedings – English; Judgment - German (& EN translation)	Documents – FR/EN; Hearings – FR/ EN; Judgment – FR (& translation) (alternatively German and Spanish)	EN	Proceedings & judgment – EN; translations doc in FR, GE or NL not required
Court fees	General fees	Distribution costs –parties agreement	General fees	Flat fee above general court fees
Procedural rules	'Road map' with parties	CPC & adaptations – 'road map'	Judge broad power of direction; parties' agreement on the 'road map' &judge control	National rules of procedure & parties' 'road map'
ICT	limited	limited	Available (video-conferences, electronic service, documents file)	eNNC (paperless procedure & submission of documents)
Representation	DE lawyer, other lawyer with DE lawyer	Foreign lawyer together with FR	No automatic right foreign lawyers	NL lawyers; other lawyers with NL
Time-limits	Strict according to case management	Strict according to case management	Strict according to case management	Flexible arrangements for case management

Figure 4. An Overview of the European International Commercial Courts Offer

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set for the commercial procedures – Ireland and the Netherlands. Where special fees are applicable, these are usually higher than the fees in the ordinary national procedures. For the analysed EU-ICCs, the highest court fees are applicable for the Netherlands Commercial Court, and the lowers is that perceived by the French CCIP-TC.

For the recognition and enforcement of the judgments issued by these ICCs, no special rules have been adopted. The applicable provisions are the same as for any other cases handled by national courts in an international setting (e.g. Brussels I-bis, the Hague Choice of Court Convention, and bilateral treaties between EU Member States and third countries). Thus, the enforcement stage of the judgment is not subject to speedier formats.

4.2. *European Commercial Courts: Answers, Grey Areas, and Remaining Considerations*

In considering the findings of the European Commission and Parliament studies and comparing these with the characteristic features of the EU-ICCs, a number of critical elements appear to have been addressed by these initiatives. These focus particularly on the issues of specialisation of justice, language, and the timing of the proceedings.

The element of specialisation and professional knowledge has been one of the focus points in the creation of the EU-ICCs. All four ICCs are providing a high level of expertise and knowledge for their users as court experience. The judges who sit on the bench are expert in commercial and private international law matters. The court staff involved is knowledgeable in handling international cases. The same high level of expertise appears to be shared by the lawyers involved in these type of cases, with the limitation that it is always local lawyers who need to be engaged by the parties. Thus, the issue do specialisation and knowledge of courts and professionals involved is directly addressed by the EU-ICCs.

The language issues have been tackled by the possibility of using English as the language of the proceeding. This is an element that is particularly underlined by all the national initiatives as a feature chosen to facilitate parties in cross-border litigation. This may be considered a non-issue, given the need to be always represented by a local lawyer, but parties, witnesses, and experts may not be able to express themselves in the language of the proceedings, and the documents may be drafted in English or other languages which in the usual court procedures will require certified translation. However, the extent to which English is being used, differs between the EU-ICCs.

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This has consequences for the costs of the proceedings. Translations remain necessary at the stage of the issuing of the judgment as in national procedures, with the exception of the NCC and the Dublin Commercial Court Division.

The jurisdiction matter is addressed by the requirement of parties concluding an express agreement conferring jurisdiction on these specialised EU-ICCs. Based on the provision of Article 25 Brussels I-bis, Article 3 Hague Choice of Court Convention,[115] or, alternatively, national rules conferring jurisdiction to these courts, such agreements solve potential conflicts with regard to the jurisdiction. This does not completely eliminate situations in which one of the parties may seek to contest jurisdiction, but given the express agreement by the parties on bringing their claim before the EU-ICCs, challenges of jurisdiction are less likely to occur. Having such express agreements on jurisdiction gives certainty to the parties and speeds up the process. The matter of jurisdiction should no longer be an issue of long adversarial debates exchanges between the parties.

The issue of procedures lasting several years before the parties would obtain a judgment has sought to be addressed by the EU-ICCs. The speedy handling of the cases and case management solutions by the EU-ICCs are particularly emphasised in the presentation of their services. The swift handling of EU-ICCs cases compared to other court procedures is achieved based on case management techniques and/or strict application of procedural deadlines. The extent to which parties can make agreements for the case management differs between the Dutch, French, and Irish ICCs. These are related to the timing of the various procedural steps, the language of the proceedings, and protocols related to evidence taking. Such arrangements influence the length of the proceedings and the expectations of the parties.

Other identified problematic elements are indirectly reflected into the EU-ICCs rules or protocols. They are not per se addressed as a way of solving a difficulty of cross-border litigation, but are included as procedural elements necessary in conducting court proceedings. This is the case for provisions concerning applicable court fees, the costs of the proceedings and their recovery, the communication needs and structure of requests, the service of documents and taking of evidence. Court fees are not necessarily higher, but with some exception (e.g. the Dutch NCC). Further, given the more limited need of translation and interpretation services in the ICCs proceedings,

[115] Hague Conference of Private International Law, Convention of 30 June 2005 on Choice of Court Agreements.

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and the strict management of the case approach followed by these courts, the overall costs of the proceedings should be lower than in the general national procedures. A series of arrangements are in place to facilitate the communication between the parties and the court staff. The structure of the requests are also an element that is addressed for easing the procedure. Another practical arrangement to facilitate the litigation is related to the use of technology at various stages (e.g. submission of the claim, consultation of the case file) and for different proceedings (e.g. service of documents, taking of evidence, hearing of witnesses). Differences between EU-ICC in the use and deployment of technology exist. This influences the channels of communication used and the speediness of the exchanges. Further, difficulties related to the service of documents and taking of evidence can be partly address by the use of technology. This is an approach encouraged also by the EU recast Service of Documents and Taking of Evidence Regulations. Given the express agreement parties have to conclude for conferring jurisdiction on the specialised courts, the parties whereabouts or electronic addresses or of their representatives are known to the court.

The complexity of procedures is not a procedural aspect expressly tackled by the procedural models proposed by the EU-ICCs. Given that the litigations are international commercial cases of a certain value, parties rely on legal representation from local lawyers who are specialists in this area of law. This potentially impacts on the perceived complexity of the procedures before these courts. Further, the cases are also closely managed by the courts. Hence, potential issues related to the management of the case or communicating on these matters may be easier to undertake given the dedicated services set up for these cases.

Recognition and enforcement as the last stage of the procedure is not subject to specific rules for the EU-ICCs cases. The EU, international, and national private international rules apply in this regard. Further, on the actual process of enforcement, the usual cross-border difficulties remain relevant for international commercial cases when the losing party does not voluntarily comply with the judgment.

5. *Concluding Remarks*

Existing studies on difficulties and expectations parties have in cross-border litigation are important pieces of information to consider when establishing or reviewing certain features of ICCs. The analysis carried out shows that there are multiple points of

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convergence between the features the EU-ICCs have and the identified critical aspects of cross-border litigation. The extent to which each of the critical points is solved by the rules or practical guides shaping the case management of the EU-ICCs case handling is difficult to measure at this point besides flagging their existence. A dedicated research on EU-ICCs looking at how the issues related to cross-border litigation are actually answered based on the courts' data and professional experiences is desirable. This would allow to better evaluate the success of the procedural solution they present for business parties in cross-border litigation.

For high value trade disputes, some of the issues or difficulties of cross-border litigation (e.g. language, complexity) may be mitigated by the fact that parties are represented by local lawyers who are highly trained and experienced lawyers in international and commercial litigation. Other improvements are related to flexible case management arrangements made with the parties and the swift handling of the cases by the courts, given the priority these cases are given at national level in each of the concerned jurisdictions.

As a future development and improvement of the services provided by these specialised courts attention should be given to expressly addressing all the relevant points related to cross-border litigation difficulties. This can be part of a dynamic process of continuous improvement of the EU-ICCs frameworks and their services to better respond to parties' needs in accessing justice. This process can concern each of the courts individually, but could be set up also as an experience sharing and collaboration between existing EU-ICCs. An exchange of experiences could contribute to the creation of a European network of International Commercial Courts[116] at formal or informal level. Experiences of each of these national initiatives are valuable for improving the European dispute resolution toolbox. Some form of collaboration and exchange of expertise with regard to their rules and practices can create cohesion in a European fragmented justice picture for international commercial disputes.

Further down the line, the present EU-ICCs experiences could be used to design specific solutions that could be easier to access or could be dedicated to small and medium size businesses. A significant share of the internal market commercial activities are carried out by such companies.

[116] On the possibility of creating a network of European Business Courts, see also Biard (n 51) 31.

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Marco Lamandini*, David Ramos Muñoz**

Two (Provocative) Ideas for a Test-Case: An EU Hybrid Court for Private-Law Disputes in the Law of Finance, and How?

Table of Contents: 1. The problem in a nutshell. Effectiveness of EU law and its challenging implications. – 2. A snapshot of specialized commercial courts and hybrid commercial courts from Asia to Europe. Lessons from abroad. – 3. A test-case for Europe? Effectiveness of the EU law of finance in its enforcement and its implications for the development of hybrid commercial courts in Europe.

1. *The problem in a nutshell. Effectiveness of EU law and its challenging implications*

We surmise that the European law of finance may possibly work as an interesting test-case for hybrid commercial courts in Europe. In this context, effectiveness of EU law is increasingly at odds, in its private-law dimension, with Member States' procedural autonomy, due to national causes of actions which are not (but for one exception) harmonized following the principle of procedural autonomy. This is so although substantive law is increasingly uniform or subject to maximum harmonization at Union level and a convergent interpretation and application of EU law, or of its national transposition, is clearly essential to ensure both the competitive level playing field and the overall European (and Eurozone) financial stability.

The Court of Justice has traditionally adopted a "hands off" approach on private causes of action, leaving Member States with a broad margin of appreciation to determine the conditions for the exercise of any private-law action. In *Bankia*,[1] for example,

* Full Professor at University of Bologna, Department of Sociology and Business Law.

** Adjunct Professor at University of Bologna, Department of Sociology and Business Law.

[1] Case C-910/19 *Bankia v Unión Mutua* [2021] ECLI:EU:C:2021:433. Compare M Lamandini and D Ramos Muñoz, 'Can you have a Capital Markets Union without harmonised remedies for securities litigation?' EuLawLive, Weekend Edition, 19 June 2021, 15.

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the Court held that Article 6(2) of Directive 2003/71 grants Member States a broad margin of appreciation to determine the conditions to exercise an action for damages for false information in the prospectus and despite its cautioning that the principles of equivalence and effectiveness must also be respected, the leeway left to procedural autonomy remained wide and unchecked. This is in line with other previous cases law, such as *Hirmann*[2] and *Craeynest.*[3] Yet, over time, the Court's acrobatics between procedural autonomy and effectiveness has become an elegant, tiptoeing on a tight rope suspended between past and future.

If private litigation is an essential component of the enforcement of EU law, as it is in the Capital Markets Union and in the Banking Union, the current situation is less than optimal, because civil remedies for private law disputes in the EU law of finance are in a sorry state, if from a procedural angle, they remain *balkanised in a variety of national modes*[4] and, from a substantive angle, this creates visible national divergencies in the enforcement of EU law.[5] A clear example is offered by the *Genil* case.[6] The CJEU held that, in case an investment firm did not comply with MiFID[7] duties of transparency, suitability and appropriateness MiFID Article 51 provides for administrative sanctions but does not dictate the consequences under the contract, which is left to the Member States' private law, *without prejudice to the principle of effectiveness.* This, however, can result in the Spanish courts' preference for nullity/invalidity *or* the Italian courts' preference for contractual liability, with no guidance as to what are the implications of the principle of effectiveness. Other examples of the same breed in the law of finance are very many.

The EU legislators can ignore this, but for how long? The Credit Rating Agencies Regulation III (Regulation EU No 462/2013) by establishing a new cause of action for private litigation when a credit rating agency intentionally or negligently breaches the Regulation,

[2] C-174/12 *Alfred Irmann v Immofinanz* [2013] ECLI:EU:C:2013:856.

[3] C-723/17 Lies Craeynest v Brussels Hoofdstedelijk [2019] ECLI:EU:C:2019:533.

[4] B Hess, 'The State of the Civil Justice Union', in B Hess, M Bergström, and E Storskrubb (eds), *EU Civil Justice. Current Issues and Future Outlook* (Hart Publishing 2016) 1-19.

[5] N Moloney, *EU Securities and Financial Markets Regulation* (OUP 2014) 968.

[6] C-604/11 *Genil 48 SL and Others v Bankinter SA and Others* ECLI:EU:C:2013:344. On this compare D Busch, 'The private law effect of MiFID I and MiFID II. The *Genil* Case and Beyond' in D Busch and G Ferrarini (eds), *Regulation of the EU Financial Markets* (OUP 2017) 567-585.

[7] Directive 2004/39/EC of the Parliament and of the Council of 21 April 2004.

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and an investor suffers damage, has taken a different stance, that of a comprehensively harmonization of the civil remedy. Yet this is still an isolated exception. One does not need to be Cassandra to predict that, at least in the peculiar context of the Banking Union and Capital Markets Union, it *comes a point, where the procedural autonomy of Member States clearly impairs the EU law principles of equivalence and effectiveness.*

The CJEU sent a clear message on this last 17 May 2022, in *Banco di Desio*, *Ibercaja Banco*, *Impuls* and *Unicaja Banco*,[8] with regard to the directive on unfair terms in consumers' contracts and its enforcement in banking and harshly clarified that, in that context of maximum harmonization, procedural autonomy has to surrender to effectiveness of EU law. We agree with the spirit, and simply regret that the Court has been hesitant to do the same in the context of investor protection *vis-à-vis* issuers/offerors and intermediaries. In our view, time has come to start discussing possible, albeit imaginative, ways which in the future may help in coping with this challenge. Responses should come, in our view, by way of a balanced institutional re-design and hybrid commercial courts come into the picture as one of the possible tools of choice.

2. *A snapshot of specialized commercial courts and hybrid commercial courts from Asia to Europe. Lessons from abroad*

The irony is that, in discussing hybrid commercial courts as a possible tool of choice for Europe, we necessarily must draw on the experience of domestic systems which, originally, were mostly established outside Europe and the EU has not taken a position on the issue. Yet, our claim for more specialized courts in the law of finance nicely intersects with a clearly visible international judicial trend.

A first example is the successful experience of the Financial List in the United Kingdom, a specialized list of judges set up in December 2015 to handle claims related to financial markets[9] operating as a

[8] Case C-693/19 and C-831/19 *Banco di Desio* [2022] ECLI:EU:C:2022:395; C-600/19 *Ibercaja Banco* [2022] ECLI:EU:C:2022:394; C-725/19 *Impuls* [2022] ECLI:EU:2022:2022:396 and C-869/19 *Unicaja Banco* ECLI:EU:C:2022:397.

[9] Pursuant to Section 63A.1 of the Practice Directions to the UK Code of Civil Procedure establishing the Financial List:

(2) In this Part and Practice Direction 63AA, 'Financial List claim' means any claim which— (a) principally relates to loans, project finance, banking transactions, derivatives and complex financial products, financial benchmark, capital or currency

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joint initiative involving the Chancery Division and the Commercial Court in London, whose declared objective has been 'to ensure that cases which would benefit from being heard by judges with particular expertise in the financial markets or which raise issues of general importance to the financial markets are dealt with by judges with suitable expertise and experience'.[10] Yet this follows the pattern of experiences of the same breed, which feature a distinct new phenomenon of global competition which has been nicely described in the literature as 'plural adjudicatory unilateralism':[11] the emergence of hybrid dispute resolution *fora*, and in particular hybrid specialized courts.[12] Among them, also recent initiatives in

controls, bank guarantees, bonds, debt securities, private equity deals, hedge fund disputes, sovereign debt, or clearing and settlement, and is for more than [£50 million] or equivalent; (b) requires particular expertise in the financial markets; or (c) raises issues of general importance to the financial markets. (3) 'Financial markets' for these purposes include the fixed income markets (covering repos, bonds, credit derivatives, debt securities and commercial paper generally), the equity markets, the derivatives markets, the loan markets, the foreign currency markets, and the commodities markets.

[10] Guide to the Financial List (1 October 2015), A.1.2 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/644030/financial-list-guide.pdf>, accessed 1 September 2022. On the Financial List, compare AP Lambert, 'The Financial List: an early assessment' (2016] 9 JIBFL 545; S Bushell, 'London's Financial List: A choice of forum crossroads' [2016] PLC Magazine <https://www.lw.com/thoughtLeadership/londons-financial-list> accessed 1 September 2022. It is noteworthy that one of the distinctive features of the financial list is that it also conducts a 'pilot Financial Markets Test Case Scheme, to facilitate the resolution of market issues in relation to which immediate relevant authoritative English law guidance is needed without the need for a present cause of action between the parties to the proceedings' (s B.9.1. of the Guide).

[11] G Dimitropoulos, 'International Commercial Courts in the "Modern Law of Nature": Adjudicatory Unilateralism in Special Economic Zones' [2021] J Int'l Econ L 24, 361-379.

[12] For a comparative taxonomy and an insightful discussion, ibid; S Brekoulakis and G Dimitropoulos (eds), *International Commercial Courts: The Future of Transnational Adjudication* (Cambridge University Press 2022). For a European perspective, XE Kramer and J Sorabji (eds), *International Business Courts - A European and Global Perspective* (Eleven International Publishing 2019). These hybrid courts have not been yet developed in the U.S. because 'many within the United States believe that US courts, particularly federal courts, are among the best, if not the best, of any nation in the world' and that therefore 'it has no competitive disadvantage when it comes to transnational litigation': For a discussion SI Strong, 'International Commercial Courts and the United States: An Outlier by Choice of by Constitutional Design?' (2019) 8 University of Missouri Legal Studies Research Paper Series (where also the former quote, at p 9) also in XE Kramer and J Sorabji (eds), *International Business Courts - A European and Global Perspective* (Eleven International Publishing 2019).

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continental Europe in response to Brexit, all aimed at establishing specialized courts for international commercial disputes (in most cases related to financial contracts) to offer alternative judicial venues to London after the United Kingdom departure from the EU.[13] As noted by Sir William Blair:[14]

'together, commercial courts provide: authoritative development of the content of commercial law; the essential basis upon which international arbitration functions; a specialised forum of choice for businesses that prefer courts to arbitration; a specialised forum for commercial disputes which cannot be arbitrated; a route to capacity building amongst the judiciary; procedure that can be/has been developed first in a commercial court for later wider use across a legal system; an ability both to optimise the potential of technology, and to develop it under high ethical standards; where methods of dispute resolution currently fall below best standards, the potential to raise standards across the whole system'.

The institutional design of these specialized international courts, which compete with international arbitration and may become "the paradigm for the future of adjudication",[15] follows a common footprint, yet with many procedural variations.[16]

In Dubai the international commercial court, which hears disputes in English and applies common law, is composed by a Court of First Instance, with a Small Claims Tribunal attached thereto, and a Court of Appeal. The Qatar International Court has a First Instance and an Appellate Circuit and is composed by (i) a Civil and Commercial Court and (ii) a Regulatory Tribunal which has jurisdiction to hear appeals against decisions of the Qatar Financial Centre Authority and other institutions. Likewise, also the Abu Dhabi Court is composed by a First Instance and a Court of Appeal. In turn, the Singapore International Commercial Court (SICC) is part of the

[13] G Rühl, 'Building Competence in Commercial Law in the Member States' (European Parliament Think Tank, 14 September 2018) <https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2018)604980>, accessed 1 September 2022, 38.

[14] W Blair, 'The New Litigation Landscape: International Commercial Courts and Procedural Innovations' [2019] Int'l J P L 2, 212-234; compare, for an Asian perspective, F Kebede Tiba, 'The Emergence of Hybrid International Commercial Courts and the Future of Cross Border Commercial Dispute Resolution in Asia' (2016) 14 Loyola Univ Chicago Int'l L Rev 1.

[15] S Brekoulakis and G Dimitropoulos (eds), *International Commercial Courts: The Future of Transnational Adjudication* (Cambridge University Press 2022).

[16] Dimitropoulos, 'International Commercial Courts in the Modern Law of Nature' (n 11).

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Singapore High Court and The China International Commercial Court is a branch of the Supreme People's Court of China, which coexists with three intermediate specialized financial courts established in Shanghai, Beijing and Chengdu/Chongquing which hear both private-law and public-law financial disputes, whereas the Astana International Financial Centre Court is an international court outside the judicial system of the Republic of Kazakhstan, yet judges, who are English judges, are appointed by the President of the Republic on the recommendation of the Governor of the Astana International Financial Centre.[17]

In Europe France was the only Member State who had already an international commercial court, namely the Paris international chamber at the Commercial Court, in operation since 1995 (it merged in 2015 with the chamber of European Union Law, established in 1999, which however adopted new rules of procedure in 2017 to keep pace with these international developments).[18] Others have more recently followed this new trend, creating international chambers within existing court structure, notably a chamber for international commercial matters (*Kammer für internationale Handelsachen*) within the District Court (*Landesgericht*) of Frankfurt[19] and the Netherlands Commercial Court and the Netherlands Commercial Court of Appeals at the Amsterdam District Court (*Rechtbank*) and the Court of Appeal (*Gerechtshof*). This move was also favored by reasons 'endogenous' to the European Union: first, the European model of administration of justice is based on private international law instruments, which are to some extent conducive to *forum shopping.* Second, Brexit and the expectation that, in the wake of it,

[17] Compare Sir R Jackson, 'A Comparative Perspective to Hybrid Dispute Resolution Fora: Jurisdiction, Applicable Law and Enforcement of Judgments' (Doha International Conference on the Promise of Hybrid Dispute Resolution Fora, Doha, November 2018).

[18] On 7 March 2017, the French Minister of Justice asked a special committee ('*Haut comité juridique de la place financière de Paris*' or HCJP) to propose a court to make it easier for foreign commercial parties to present their disputes. On the basis of the works developed by that committee two protocols were signed on February 2018 to amend the procedure of the existent International Chamber and to create a new one. An International Chamber of the Paris Court of Appeal was also established.

[19] B Hess and T Boerner, 'Chambers for International Commercial Disputes in Germany: the State of Affairs' (2019) 12 Erasmus L Rev 33-41; M Lehmann, 'Law Made in Germany - Quality or Lemon?' in XE Kramer and J Sorabji (eds), *International Business Courts - A European and Global Perspective* (Eleven International Publishing 2019).

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London commercial courts would have inevitably lost their central role in the adjudication of cross-border commercial disputes in the EU context.[20] A first indication in that direction was offered by ISDA with changes in the ISDA Master Agreement for financial derivatives, now providing as jurisdiction and choice of law Dublin and Irish law and Paris and French Law, respectively.[21] However, the practice of hybrid courts in Europe is still at its infancy; and yet it calls for more system-wide coordination.[22]

All this shows the importance not only of expert judgement but also of procedural specialization. International commercial courts are the tool of choice also to adopt procedural innovation.[23] Elements of specialisation pertaining to the procedural aspects mimic to some extent arbitral procedure and range from limits to over-lengthy submissions, to document production, to expert witness, to more flexible approaches to the applicable foreign law[24] and to a wider use of technology, from online case management systems (eCourt) to AI-augmented translation of evidence, documents and real-time transcript for the hearings.[25]

International commercial courts' unilateralism responds to global competition not only from arbitration but also from ordinary courts long established in leading jurisdictions like the U.S. Those courts followed however a distinct path of specialization whose most

[20] Pl Beaumont and others, 'Cross-border Litigation in Europe: Some Theoretical Issues and Some Practical Challenges' in P Beaumont and others (eds), *Cross Border Litigation in Europe* (Hart Publishing 2017) 831. Hess and Boerner, 'Chambers for International Commercial Disputes in Germany: the State of Affairs' (n 19) 33-41.

[21] Hess and Boerner, 'Chambers for International Commercial Disputes in Germany' (n 19). The same Authors find however that, even in the past, despite the ISDA standard, many financial instruments contained several and overlapping non-exclusive jurisdiction clauses providing not only for London but also for Frankfurt and other courts of the Continent.

[22] The Standing International Forum of Commercial Courts (SIFoCC) paved the way of such an initiative and was led by Lord Thomas of Cwmgiedd in the course of an influential series of speeches setting out the changing issues facing commercial dispute resolution. He proposed that commercial courts owe a duty to work together to underpin the rule of law: 'By bringing order to commerce and finance, a sound system of commercial dispute resolution helps to give the stability that is essential to the peace and prosperity of all our societies'. SIFoCC was set up in 2017 to share knowledge and expertise. Courts are represented often at the Chief Justice level. Compare W Blair, 'The New Litigation Landscape' (n 14), 234.

[23] ibid 226.

[24] ibid.

[25] ibid.

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clear examples are, notably, the United States District Court for the Southern District of New York (SDNY), a Federal Court established as early as in 1789, and the New York Commercial Division of the Supreme Court, a state court established in 1995 as a forum to resolution for complex commercial disputes (including 'business transactions involving or arising out of dealings with commercial banks and other financial institutions': Section 202.70 Rules of the Commercial Division of the Supreme Court). The New York Commercial Division blazed a judicial trail. In the words of the Chief Judge's Task Force on Commercial Litigation in the 21st Century.[26]

[T]oday, the judges of the Commercial Division adjudicate thousands of cases and motions that include some of the most important, complex commercial disputes being litigated anywhere. This is especially true in the wake of the financial crisis (…). Additionally, a host of other states have followed New York's lead, creating new commercial courts to attract both business disputes and businesses in their jurisdictions. In 2010 even Delaware, whose Chancery Court remains a leader in the world of corporate law, created in its Superior Court a new Complex Commercial Litigation Division.

More than a dozen states, through special legislation (like in Michigan and Oklahoma) or via administrative orders of the judicial branch,[27] have meanwhile set up trial courts or courts division for business litigation or for complex litigation.

3. *A test-case for Europe? Effectiveness of the EU law of finance in its enforcement and its implications for the development of hybrid commercial courts in Europe*

The establishment of a European court for cross-border commercial disputes grounded on Article 81 TFEU is not a new idea and has already been nicely voiced in the literature and advocated in policy making.[28] It could also work as a complement of the existing

[26] Commercial Division Justices Supreme Court of the State of New York, *Report and Recommendations to the Chief Judge of the State of New York* (June 2012) 1.

[27] A Tucker Nees, 'Making a Case for Business Courts: A Survey of and Proposed Framework to Evaluate Business Courts' (2007] 24 Georgia St Univ L Rev 477-532.

[28] G Rühl, 'The Resolution of International Commercial Disputes - What Role (if any) for Continental Europe?' (2021) 115 AJIL 11-16; Rühl, 'Building

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national commercial courts' system and thus as an optional "28th regime". Proponents have argued that Article 81 TFEU 'allows the EU to adopt self-standing European procedures that replace national procedures' and that 'based on this broad understanding of its competences, the EU legislature has for example adopted the Small Claims Regulation, the Payment Order Regulation and the Insolvency Regulation'. The European commercial court, in the design of its proponents, would primarily apply national law and would work under the control of the CJEU (it should be expressly granted the right to make requests for preliminary ruling under Article 267 TFEU).[29]

Building on those proposals, we surmise[30] that the EU law of finance would be the ideal context to experiment this, without impinging on the current organization of the Court of Justice at the apex of the system and with no recourse to Article 257 TFEU. Also in our view a not too ambitious, yet pragmatic reform based on Article 81(2) and Article 67(4) TFEU (that grant a legislative competence for the EU to take measures aimed at ensuring 'effective access to justice' in civil matters having cross border implications)[31] would be desirable.

More specifically, we argue that the needs of the EU law of finance would be nicely served by a two-step judicial reform as follows:

a) First, an interconnected system of (one or a limited number per country) specialized commercial courts, established in each Member State along the lines of the specialized courts for intellectual property under the Community Design Regulation[32] and the EU Trademark Regulation[33] to hear domestic and cross border private

Competence in Commercial Law in the Member States' (n 13) in particular 60 ff; G Rühl, 'Ein europäisches Handelgericht' [2018] FAZ 6; T Pfeiffer, 'Ein europäisches Handelgerichtshof und die Entwicklung des europäischen Privatrechts' [2016] ZEuP 797.

[29] Rühl, 'Building Competence in Commercial Law in the Member States' (n 13), 60 and n 322.

[30] Compare M Lamandini and D Ramos Muñoz, *Finance, Law and the Courts* (Oxford University Press, 2023) forthcoming.

[31] These provisions, together with the right to an effective remedy under Article 47 of the Charter of Fundamental Rights lay the foundations of EU justice: P Beaumont and M Danov, 'Introduction: Research Aims and Methodology' in P Beaumont and others (eds), *Cross Border Litigation in Europe* (Hart Publishing 2017), 1.

[32] Council Regulation (EC) No 6/2002 of 12 December 2001.

[33] Council Regulation (EC) No 40/94, then codified as Regulation (EC) No 207/2009 and now Regulation (EU) 2017/1001 of the European Parliament and of the Council.

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law disputes in the law of finance, where the applicable law is either EU law with direct effect or national law implementing EU law. It would be left to the procedural autonomy of each Member State to organize those courts, in compliance with the principles of equivalence and effectiveness. Cross-border disputes, however, may be further concentrated in one single court per country, where the use of English, as the language customary in international finance, could be used through the entire proceedings and also for the judgment.

b) Second, to further promote effectiveness and equivalence, for appeals of disputes having cross border implications the parties may be offered the option to apply either to national generalist courts of appeal or to a single, specialized European court of appeal, established under Article 81(2) TFEU and working in English.

Convergence through appropriate guidance at the level of the appeal is, in our view, important; but even more important is an increased interconnection of the network of specialized national courts, which, drawing from the experience of many common law state judiciaries, and also civil law systems like Germany and Switzerland, may lead courts to consider also precedents of other state courts when appropriate.[34] To this purpose a national court for cross border dispute and a European court of appeal delivering their judgments in English would hugely contribute to finally reverse the undesirable situation of "*national* judiciaries which are not only ensconced each in its own legal culture but also separated by language barriers which range from merely inconvenient to the virtually insurmountable.[35]

[34] D Halberstam, and M Reimann (eds), *Federalism and Legal Unification* (Springer 2016), 17; S Cassese, *A World Government?* (Global Law Press 2018) 218.

[35] Halberstam and Reimann, 'Federalism and Legal Unification' (n 33), 18.

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Michael Stürner*

Commercial Courts in Germany: Fit for Purpose?

Table of Contents: 1. Civil Justice in Crisis? – 2. Competition among Dispute Resolution Providers. - 3.1. The Emergence of Commercial Courts. - 3.2. Structural issues. - 3.3. Procedural Issues. - 3.4. The Applicable Law. - 3.5. Judgment and Appeals. - 3.6. Execution. – 3. Commercial Courts in Germany: Status Quo and Recent Developments. – 4. Outlook.

1. *Civil Justice in Crisis?*

Around the globe, German civil procedure enjoys an excellent reputation, particularly with regard to the accessibility of courts, the quality of their decisions, the length of proceedings, freedom from discrimination and the absence of corruption. Taking these and other factors into account, the World Justice Project's Rule of Law Index 2021[1] ranks Germany fifth overall in the world in terms of the rule of law;[2] the civil justice system did even better, ranking third.[3] And yet, for about 20 years, the number of cases before German civil courts has been steadily declining. At a good 50%, the decline in the number of cases filed is particularly marked in relation to major commercial disputes, which can be heard before the Chambers for Commercial Matters: There, a minus of 45.7% was recorded between 1995 and 2013; if one looks at the period between 2004 and 2017, a decline

* Professor at University of Konstanz, Department of Law. This paper draws on the author's following publication: M Stürner, 'Krise und Zukunft der staatlichen Gerichtsbarkeit als Instrument der Streitbeilegung im internationalen Handel' in A Peters, S Hobe, and EM Kieninger (eds), *Abkehr vom Multilateralismus - Internationales Recht in Gefahr?* (C.F. Müller 2023) 51 Berichte der Deutschen Gesellschaft für Internationales Recht (forthcoming).

[1] Cf <https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2021> accessed 5 October 2022.

[2] Rule of Law Index 2021, 10, 22.

[3] Rule of Law Index 2021, 34.

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of more than 50% in the number of settled cases was recorded.[4] A renewed increase in recent years – almost 20% more submissions to the regional courts since 2017[5] – is likely to be mainly due to the tens of thousands of proceedings in the aftermath of the "Volkswagen diesel scandal". The Chambers for Commercial Matters (Kammern für Handelssachen) were not affected by this "boom", but continued to have declining figures.[6]

One of the reasons repeatedly cited for the decline in the number of incoming cases is the increased emergence of alternative dispute resolution mechanisms.[7] But their absolute number is comparatively small. It cannot be denied that in the area of complex commercial disputes, international commercial arbitration has a certain dominance, even though there is of course no precise empirical data on the absolute number of such disputes and the respective paths to their resolution. However, there are no statistical surveys to suggest a correlation between the decline in proceedings on the one hand and dispute resolution by arbitral tribunals on the other. On the contrary: only about 150 cases are heard before the German Institution of Arbitration (DIS) each year.[8] In 2020, there were just about 3,500 new proceedings before the major arbitration institutions worldwide.[9] That is only a fraction of the commercial law cases heard before state courts in Germany alone.

And yet these comparatively few cases are capable of shaping

[4] In 2004: 52477 completed cases, in 2017: 26959 completed cases (decline by 51.37%). Between 1995 and 2013 there was a decline by 45.7%, cf C Wolf, 'Zivilprozess versus außergerichtliche Konfliktlösung - Wandel der Streitkultur in Zahlen' [2015] NJW 1656.

[5] New cases before regional courts (*Landgerichte*): 307718 (2017); 366.296 (2020). Before the local courts (*Amtsgerichte*) the figures are declining in this period of time: 936.979 (2017); 852.907 (2020), (decline by almost 10%). Source: <www.bundesjustizamt.de/DE/Themen/Buergerdienste/Justizstatistik/Geschaeftsbelastungen/Uebersicht_node.html> accessed 5 October 2022.

[6] 26.959 completed cases in 2017; 22.502 completed cases in 2020, cf Statistisches Bundesamt, Fachserie 10 Reihe 2.1 'Zivilgerichte', 2020.

[7] See eg H Hoffmann, 'Schiedsgerichte als Gewinner der Globalisierung? - Eine empirische Analyse zur Bedeutung staatlicher und privater Gerichtsbarkeit für den internationalen Handel' [2010] SchiedsVZ 96; GP Calliess, *Der Richter im Zivilprozess - Sind ZPO und GVG noch zeitgemäß?, Gutachten A für den 70. Deutschen Juristentag* (CH Beck 2014) s 24 ff.

[8] 2019: 151 cases; 2020: 165 cases, cf <www.disarb.org/ueber-uns/unsere-arbeit-in-zahlen> accessed 5 October 2022.

[9] LCIA: 444 cases, ICC: 946 cases, HKIAC: 318 cases; SIAC: more than 1000 cases, CIETAC: 739 cases (without domestic cases), cf <www.faegredrinker.com/en/insights/publications/2021/6/2020-a-record-breaking-year-for-international-commercial-arbitration> accessed 5 October 2022.

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entire areas of law. This can be demonstrated, for example, by the law of corporate acquisitions, M&A transactions, which is characterised in a special way by an international market[10] and in which the tension between state and private autonomous law is prototypically demonstrated. In M&A deals, alternative dispute resolution mechanisms are very common,[11] so that disputes related to corporate acquisitions reach the state courts relatively rarely.[12] There is a risk that the state courts' function of developing the law will not work properly if entire areas of law are litigated outside the court system and can at best be judged from an ex-post perspective and with a very limited standard of review when it comes to the recognition of an arbitral award.

The lack of demand from the public seeking justice could be interpreted as a sign that the legal service in demand is not attractive enough. But is state jurisdiction about a system that is in competition? Are there clients for whom corresponding services must be offered? After all, it is not economic activities or the promotion of domestic industry that are at issue, but a basic element of the democratic constitutional state.

2. *Competition among Dispute Resolution Providers*

One can speak of competition when several participants strive for the same goal, but not all can achieve it equally. Expressed in economic categories, this presupposes a market for dispute resolution, which in turn knows several participants on the side of both the suppliers and the demanders, who do not behave cooperatively, but antagonistically.[13] Many commentators subscribe to this with a view to the state justice system.[14] From this perspective, dispute resolution

[10] Cf eg HP Westermann, '§ 453 BGB' in *Münchener Kommentar zum BGB* (8th edn, CH Beck 2019) para 18.

[11] See T Meyding and S Sorg, 'Rechtstatsachen zur Gestaltung von Unternehmenskaufverträgen in Deutschland unter besonderer Berücksichtigung der Schiedsverfahren' in R Wilhelmi and M Stürner (eds), *Post M&A-Schiedsverfahren. Recht und Rechtsfindung jenseits gesetzlichen Rechts* (Springer 2019) s 11; U Büdenbender, 'Anh. II zu §§ 433-480' in *NK-BGB* (3rd edn, Nomos 2015) para 133; SH Elsing and M Kramer, 'Post M&A Disputes under German Law' in R Schütze (ed), *Fairness Justice Equity: Festschrift für Reinhold Geimer zum 80. Geburtstag* (CH Beck 2017) s 67.

[12] One of the rare decisions can be found in BGH NJW 2019, 145.

[13] Cf. A Suchanek, 'Wettbewerb', *Gabler Wirtschaftslexikon* (19th edn, 2018).

[14] G Wagner, *Rechtsstandort Deutschland im Wettbewerb. Impulse für Justiz und Schiedsgerichtsbarkeit* (CH Beck 2017); A Wolf, 'Ist der "Justizstandort

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can be seen as a market segment,[15] a service of the judiciary, as is also the case in other state sectors, such as energy supply or passenger transport. From the point of view of the demand side, this legal service is a fungible good insofar as parties all over the world can submit their dispute to different courts via agreements on the place of jurisdiction and thus in fact choose different providers. What is more, the service in demand is also offered in the private sector by a large number of institutional or non-institutional providers in the field of arbitration, adjudication or mediation. Arbitration agreements can largely derogate the jurisdiction of state courts.

It cannot be overlooked that the provider side is also embracing this competition. This is evidenced, for example, by the "Alliance for German Law" launched in 2008, with which the Federal Ministry of Justice and the professional organisations[16] pursue the goal of "strengthening Germany internationally as a legal location and promoting German law abroad"[17] The brochure "Law Made in Germany", which emerged from the alliance, deliberately takes up the idea of competition in its title, but limits it to competition between German and foreign institutions: State courts and arbitration courts are equally touted here as German quality products.[18]

There seems to be a broad consensus among the relevant players that Germany needs to be "made fit again" as a judicial location.[19] The legal profession – especially the globally operating big law

Deutschland" international wettbewerbsfähig?' [2019] RIW 258; B Klose, *Justiz als Wirtschaftsfaktor. Rechtsfindung im Spannungsfeld von Effizienz und Planbarkeit* (Nomos 2020) s 239; S Domhan, *Internationale private Streitschlichtung. Impulse für die Errichtung eines Europäischen Handelsgerichts* (Duncker & Humblot 2022) s 16 ff; N Grohmann, *Internationalisierung der Handelsgerichtsbarkeit. Eine Frage des Managements* (Mohr Siebeck 2022) s 2 ff.

[15] H Eidenmüller, 'Recht als Produkt' [2009] JZ 641, 646.

[16] *Deutscher Anwaltverein* (DAV), *Bundesrechtsanwaltskammer* (BRAK), *Deutscher Notarverein* (DNotV), *Bundesnotarkammer* (BNotK), *Deutscher Richterbund* (DRiB), *Deutscher Juristinnenbund* (DJB) as well as *Deutscher Industrie- und Handelskammertag* (DIHK) and *Bundesverband der Deutschen Industrie* (BDI).

[17] Cf <www.bmj.de/DE/Themen/EuropaUndInternationaleZusammenarbeit/BuendnisDeutschesRecht/BuendnisDeutschesRecht_node.html> accessed 5 October 2022.

[18] For criticism see AF Peter, 'Warum die Initiative "Law - Made in Germany" bislang zum Scheitern verurteilt ist' [2011] JZ 939.

[19] L Röckrath and S Fischer, 'Suche nach einer Alternative zu London: Justizstandort Deutschland macht sich fit für den Brexit' (*Legal Tribune Online*, 16 March 2018) <www.lto.de/persistent/a_id/27591/> accessed 5 October 2022; Wolf (n 14) 258.

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firms – expects new mandates and lucrative fields of activity through a higher attractiveness of German courts.[20] Legal policy-makers – at least those in some of the German Federal States – are thinking along the same lines. The Justice Minister of North Rhine-Westphalia, Peter Biesenbach, wants to position North Rhine-Westphalia as the most important court location for international commercial disputes after Brexit and replace London as the number one court location for civil commercial proceedings after the UK's exit from the EU.[21] To this end, a package of measures entitled "QualityLaw NRW" has established so-called competence centres for certain legal disputes, including the aforementioned corporate acquisitions, at the regional courts in Düsseldorf, Cologne, Essen and Bielefeld with effect from 1 January 2022. This could simply be a matter of fiscal interests. Large amounts in dispute bring high fees, which in turn cross-subsidise proceedings with smaller amounts in dispute. A judicial system is ultimately dependent on such transfers, as otherwise it cannot come close to covering its costs. This is accompanied by an economic policy interest. Entire economic sectors are formed around the judiciary; the legal profession in the first place, but also infrastructure, insurance companies, consulting firms, hotels and the like. Increasing the attractiveness of German courts for large-scale international proceedings would therefore also be a part of structural policy.[22]

The federal government has so far not seemed to share this assessment with the necessary enthusiasm.[23] This is certainly due in part to the fact that the judiciary is the responsibility of the Länder. The coalition agreement of 24 November 2021 at least addresses the issue, albeit only very cautiously. It states:[24] "We will enable English-speaking specialised chambers for international commercial and economic disputes." What is certain is that the relevant players see

[20] J Curschmann, 'Justizstandort Deutschland stärken!' [2018] IWRZ 241.

[21] 'Internationale Wirtschaftsstreitigkeiten: NRW will London als Top-Justizstandort ablösen' (*Legal Tribune Online*, 28 March 2018) <www.lto.de/persistent/a_id/27775/> accessed 5 October 2022.

[22] See for patent litigation S Bechtold, J Frankenreiter, and D Klerman, 'Forum Selling Abroad' (2019) 92(3) S Cal L Rev 487, 519 ff; cf also Klose (n 14) s 15 ff.

[23] Cf 'Wer springt ein, wenn London schwächelt?' (2019) 3 JUVE <www.juve.de/nachrichten/verfahren/2019/03/internationale-wirtschaftsprozesse-wer-springtein-wenn-london-schwaechelt> accessed 5 October 2022.

[24] *Koalitionsvertrag 2021–2025 zwischen der Sozialdemokratischen Partei Deutschlands (SPD), BÜNDNIS 90 / DIE GRÜNEN und den Freien Demokraten (FDP), Mehr Fortschritt wagen. Bündnis für Freiheit, Gerechtigkeit und Nachhaltigkeit*, s 106 <www.bundesregierung.de/breg-de/service/gesetzesvorhaben/koalitionsvertrag-2021-1990800> accessed 5 October 2022.

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themselves in a (global) competition and are acting accordingly. In the meantime, a legislative procedure has also been initiated.[25]

Other states also see themselves in a competition of judicial systems and act accordingly. This applies in particular to England, the Netherlands, France and Singapore. There, increased efforts can be seen to bring commercial disputes that are considered attractive to the local commercial courts. This is particularly true since Brexit, which has triggered a veritable fireworks display of activity in a number of member states, in addition to Germany, especially in France, the Netherlands and Belgium, and interestingly also in Switzerland, which as a contracting state to the Lugano Convention participates in the Europe-wide free movement of titles. The aim of these initiatives was to create prominent commercial courts in order to bring the litigation business, which might be lost in London, to the continent.[26] However, whether this alone will lead to a noticeable shift of major disputes to continental commercial courts remains rather questionable.[27] After all, the attractiveness of the London courts is based on the special expertise and authority of the judges working there. It will therefore not be enough to designate a few particularly modern courtrooms as "Commercial Court" and to fill the judges' benches with judges who are sufficiently proficient in English. In order to survive in competition, fundamental reforms are needed.

In all these efforts, international private arbitration serves as a model. It is considered a model of flexibility, expertise and confidentiality. There is a certain irony in the fact that the strengthening of arbitration through comparatively liberal regulation should also serve to relieve the judiciary.[28] For all the freedom and regulatory autonomy that prevails there, it should nevertheless be

[25] See below at § 3.

[26] Röckrath and Fischer (n 19); H Eidenmüller, 'Collateral Damage: Brexit's Negative Effects on Regulatory Competition and Legal Innovation in Private Law' [2018] ZEuP 868, 875 ff; M Requejo Isidro, 'International Commercial Courts in the Litigation Market' [2019] IJPL 4; XE Kramer and J Sorabji (eds), *International Business Courts: A European and Global Perspective* (Eleven International Publishing 2019).

[27] In a similar vein H Hoffmann, 'Von "Law - Made in Germany" zu "Commercial Litigation in Germany". Impulse für eine Verbesserung der Justiz im internationalen Handelsrecht' [2018] IWRZ 58, 59.

[28] See the explicit rationale in the Draft Bill for the Revision of the Arbitration Act of 12 July 1996, BT-Drucks. 13/5274, s 1: "*Ferner bietet [ein zeitgemäßes und den internationalen Rahmenbedingungen angepaßtes Recht] einen Anreiz, auch bei nationalen Streitigkeiten verstärkt von der Schiedsgerichtsbarkeit Gebrauch zu machen und damit die staatlichen Gerichte zu entlasten*."

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emphasised that the decisive parameters were set by the state: The landmark 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (UNC) has been ratified by 169 states,[29] making it more successful than almost any other comparable convention. It is based on an extremely liberal and arbitration-friendly approach. The UNCITRAL Model Law on International Commercial Arbitration of 21 June 1985 is written in the same spirit. It now serves 85 states, including Germany, in whole or in part as a model for their national arbitration laws.[30]

But even within the "arbitration community", despite all its self-confidence, there are increasing voices that fear a loss of its position as the primary contact point for high-value international commercial disputes. There is growing dissatisfaction on the demand side with arbitration proceedings, which are considered expensive and sometimes inefficient.[31] The increased efforts of the state judiciary to compete for lucrative large-scale proceedings[32] are definitely perceived with concern[33] and in turn trigger measures to increase the attractiveness of arbitration.

3. *Commercial Courts in Germany: Status Quo and Recent Developments*

3.1. *The Emergence of Commercial Courts*

A comparative overview shows that there is no uniform approach to the establishment of commercial courts. Some are organised locally, others regionally or even nationally.

[29] As of March 2022, cf <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2>.

[30] As of March 2022, cf <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status>.

[31] JQ Loh, 'The Rise of International Commercial Courts - A Threat to Arbitration?' in RA Schütze, TR Klötzel, and M Gebauer (eds), *Festschrift für Roderich C. Thümmel zum 65. Geburtstag am 23.10.2020* (De Gruyter 2020) s 501, 502: "rising dissatisfaction with International Arbitration".

[32] Cf H Eidenmüller, 'Competition between State Courts and Private Tribunals' in Schütze, Klötzel, and Gebauers (n 31) s 126.

[33] D Ruckteschler and T Stooß, 'International Commercial Courts: A Superior Alternative to Arbitration?' (2019) 36(4) J Int'l Arb 431. In a 2020 survey on the CISG, in 70% of the cases the parties agree to submit their disputes to state courts and only in 30% to arbitral courts, see C Lehnert and P Schäfer, 'Die Rechtswahl bei internationalen Kaufverträgen - ein empirischer Befund aus 2020' [2021] IHR 145.

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a) Centralised Commercial Courts

Similar to the London role model are France, for example, with the International Chamber of the Paris Court of Appeal, which has been in existence since the beginning of 2018, and the Netherlands with the Netherlands Commercial Court, a division of the Amsterdam Court of Justice, which has been in existence since 1 January 2019.[34] Similarly, the Belgian Brussels International Business Court was planned to be established by 1 January 2020; however, the corresponding legislative project was not pursued due to a lack of political support.[35] These commercial courts enjoy a kind of national monopoly and have no direct competition nationwide. At the same time, they are located in the respective capital of the country, where a corresponding legal infrastructure is available.

b) Local and regional specialised chambers

The approach in Germany is markedly different. Berlin has neither a special reputation as a judicial location, nor is the capital of any outstanding economic importance. It is therefore not surprising that pilot projects with English-language trials have not been running in Berlin, but in Bonn, Cologne and Aachen since 2010. Admittedly, there was not much demand here.[36] However, patent law shows that courts operating regionally or even locally can be quite successful. Here, the corresponding special chambers of the Regional Courts of Düsseldorf, Mannheim and also Munich have established a very good reputation. The patent chambers of the Düsseldorf Regional Court handle a good two-thirds of German patent cases and one-third of all patent cases in Europe.[37] This has been described in the

[34] Cf H Duintjer Tebbens, 'Une justice internationale néerlandaise à la sauce anglaise' in *Europa als Recht - und Lebensraum: Liber Amicorum für Christian Kohler zum 75. Gerburstrag* (Gieseking 2018) s 39; F Henke, 'Netherlands Commercial Court - englischsprachige Gerichtsverfahren in den Niederlanden' [2019] RIW 253.

[35] G Antonopoulou and X Kramer, 'The International Business Courts saga continued: NCC First Judgment - BIBC Proposal unplugged' (*Conflict of Laws*, 27 March 2019) <https://conflictoflaws.net/2019/the-international-business-courts-saga-continued-ncc-first-judgment-bibc-proposal-unplugged/> accessed 5 October 2022; W Blair, 'The New Litigation Landscape: International Commercial Courts and Procedural Innovations' [2019] IJPL 212, 220. The draft bill was withdrawn on instruction of the Belgian Prime Minister, cf <https://cew-law.be/problems-for-the-brussels-international-business-court/?lang=en> accessed 5 October 2022.

[36] M Lehmann, '"Law Made in Germany": The Export Engine Stutters' in Kramer and Sorabji (n 26) 83, 86 (two cases).

[37] Cf <www.juve.de/markt-und-management/patentprozesse-duesseldorf-hat-die-nase-vorn/> accessed 5 October 2022.

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literature as a model example of "forum selling abroad".[38] In this respect, it is not surprising that the development of commercial courts in Germany is also being pursued in a decentralised manner, i.e. at the state level.

On the legislative level, there has been no success to report so far: A legislative initiative to create chambers for international commercial matters, repeatedly introduced by some Länder via the Bundesrat,[39] has not made it into the Federal Law Gazette in over ten years. The 70th German Jurists' Conference (Deutscher Juristentag) in 2014 had also endorsed corresponding demands for greater specialisation.[40] By dealing more frequently with a particular matter, an increase in quality is to be achieved.[41] After all, with effect from 1 January 2018, the legislature introduced mandatory specialised chambers and senates at regional courts and higher regional courts for certain matters.[42] According to the new section 72a GVG, one or more civil chambers will be established at the regional courts – on a mandatory basis – for disputes arising from banking and financial transactions, from construction and architects' contracts as well as from engineering contracts, insofar as they are related to construction work, on claims arising from medical treatment and from insurance contract relationships. In addition, further special chambers may be established on an optional basis, as has been the case up to now. Parallel to this, obligatory special panels with corresponding subject-matter jurisdiction will also be established at the Higher Regional Courts pursuant to section 119a GVG.

[38] Bechtold, Frankenreiter, and Klerman (n 22) 497 ff. The authors see a plaintiff-friendliness of the courts as the main cause and attribute this primarily to three factors: the quality, predictability and speed of the decision, the reluctance to obtain expert opinions and the only rare stay of proceedings in favour of parallel patent invalidity proceedings.

[39] BT-Drucks. 17/2163 of 10 June 2010. The draft fell victim to discontinuity and was reintroduced practically unchanged as BT-Drucks. 18/1287 of 30 April 2014, then again BT-Drucks. 19/1717 of 18 April 2018.

[40] *70. Deutscher Juristentag 2014*, Bd. II/2, Sitzungsberichte und Beschlussfassung, Abteilung Prozessrecht, I 211, Beschluss I.1 on the basis of the recommendation by Calliess (n 7) s 96 ff.

[41] On the pros and cons of specialised courts cf H Fleischer, 'Spezialisierte Gerichte: Eine Einführung' (2017) 81 RabelsZ 497, 502 ff; specifically with respect to foreign law M Stürner, 'Wie kann der Zugang zu ausländischem Recht in Zivilverfahren verbessert werden?' (2018) 117 ZVglRWiss 1, 21 ff; Wolf (n 14) 270 ff.

[42] By the *Gesetz zur Reform des Bauvertragsrechts, zur Änderung der kaufrechtlichen Mängelhaftung, zur Stärkung des zivilprozessualen Rechtsschutzes und zum maschinellen Siegel im Grundbuch- und Schiffsregisterverfahren vom 28. April 2017*, BGBl. I, s 969.

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Subsequently, regional initiatives were formed,[43] prominently the Frankfurt Justice Initiative (Justizinitiative Frankfurt),[44] the Stuttgart and Mannheim Commercial Courts as well as corresponding chambers in Hamburg, Düsseldorf and also Berlin.[45] They are all based on very similar concepts that are supposed to be realisable on the basis of the currently applicable law. They operate in the regulatory leeway and grey areas that the ZPO and GVG leave them. Whether they can be a real competitor to the globally operating arbitration courts or the centrally placed commercial courts of other countries, or whether they are far too little noticed due to their regional embedding, remains to be seen.

The draft bill to strengthen the courts in commercial disputes, which the states of North Rhine-Westphalia and Hamburg had introduced to the Bundesrat in spring 2021,[46] also fell victim to parliamentary discontinuity. However, it has since been reintroduced into the legislative process virtually unchanged.[47] This proposal provides in section 119b GVG-E for an authorisation of the state governments to establish a senate or several senates at a higher regional court before which commercial matters with an international connection with an amount in dispute of more than two million euros can be heard at first instance; the draft explicitly defines these as "commercial courts". This proposal has some merits, such as the shortening of the appellate procedure.[48] However, it also remains a regionally oriented approach, which should be much less visible compared to the centralised models in London, Paris or Amsterdam.

3.2. *Structural issues*

This brings me to the central structural question: How must commercial courts be designed to be successful?[49]

a) Access

First, there is the question of access to this specialised court.

[43] Cf Domhan (n 14) s 47 ff.

[44] T Pfeiffer, 'Der Brexit und die Chancen der deutschen Justiz' (2017) 50 BB 1.

[45] Press Statement of 18 December 2020 <www.berlin.de/sen/justva/presse/pressemitteilungen/2020/pressemitteilung.1032738.php> accessed 5 October 2022.

[46] BR-Drucks. 219/21 of 17 March 2021.

[47] BT-Drucks. 20/1549 of 27 April 2022.

[48] In a similar vein Wagner (n 14) 228 ff; GP Calliess and H Hoffmann, 'Justizstandort Deutschland im globalen Wettbewerb' [2009] AnwBl 52 ff; Peter (n 18) 941 with fn 24.

[49] Cf also Grohmann (n 14) s 374 ff; Domhan (n 14) 83 ff.

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Here, following the example of arbitration, there should be as much party autonomy as possible. In the first instance, therefore, jurisdiction should be based on a prorogation. A restriction to cross-border commercial disputes or – as is the case in the "QualityLaw NRW" legislative initiative – even more specifically to M&A disputes is conceivable.[50] A lower limit on the amount in dispute can also be envisaged,[51] even if it is always somewhat arbitrary and, in view of the concern to generate more case material for the further development of the law, may well have a counterproductive effect. In any case, it is likely to have a chilling effect on potential parties if the justification of jurisdiction depends on the schedule of responsibilities (Geschäftsverteilungsplan) of the respective court:[52] Since the prorogation regularly stands or falls with the transfer of the dispute to the Commercial Court – and only to this court – It would be preferable if a direct prorogation of this court were possible. So far, the prevailing opinion does not want to allow this[53] and, in this respect, assumes that the organisational mechanisms of the courts take precedence over explicit statutory regulations.[54]

The draft Act on the Introduction of Chambers for International Commercial Matters of 20 February 2018[55] simply provided for a link to the already existing jurisdiction of the Chamber for Commercial Matters: The latter should then become the Chamber for International Commercial Matters if there is an international connection and the

[50] Cf § 2 Abs. 1 *der Verordnung über die gerichtliche Zuständigkeit für Streitigkeiten aus den Bereichen der Unternehmenstransaktionen (Mergers & Acquisitions), der Informationstechnologie und Medientechnik sowie der Erneuerbaren Energien vom 22.11.2021.*

[51] See previous reference.

[52] Note that the online publication of the schedule of responsibilities is not common practice throughout, cf JH Labusga and M Petit, 'Die Veröffentlichung gerichtlicher Geschäftsverteilungspläne im Internet' [2022] NJW 300.

[53] G Lüke, 'Unorthodoxe Gedanken zur Verkürzung der Prozeßdauer und Entlastung der Zivilgerichte' in H Prütting (ed), *Festschrift für Gottfried Baumgärtel zum 70. Geburtstag* (Heymanns 1990) s 349, 352; R Bork, '§ 23 ZPO' in F Stein and M Jonas, *Kommentar zur ZPO* (23rd edn, Mohr Siebeck 2014) para 2; H Schultzky, '§ 38 ZPO' in R Zöller, *ZPO* (34th edn, Otto Schmidt 2022) para 3; however, for a corresponding prorogation authority see G Wagner, *Prozeßverträge. Privatautonomie im Verfahrensrecht* (Mohr Siebeck 1998) s 570 ff; E Schilken, 'Zur Zulässigkeit von Zuständigkeitsvereinbarungen bei Beteiligung von Nichtkaufleuten (§§ 38 Abs. 3, 40 ZPO)' in C Heinrich (ed), *Festschrift für HansJoachim Musielak zum 70. Geburtstag* (CH Beck 2004) s 439, 450.

[54] H Roth, '§ 1 ZPO' in Stein and Jonas (n 53) para 60; C Lückemann, '§ 93 GVG' in Zöller (n 53) para 4 (arg. § 98 Abs. 4 GVG).

[55] BR-Drucks. 53/18 (resubmission of BR-Drucks. 93/14).

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proceedings are to be conducted in English according to the parties' consensual will (section 114b, sentence 1 GVG-E). Against this backdrop, the parties would be advised to agree, in addition to the prorogation in the context of a procedural agreement, on the binding submission of the case to the chamber for international commercial matters. These imponderables are avoided by the laudable Draft Bill to strengthen the courts in commercial disputes:[56] According to this Draft Bill, a corresponding agreement of the parties shall directly establish the jurisdiction of the Commercial Court (section 119b (2) sentence 1 GVG-E).

b) Language issue

At first glance, the language issue appears to be quite simple. International commercial disputes are conducted in English practically all over the world. It seems obvious that German commercial courts will also hear cases in English.[57] This is ultimately also the core of the pilot proceedings that have been ongoing since 2010 before the regional courts in Aachen, Bonn and Cologne. All of the initiatives that have been running in Germany since 2017, such as the Frankfurt Justice Initiative – and also the international competition in Brussels, Paris and Amsterdam – provide for English as the language of proceedings.[58] There is nothing intrinsically wrong with this, as English has been established as the "global language of law" for some time.[59] However, it should at least be considered whether the proceedings have to be conducted in English or whether it is possible to deviate from this if the parties so agree.

However, according to § 184 S. 1 GVG, court language is German without exception.[60] If proceedings are held with the participation of persons who do not speak German, interpreters are called in (section 185 (1) sentence 1 GVG). However, if the parties are all proficient in the foreign language, they may agree to dispense with interpreters pursuant to section 185 (2) GVG. In a rather generous interpretation of this provision, which thus changes from the exception to the rule,

[56] BT-Drucks. 20/1549 of 27 April 2022.

[57] Cf A Remmert, 'Englisch als Gerichtssprache: Nothing ventured, nothing gained' [2010] ZIP 1579.

[58] Note that before the Regional Court Berlin the proceedings may be conducted in French language, see <www.berlin.de/sen/justva/presse/pressemitteilungen/2020/pressemitteilung.1032738.php> accessed 5 October 2022.

[59] Cf *Entwurf eines Gesetzes zur Einführung von Kammern für internationale Handelssachen* (KfiHG), BR-Drs. 53/18, s 1.

[60] S Pabst,'§ 184 GVG' in *Münchener Kommentar zur ZPO* (6th edn, CH Beck 2022) para 1.

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this leads to English proceedings in practice.[61] For German law, however, an amendment of the GVG and ZPO would be sensible and necessary in order to enable the complete conduct of proceedings, including pleadings – and not only the conduct of the proceedings themselves – In English.[62]

The draft Act to Strengthen the Courts in Commercial Disputes[63] provides for exactly this. It allows proceedings to be conducted in English for both the first and second instance after the parties have agreed on this (section 184 (2) sentence 1 GVG-E). However, the court may order that an interpreter be consulted (section 184 (2) sentence 4 GVG-E). The Federal Supreme Court, as a court of appeal, is excluded from this automatism: Here, in international commercial matters, the proceedings may be conducted in English (section 184 (4) GVG-E). The explanatory memorandum to the law reveals that this is only a transitional provision until the requirements for purely English proceedings are also met at the Federal Supreme Court.[64]

c) Infrastructure

It seems self-evident that a commercial court is equipped with modern communication technology, so that hearings or witness examinations can also be conducted by video within the bounds of legal admissibility. Relevant glossy brochures boast with appropriately staged visual material.[65]

d) Composition of the bench

The attractiveness of arbitration proceedings is often attributed to the fact that the parties can largely compose the bench themselves. The expertise and authority of the decision-making body are decisive. The legal and extra-legal qualifications of the decision-makers, but also their personality, probably make a decisive contribution to the acceptance of the proceedings and the decision. The state judiciary, on the other hand, does not allow such a determination of the decision-makers. Here, the authority of the institution alone is decisive. The individual judges – with some exceptions – hardly appear as individuals.

[61] ibid para 16; P Meier, 'Fremdsprachige Verhandlung vor deutschen Gerichten?' [2018] WM 1827.

[62] Cf 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 Zum 70. Geburtstag* (Sellier 2012) s 49.

[63] BT-Drucks. 20/1549 of 27 April 2022.

[64] BT-Drucks. 20/1549, s 21.

[65] See eg the Website of the Commercial Courts in Stuttgart and Mannheim: <www.commercial-court.de/> accessed 5 October 2022.

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aa) Selection by the parties?

Against this backdrop, should the parties be given a stronger possibility to influence the composition of the court in the case of commercial courts? Constitutional law must first be consulted in this regard: According to Article 101 (1) sentence 2 of the Basic Law, no one may be deprived of his or her legal judge. This provision, which was deliberately formulated in the abstract, serves to prevent political encroachments on the judiciary[66] and thus strengthens the confidence of those seeking justice and also of the public in the impartiality and objectivity of the courts.[67] From this follows the necessity of adhering to an abstract legal order of jurisdiction.[68] The resulting court business allocation plans, which are drawn up annually within the framework of judicial self-administration and, in the case of larger courts, sometimes comprise several hundred pages, bear eloquent witness to this. Arguably no other European country sets such strict standards;[69] the guarantee of a fair trial from Article 6 (1) ECHR does not require such a precisely determined composition of the court.[70] However, at least in Germany, a partisan selection of judges would be so diametrically opposed to the guarantee of the statutory judge that a constitutional justification seems impossible.[71] At least a certain flexibilisation of the assignment of judges would be conceivable, for instance to the effect that in objectively justified exceptional cases a case assignment can also be made deviating from the business allocation plan.[72]

bb) Expertise of the statutory judge

It is possible, however, not to allow the selection of the judge by the parties, but to select those judges who work at the Commercial Court from the outset in such a way that the requirements of practice are met to the greatest possible extent. These include: an excellent

[66] H Schulze-Fielitz, 'Art. 101 GG' in H Dreier (ed), *GG Kommentar*, Band 3, (3rd edn, Mohr Siebeck 2018) para 14.

[67] BVerfGE 4, 412, 416; BVerfGE 95, 322, 327.

[68] BVerfGE 3, 359, 364.

[69] Cf E Kern, 'Der gesetzliche Richter - Verfassungsprinzip oder Ermessensfrage? Teil I' (2017) 130 ZZP 91, 102 ff; M Lotz, 'Flexibilisierung des Richtereinsatzes' in B Czerwenka, M Korte, and B Kübler (eds), *Festschrift zu Ehren von Marie Luise Graf-Schlicker* (RWS 2018) s 73, 81 ff.

[70] Cf G Morgenthaler, 'Art. 101 GG' in *BeckOK-GG* (49th edn, CH Beck, Stand: 15 November 2021) para 3.1.; Lotz (n 69) s 79 ff.

[71] E Kern, 'Der gesetzliche Richter - Verfassungsprinzip oder Ermessensfrage? Teil II' (2017) 130 ZZP 137, 169 ff.

[72] Cf Lotz (n 69) s 73; R Podszun and T Rohner, 'Die Zukunft der Kammern für Handelssachen' [2019] NJW 131, 133 ff.

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knowledge of the English legal language, experience in dealing with cross-border disputes, an understanding of economic interests and contexts, and, if necessary, also of technical issues – one only has to think of complex construction contracts or extensive M&A deals.

However, it is doubtful whether all this can be acquired in many years of purely judicial practice. Following the example of other Länder, greater permeability of the judiciary would therefore be recommended. The current system makes it difficult to enter the judiciary as a career changer – with the exception of the Federal Constitutional Court, where this is the rule – to such an extent that, to put it bluntly, it can be described as compartmentalisation. Those who have not yet made it to the bench at the age of 35 are very likely to end their career outside the judiciary. Why shouldn't ten years of experience in the legal profession be an advantage when applying for a position on the bench?[73] Should it really be the higher pension burden in relation to the expected working life of such lateral entrants that prevents such career changes?

If one does not want to change the current system of the judges' careers, the expertise of the relevant legal practice must be brought onto the bench in the form of associate judges. Here, it is necessary to vigorously and sustainably align the currently quite diverse appointment practice at the chambers for commercial matters on the basis of the above-mentioned criteria. For the professional judges, a higher prestige of appointment to the Chamber for Commercial Matters would have to be granted.[74] These are all rather long-term measures. But in the best case, they would be suitable to decisively improve the prestige of the Commercial Courts. In any case, when filling the existing chambers of the Commercial Courts in Frankfurt, Stuttgart or Düsseldorf, great attention was paid to a corresponding track record. The judges assigned to these chambers usually have a foreign degree, a very good command of English and, in some cases, legal experience in transactional business or a qualification as a tax consultant. Whether the practice accepts this as sufficient remains to be seen. Experience shows that it takes many years to build up a corresponding reputation.

e) Publicity of Hearings

The question of the publicity of the proceedings is of great

[73] In a similar vein Lehmann (n 36) 105.

[74] See M Lotz in *Verhandlungen des 70. Deutschen Juristentages*, Band II/1, 2015, s 111, 115 ff; H Fleischer and N Danninger, 'Die Kammer für Handelssachen: Entwicklungslinien und Zukunftsperspektiven' [2017] ZIP 205.

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importance. From the parties' point of view, one of the main advantages of private arbitration in comparison to state courts is the confidentiality of the arbitral proceedings. This is diametrically opposed to the GVG: According to this, the proceedings before the adjudicating court, including the pronouncement of judgments and orders, are public (section 169 (1) sentence 1 GVG). Exceptions are only permitted to a very limited extent, for example in family cases and in matters of voluntary jurisdiction (section 170 (1) GVG). Although the public can also be excluded to protect secrets (section 172 no. 2 GVG), which also includes business secrets, these must be so important that they carry more weight than the interests of the public.[75] Behind this is the interest in control, which is also constitutionally secured, and which is intended to counteract the smell of a secret justice system. Indirectly, this strengthens the independence of the judiciary and, more generally, the public's trust in the judiciary as a third power.[76]

It should also be borne in mind that the English conduct of proceedings as such is already capable of weakening the principle of publicity. Finally, the English language skills of large parts of the population do not appear to be sufficient to be able to follow a Commercial Court Hearing.[77] In view of the legal policy concern that such proceedings be conducted before German courts at all, this does not speak against English proceedings in principle, but must nevertheless be included in the weighing of interests.[78] Even if the public usually has no interest at all in following court proceedings – this is particularly true for civil proceedings – and the content of such proceedings is ultimately unlikely to be comprehensible without knowledge of the contents of the file,[79] it would nevertheless appear problematic to generally exclude the public for certain commercial disputes. At best, a compromise would seem possible to the effect that in proceedings before the commercial courts the public can be excluded if the interests of the parties predominate. In any case, it should not suffice that the parties would like to keep the legal dispute as such secret for economic reasons – this would amount to an automatism at the expense of the publicity of the proceedings,

[75] S Pabst,'§ 172 GVG' in *Münchener Kommentar zur ZPO* (n 60) para 7.

[76] *Pretto and Others v Italy* (1984) 6 EHRR 182, para 21.

[77] T Handschell, 'Die Vereinbarkeit von Englisch als Gerichtssprache mit dem Grundgesetz und europäischem Recht' [2010] DRiZ 395; Pabst (n 60) para 15.

[78] Cf Lehmann (n 36) 95 ff.

[79] See C Lückemann, '§ 185 GVG' in Zöller (n 53) para 4.

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which is problematic from the point of view of the rule of law. Here, too, it would have to be seen whether the parties would be willing to run the risk of a motion to exclude the public failing.

The draft law on strengthening the courts in commercial disputes now openly formulates a conflict of objectives between the principle of publicity and the interest of the judiciary to "win back" relevant proceedings.[80] According to the drafters of the Bill, the latter must prevail, because the principle of publicity de facto leads to the parties completely withdrawing from the state judiciary.[81] Against this backdrop, the court is to be able, upon application of a party, to classify information that is the subject matter of the dispute as confidential in whole or in part if it may be a trade secret within the meaning of the Act on the Protection of Trade Secrets of 18 April 2019[82] (section 510 (5) ZPO-E). The proceedings may also be conducted in a non-public manner in application of this law. In order to sufficiently support the desideratum of further development of the law, the draft also provides for anonymised publication of the decision in such proceedings (section 510 (6) ZPO-E). Such "confidential offers of proceedings in a narrowly defined area", as the draft puts it, would make jurisdiction possible in areas such as the law of company purchase agreements, which "remain almost completely closed to the state judiciary", "without broadly affecting or restricting the principle of publicity".[83] Even though in a liberal legal system there can be no question of parties "evading" state proceedings, the draft does provide the basis for a reasonable balancing of the protection of secrets and public interests.

3.3. *Procedural Issues*

a) Party Autonomy

The design of the procedure is of paramount importance for the attractiveness of a commercial court.[84] As is known from arbitration, this does not so much concern the place where the oral proceedings take place. This is not to obscure the fact that it can be convenient for the parties, especially in cross-border proceedings, to choose the

[80] Verbatim BT-Drucks. 20/1549, s 24.
[81] BT-Drucks. 20/1549, s 24.
[82] BGBl. I, s 466.
[83] BT-Drucks. 20/1549, s 25.
[84] T Pfeiffer, 'Justiz neu denken - Brauchen wir einen Commercial Court?' [2020] IWRZ 51, 53 ff.

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place of the hearing according to very practical criteria, for example in the vicinity of an international airport. However, it is much more important that the course of the proceedings accommodates the parties' interests in an efficient and speedy settlement.[85]

State courts have procedural rules, such as the ZPO, which are essentially not dispositive. The procedural autonomy of the parties is essentially limited to the choice of the place of jurisdiction. Of course, the parties remain authorised to dispose of the subject matter of the dispute; they can, for example, suspend the proceedings, reach a settlement or otherwise end the proceedings by mutual agreement. The procedural rules themselves, on the other hand, are not amendable in principle. Arbitration, on the other hand, is quite different. Here, there is practically no mandatory procedural law. Arbitral institutions such as the DIS, the LCIA or the ICC Court of Arbitration all have procedural rules which are deemed to be agreed with a corresponding arbitration clause. However, it is up to the parties to draft a tailor-made set of procedural rules that meets their needs. However, this is countered by rather high transaction costs, the investment in which is probably only worthwhile in the case of very high amounts in dispute. As a rule, one will be satisfied with the standard rules of procedure and intervene at most selectively, for example with regard to procedural time limits. Here, it is up to the arbitral tribunal to work out a timetable together with the parties and to set deadlines for each procedural step and possibly also sanctions in case of non-compliance.

At the outset, this is not the case in state proceedings, at least not in Germany. Here, the formal (and substantive) management of the proceedings lies with the court.[86] A case management conference along the lines of the English Civil Procedure Rules and other legal systems is not provided for in the ZPO. According to this, the judge simply sets an early first date or orders written preliminary proceedings (section 272 (2) ZPO). Then the proceedings take their course. The parties' ability to influence the proceedings is rather limited. They can make submissions on the merits and request that evidence be taken. If the court sets deadlines, it is normal for them to be extended at least once at the request of the parties. As a rule, consultation with clients domiciled abroad requires considerable time resources. The preclusion provisions, which were once introduced and tightened in the ZPO to

[85] Cf Grohmann (n 14) s 412 ff.

[86] § 139 ZPO; cf L Rosenberg, KH Schwab, and P Gottwald, *Zivilprozessrecht* (18th edn, CH Beck 2018) § 77 paras 17 ff, § 78 paras 24 ff.

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speed up proceedings (especially § 296 ZPO), are comparatively rarely applied. There is too much concern that this could lead to a reduction in the right to be heard, which could possibly result in a reversal of the judgement in the appellate court.[87]

In proceedings before the German Commercial Courts, case management is consistently based on the ZPO. Within the framework of formal (§ 136 ZPO) and substantive (§ 139 ZPO) case management, this of course allows for anticipatory case management orders and even more so for a planning of the individual steps of the proceedings determined in consensus with the parties within the framework of an "early organisational meeting to structure the further conduct of the proceedings", the so-called case management conference. However, a regular discovery of documents, as is sometimes customary in arbitration proceedings, would not be possible. With the new section 139 (1) sentence 3 of the Code of Civil Procedure (ZPO), which was introduced on 1 January 2020, the legislature has once again emphasised that the court can structure the proceedings and classify the subject matter of the dispute by means of case management measures. The provision serves to encourage judges to be more active in managing the proceedings.[88] Ultimately, this reflects a self-evident fact that was already possible under the law applicable until then.[89]

The draft law on strengthening the courts in commercial disputes is even clearer in this respect. For proceedings before the Commercial Courts, it provides that the court may reach agreements with the parties in an organisational meeting – the case management conference – on the organisation and conduct of the proceedings, which will bind the court unless there are factual or organisational reasons to the contrary (section 510 (3) ZPO-E). This serves not only to structure the proceedings, but also to identify the points at issue and those requiring evidence.[90]

b) Costs

The German Commercial Courts advertise "moderate court fees".[91] The ZPO and GKG do not yet provide for special regulations

[87] Cf R Greger, '§ 296 ZPO' in Zöller (n 53) para 2.

[88] BT-Drucks. 19/13828, s 32.

[89] Cf R Gaier, 'Erweiterte Prozessleitung im zivilgerichtlichen Verfahren' [2020] NJW 177; F Diekmann, 'Commercial Courts - Innovative Verfahrensführung trotz traditioneller Prozessordnung?' [2021] NJW 605, 607; A Stadler, '§ 139 ZPO' in HJ Musielak and W Voit (eds), *ZPO Kommentar* (18th edn, Franz Vahlen 2021) para 2.

[90] BT-Drucks. 20/1549, s 23.

[91] See for Stuttgart and Mannheim: <https://commercial-court.de/commercial-court> accessed 5 October 2022.

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for relevant proceedings. Currently, there is an upper limit for court fees at an amount in dispute of 30 million euros (section 39 (2) GKG): All amounts in dispute above this amount are charged the same fee. The RVG follows this in principle with regard to the billing of lawyers' fees.[92] According to its wording, this provision only concerns the aggregation of different matters in dispute. However, if one of several matters in dispute already reaches this maximum value, there is no further increase.[93] This cap does not violate the constitution.[94] However, in view of the fact that the amount in dispute may be several billion euros, it would hardly be comprehensible if the same fees were always charged under the GKG and the RVG regardless of this. It should also be pointed out that both the Netherlands Commercial Court in Amsterdam and the Brussels International Business Court have significantly higher court fees than comparable "normal proceedings".

Such approaches are not found in the draft of a law to strengthen the courts in commercial disputes.[95] It does, however, propose an increase in the maximum amount in dispute to 50 million euros, as it is "simply not justifiable to offer particularly efficient structures for a certain segment of disputes and then additionally privilege this by capping fees at a level that is too low".[96]

c) Preliminary Reference Procedure before the CJEU

Another "competitive disadvantage" vis-à-vis arbitration courts and now also vis-à-vis the London Commercial Court is the preliminary ruling procedure under Article 267 TFEU. For all courts of the EU, there is an obligation, at least in the last instance, for the court to submit legal questions requiring clarification to the ECJ. It is well known that this can lead to considerable delays. For arbitral tribunals, on the other hand, there is no obligation to make a referral; as private dispute resolution mechanisms, they do not fall under the term "court" in the sense of Article 267 TFEU. In this respect, the obligation of the commercial courts to make a reference would remain, economically speaking, a locational disadvantage that would be difficult to compensate for by other advantages.

[92] §§ 22 Abs. 2 s 1, 23 Abs. 1 RVG.
[93] BGH BeckRS 2010, 9771.
[94] BVerfG NJW 2007, 2098: No impairment of the lawyers' professional freedom or the principle of equality.
[95] BT-Drucks. 20/1549 of 27 April 2022.
[96] BT-Drucks. 20/1549, s 25.

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d) Verbatim Record

Finally, there is the (seemingly trifle) plea for a verbatim record.[97] This does not exist in current civil court practice in Germany. Instead, the presiding judge writes minutes of the hearing that condense the content of the oral proceedings including the taking of evidence (§ 159 ff. ZPO) – often in standard sentences that are not very meaningful, such as "The parties negotiate on the merits of the case". This alone serves to prove the formalities prescribed for the hearing (§ 165 ZPO), but above all it is the only means of refuting incorrect findings on the oral party submissions and generally on the party submissions in the facts of a judgment (§ 314 p. 2 ZPO), which is clearly demonstrated not least in the appeal instances, for which the record establishes the relevant factual submissions (§ 559 (1) p. 1 ZPO for the appeal). The necessity to dictate the minutes during the hearing or taking of evidence disturbs the flow of the proceedings and is prone to errors. It would seem possible to replace the minutes of the hearing with a video recording, as is already common practice in Spain.[98] Those who find this too far-reaching for various reasons may have sympathy for a verbatim record made with the help of computer-assisted speech recognition.[99]

The draft Act to Strengthen the Courts in Commercial Disputes provides for an obligation of the court to keep a verbatim record of the oral proceedings and any taking of evidence upon the parties' concurring request (section 510 (4) ZPO-E). As a rule, this is achieved by calling in an external minute-taker, who is to be treated like an expert witness.[100] In any case, it should be possible to prepare a verbatim record at the request of a party. This should also be possible after the oral proceedings. This could be realised in connection with appropriate technical equipment in such a way that an audio file is always made of every oral hearing, which, however, is only the basis for the preparation of a formal verbatim record upon application by a party and can then serve as the basis for an objection to the record. As before, the judicial record would remain decisive, which can be supplemented or corrected, if necessary, with the help of the verbatim record within the meaning of section 164 of the Code of Civil Procedure.[101] In the German Commercial Courts,

[97] Cf Peter (n 18) 942.

[98] Art. 147 *Ley* 1/2000, *de 7 de enero, de Enjuiciamiento Civil.*

[99] Cf the proposal made by J Stürner, 'Protokollierung von Aussagen im deutschen Zivilverfahren' [2016] JZ 137, 142.

[100] BT-Drucks. 20/1549, s 23.

[101] Cf M Stürner, 'Chancen und Risiken einer virtuellen Verhandlung. Von den besonderen Schwierigkeiten der Verfahren mit Auslandsbezug - Und: Kommt das

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the possibility of taking minutes by the party representatives seems to exist and to be practised.[102]

3.4. *The Applicable Law*

As a general rule, the Rome I and Rome II Regulations are applied in the relevant proceedings before Commercial Courts. Both Regulations are based on the principle of party autonomy: Consequently, the parties can determine the applicable law in the matter to a large extent by corresponding agreement (Art. 3 Rome I Regulation, Art. 14 Rome II Regulation).

However, in view of the exception for arbitration and choice of court agreements in Art. 1(2)(e) Rome I, there is some dispute about the applicability of this conflict of laws regime in arbitration proceedings: The application of the Rome Regulations is widely rejected.[103] However, a narrow reading of the aforementioned exception in the Rome I Regulation, referring only to the arbitration agreement statute, seems preferable, so that special conflict-of-law rules of autonomous national conflict-of-law law, such as § 1051 ZPO, would be superseded in this respect.[104] Even if the differences are hardly noticeable in the practical result, the somewhat stricter IPR regime that applies before state courts could be perceived as a disadvantage of the commercial courts. At any rate, this cannot be changed for Germany alone.

Moreover, according to popular opinion, non-state law such as the UNIDROIT Principles of International Commercial Contracts (2016) or international commercial customs, the so-called lex mercatoria, can also apply before arbitral tribunals. The situation is different in state courts: Generally, the Rome I Regulation is interpreted as not allowing the choice of non-state law.[105] However, this is hardly ever significant from a practical point of view: it may

Wortprotokoll?' [2021] AnwBl online 167, 169; M Stürner, 'Der digitale Zivilprozess' (2022) 135(3) ZZP 369.

[102] See Diekmann (n 89) 606 ff.

[103] Cf J von Hein, 'Bindung an Recht und Gesetz in der Schiedsgerichtsbarkeit' in Wilhelmi and Stürner (n 11) s 121; R Wolff, 'Das vom Schiedsgericht anzuwendende Recht: Eine responsio' in SL Gössl and others (eds), *Politik und Internationales Privatrecht* (Mohr Siebeck 2017) s 53.

[104] P Mankowski, *Interessenpolitik und europäisches Kollisionsrecht* (Nomos 2011) s 60 ff; M Ulfat, 'Zwischen entfesselten Schiedsgerichten und europäischer Harmonisierung - Die Rom I-Verordnung und die Schiedsgerichtsbarkeit' in Gössl and others (n 103) s 37.

[105] Cf von Hein (n 103) s 138 ff.

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be that individual arbitral tribunals have applied the UNIDROIT Principles, for example, but this remains rather rare, as it is regularly opposed by the interests of the parties.[106] And of course, a substantive choice of law based on these principles can also be made before state courts; in the area of commercial and business law, mandatory law should rarely stand in the way of this anyway.

More sensitive than this perhaps rather academic point is the question of the validity of overriding intervention norms, such as embargo regulations. For arbitration proceedings, the strict application of such intervention norms is widely rejected.[107] In general, the arbitral tribunal only has the discretion to apply mandatory rules, in individual cases an obligation; the latter, for example, if the non-observance of mandatory rules of the embargoed state with regard to the arbitral award would result in an obstacle to recognition in that state (Art. V para. 2 lit. b UNC - ordre public). This is because there is a contractual obligation on the arbitral tribunal to make an award, the enforcement of which is not prevented by any obstacles. Thus, even the consideration of mandatory rules does not result in a decisive competitive disadvantage for the commercial courts. However, just as with the parallel problem of IPR, the parties may have the impression that the scope of freedom is smaller than it would be before arbitral tribunals.

One last aspect seems to be the most important: The freedom of choice of law entails competition between legal systems on the demand side. Even the prorogation of German courts does not change this: there is no compulsory concurrence of international jurisdiction and applicable law. However, it is usually a sensible legal procedure to combine an agreement on jurisdiction with an agreement on the relevant lex fori prorogati. In this respect, the applicability of German law can also be a factor that speaks against the agreement of the international jurisdiction of German courts. In particular, business representatives repeatedly complain about the rather high level of control in the area of general terms and conditions in an international comparison, even outside consumer law, for example with regard to the inadmissibility of liability limitation clauses. This

[106] S Wilske, 'Post-M&A-Schiedsverfahren und Fragen zur Bindung an Recht und Gesetz und Rechtsfindung jenseits gesetzlichen Rechts in der Schiedsgerichtsbarkeit' in Wilhelmi and Stürner (n 11) s 145, 151 ff. Figures can be found at <www.unilex.info/principles/cases/date/all> accessed 5 October 2022 (it should be noted, however, that only published arbitral awards could be taken into account here).

[107] Cf von Hein (n 103) s 129 ff.

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goes so far that German courts are advised to be deselected;[108] the relevant literature discusses above all the "circumvention" of the strict clause control by concluding an arbitration agreement[109] or advises an immediate "escape" to Swiss law.[110] The efforts to reform the German law on general terms and conditions, which have been ongoing for several years, cannot be discussed here.[111] In any case, recent studies have come to the conclusion that the dimension of the differences between German law, which is perceived as particularly strict, and Swiss law, which is widely considered to be quite liberal, is generally somewhat overestimated.[112]

3.5. *Judgment and Appeals*

If no settlement is reached or the proceedings are terminated in some other way, a judgment will be rendered. This judgment will be consistently drafted in English before the Commercial Courts, as also provided for in the draft Act to Strengthen the Courts in Commercial Disputes[113] (section 184 (2) sentence 2 GVG-E). A German translation is necessary at most for the purposes of compulsory enforcement in Germany. However, another factor is more important for the attractiveness of the commercial courts. Arbitration proceedings regularly do not require an appellate court. With the exception of two-tier models such as the ICC Court of Arbitration, in which the arbitral tribunal's award is reviewed and, if necessary, modified by the Court of Arbitration (e.g. Art. 34 ICC

[108] Cf G Maier-Reimer, 'AGB-Recht im unternehmerischen Rechtsverkehr - Der BGH überdreht die Schraube' [2017] NJW 1.

[109] Cf J Kondring, 'Flucht vor dem deutschen AGB-Recht bei Inlandsverträgen' [2010] RIW 184; T Pfeiffer, 'Die Abwahl des deutschen AGB-Rechts in Inlandsfällen bei Vereinbarung eines Schiedsverfahrens' [2012] NJW 1169; K Pörnbacher and B Zahn, 'Die Wahl deutschen Rechts unter Ausschluss der AGB-Kontrolle: Lösungsansätze für die Praxis aus der schiedsrechtlichen Perspektive' in Schütze, Klötzel, and Gebauer (n 31) s 617.

[110] Cf T Pfeiffer, 'Flucht ins schweizerische Recht?' in CF Genzow, B Grunewald, and H Schulte-Nölke (eds), *Zwischen Vertragsfreiheit und Verbraucherschutz. Festschrift für Friedrich Graf von Westphalen zum 70. Geburtstag* (Otto Schmidt 2010) s 555; Wagner (n 14) 178; G Rühl, 'Mehr Freiheit wagen im Vertragsrecht. Zur AGB-Kontrolle im unternehmerischen Geschäftsverkehr' in A Dutta and C Heinze (eds), *Mehr Freiheit wagen* (Mohr Siebeck 2018) s 33.

[111] Cf A Sommerfeld, *AGB-Reform und Rechtsflucht. Bedeutung der Rechtsflucht für die AGB-Reformdebatte im unternehmerischen Rechtsverkehr* (Mohr Siebeck 2021) s 44 ff.

[112] ibid s 243 ff, 299 ff, 336.

[113] BT-Drucks. 20/1549 of 27 April 2022.

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Rules), the proceedings are to be concluded in a final and binding manner in one tier. A normally three-stage procedure, as provided for by German law, would in no way be in the parties' interest in a speedy resolution of the dispute. In contrast, the Dutch model with the Netherlands Commercial Court of Appeal has only one appellate instance; the Belgian proposal with the Brussels International Business Court even provided for only one instance without any possibility of appealing against the judgement. Of course, the parties in Germany can also agree on a waiver of appeal. However, it would send out a considerable signal if the procedure were to be structured in two stages from the outset. This is precisely the approach taken by the draft law to strengthen the courts in commercial disputes by establishing the commercial courts at the higher regional courts from the outset. Constitutionally, this would not be problematic, as a three-tier court system is not guaranteed.[114]

3.6. *Execution*

Finally, the enforcement of an enforceable claim must be addressed. The cross-border enforcement of commercial court decisions is primarily governed by the Brussels Ia Regulation. This means that the decision would be recognised and enforced throughout the internal market. In this respect, there are only minor differences to arbitration. There, recognition and enforcement is governed by the 1958 UN New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which is very recognition-friendly. However, an exequatur procedure is mandatory. The losing parties in international arbitration proceedings sometimes use this stage of the procedure to raise substantive objections to the arbitral award. This misunderstands the function of this enforceability procedure, in which – apart from the rare cases of violations of the public order of recognition (Art. V para. 2 lit. b of the New York Convention) – there may no longer be any review of the substance of the award: the prohibition of révision au fond applies.[115] However, it is possible to delay enforcement and thus gain time.

Within the European judicial area, there is an advantage for state jurisdiction in that its decisions do not have to go through an

[114] Even a procedure without any appeal would not necessarily be unconstitutional, cf M Stürner, *Die Anfechtung von Zivilurteilen* (CH Beck 2002) 78 ff.

[115] Cf J Adolphsen, 'Art. 5 UNÜ' in *Münchener Kommentar zur ZPO* (n 60) para 68.

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exequatur procedure in the Brussels system. It is true that the debtor has a legal remedy in the state of enforcement with which he can complain about serious procedural errors in the original proceedings (Art. 46 et seq. Brussels Ia Regulation). However, these proceedings are comparatively rare. However, if enforcement in third countries is involved, the often tedious route via the declaration of enforceability procedure required under this law must be taken. In contrast, the New York UN Convention is regularly much more recognition-friendly.

4. *Outlook*

It seems difficult to predict whether the German commercial courts will prevail. Should a legislative initiative such as the draft law to strengthen the courts in commercial disputes become law, the framework conditions of proceedings before German commercial courts should come a good deal closer to those of institutional arbitration courts. Many of the essential desiderata of practice would thus be served. However, even then it will depend on coincidences and in any case it will take some time until these courts have acquired the necessary reputation to penetrate the various lawyers' handbooks and contractual clauses. In any case, it seems questionable by what one will measure the success or failure of the Commercial Courts. Is it a question of the number of cases filed or settled, of aggregated amounts in dispute? Is it particularly prominent cases that were brought before a commercial court, although other forums and dispute resolution institutions could have been considered?

Anyhow, it remains to be seen whether the special position of the commercial courts in the judicial architecture will not lead to distortions overall, which could be caused, for example, by more generous judicial deputations or lower limits on the amount in dispute. The draft law on strengthening the courts in commercial disputes also sees the danger of a "two-tier judiciary", but turns the picture around: the handling of large-volume disputes before the commercial courts ultimately leads to a relief of the regular civil chambers, which also serves the smoother handling of "normal" [sic] cases there.[116] Ultimately, it is only consistent if special framework conditions are also created for particularly complex proceedings. At the lower end of the scale, this has been the case for a long time: here, there are the order for payment proceedings, the summary proceedings or the equitable discretionary proceedings under section

[116] BT-Drucks. 20/1549, s 17 citing Wagner (n 14) 236 ff.

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495a of the Code of Civil Procedure.

However, one may doubt whether the overriding goal of securing the judiciary's function of furthering the development of the law can really be achieved in this way: in the meantime, practice increasingly relies on dispute avoidance; for example, escalation clauses can be found in company purchase agreements which, in the case of emerging differences of opinion, initially stipulate an obligation to negotiate which is underpinned by a limited peace obligation. If these fail, a third party is called in as an arbitrator (§ 317 BGB). Only in the last resort do these clauses provide for recourse to a court or arbitral tribunal.[117] Incidentally, studies have shown that not even half of all company purchase agreements in Germany contain arbitration clauses; in England and the USA the figures are significantly lower.[118] In all this, relevant legal disputes are often subject to foreign law anyway, and here the Federal Supreme Court does not see itself – wrongly, in my opinion – as being called upon to further develop the law: Foreign law is not supposed to be revisable from the outset.[119] And finally, even post-M&A disputes fought out in court do not always end in a final judgment.

However, in the absence of legislative support, the prognosis will be less optimistic. In the long run, it will hardly be possible to build up serious competition to arbitration or to steal cases away from more progressive judicial locations in other countries. From the point of view of the rule of law, this is acceptable as long as it does not lead to an outright drying up of state dispute resolution: Arbitration, for all its freedom, is not completely detached from the judicial architecture: arbitral awards require state recognition before they can be enforced (§§ 1060, 1061 ZPO). Arbitral institutions have also been striving for some time to publish their awards more extensively.[120] Although this does not replace the judicial development of the law, it does at least provide some orientation for practice. And last but not least, international arbitration based on the New York Convention is a good example of functioning multilateralism.

[117] RC Thümmel, 'Eskalationsmechanismen bei der Bestimmung des endgültigen Kaufpreises in Unternehmenskaufverträgen' in Wilhelmi and Stürner (n 11) s 201, 210 ff.

[118] Meyding and Sorg (n 11) s 14 ff; cf also J Drude, 'Post-M&A Arbitration and Joinder: Process and Drafting Considerations for M&A Transactions' [2017] SchiedsVZ 224, 225 (arguing for higher figures).

[119] BGHZ 198, 14; BGH NJW-RR 2017, 902.

[120] Cf P Wimalasena, *Die Veröffentlichung von Schiedssprüchen als Beitrag zur Normbildung* (Mohr Siebeck 2016) s 48; J Menz, 'M&A-Schiedsverfahren aus institutioneller Sicht - Herausbildung einer ständigen schiedsgerichtlichen Rechtsprechung im Bereich Unternehmenskauf?' in Wilhelmi and Stürner (n 11) s 49, 52.

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Alexandre Biard*

International Commercial Courts in France: Innovation Without Revolution?

Table of Contents: 1. Rationale: Brexit and beyond. - 1.1. Contextual reason: Brexit as catalyst. - 1.2. Structural reasons: boosting the French judicial system. – 2. Procedural changes: innovating without revolutionizing. - 2.1. Legal transplants and rediscovery of the wheel. - 2.2. Key adjustments: language and procedural rules. – 3. Looking to the Future while keeping our ears to the ground. - 3.1. Will all of this work? - 3.2. French international business courts: *judicial labs* for high-quality judiciary or symptoms of a multi-tiered judicial system? - 3.3. Beyond competition: imagining a collaborative EU framework for resolving international commercial litigation.

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 the latter are confronted with international commercial litigation. In February 2018, the Paris Court of Appeal inaugurated a new specialized 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 down the ICCP-CA's new rules of procedure.[1] The

* Affiliated Senior Researcher at Erasmus University Rotterdam (biard@law.eur.nl). The research leading to these results has received funding from the European Research Council—ERC Consolidator grant agreement no. 726032 ('Building EU Civil Justice: Challenges of Procedural Innovations Bridging Access to Justice' <www.euciviljustice.eu> accessed 31 January 2019). I thank Ms. Schaller for the additional information on the functioning of the ICCP-CA, and the two anonymous reviewers for their useful comments on previous drafts (last updates: January 2019).

[1] This paper was first published in*: Erasmus Law Review, 1/2019, DOI:* 10.5553/ELR.000111.

Protocole relatif à la procédure devant la Chambre Internationale de la Cour d'appel de Paris <www.avocatparis.org/system/files/editos/protocoles_signes_creation_juridiction_commerciale_internationale_1.pdf> accessed 31 January 2019 (hereafter 'ICCP-CA Protocol'). English translation available at <www.cours-appel.

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effective launch of the ICCP-CA was relatively smooth and quick. It notably avoided the meanders and delays arising out from 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 already-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 both in French and English presenting the functioning of the two international commercial courts.[4] By December 2018, 17 cases had been filed before the ICCP-CA, and hearings had taken place in two of them.[5]

It is today commonly acknowledged that courts do not only

justice.fr/sites/default/files/2018-06/CICAP_English_Protocole%20barreau%20de%20Paris%20-%20Cour%20d'appel%20de%20Paris_mai2018.pdf> accessed 31 January 2019.

[2] See eg 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) <www.hrj.be/sites/default/files/press_publications/avis-bibc-fr.pdf> accessed 31 January 2019; 'Le Brussels International Business Court, le tribunal cinq étoiles qui fait grincer des dents les magistrats' (*Le Vif*, 22 August 2018) <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> accessed 31 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 Winter 2018. See G Antonopoulou, E Themeli, and X Kramer, 'This one is next: the Netherlands Commercial Court!' (*Conflict of Laws*, 8 March 2018) <http://conflictoflaws.net/2018/this-one-is-next-the-netherlands-commercial-court/> accessed 31 January 2019; F Henke, 'Netherlands Commercial Court: English Proceedings in the Netherlands' (*Conflict of Laws*, 25 October 2018) <http://conflictoflaws.net/2018/netherlands-commercial-court-english-proceedings-in-the-netherlands/> accessed 31 January 2019.

[3] *Protocole relatif à la procédure devant la Chambre Internationale du Tribunal de Commerce de Paris* <www.cours-appel.justice.fr/sites/default/files/2018-06/CICAP_Protocole%20barreau%20de%20Paris%20-%20Tribunal%20de%20commerce%20de%20Paris.pdf> accessed 31 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> accessed 31 January 2019.

[4] Ministère de la Justice, 'International Commercial Courts of Paris (ICCP)' (2018) <www.cours-appel.justice.fr/sites/default/files/2018-08/Leaflet_CCIP_180629_V11.pdf> accessed 31 January 2019.

[5] As kindly indicated by a ICCP-CA Judge.

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deliver justice but also act as service providers, competing against each other to be selected by parties as dispute resolution forum in 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 due to the decision of the United Kingdom to leave the European Union (*Brexit*). This event has served as a catalyst, and many European countries have regarded Brexit as a not-to-be-missed opportunity for promoting their national systems. Brexit has thus stirred legal innovations among Member States wishing to propose alternative venues to London, the latter being for long worldwide considered as one of the leading international commercial litigation hubs. 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]

[6] E Themeli, *Civil justice system competition in the European Union - the great race of courts* (Eleven Publishing 2018) 368; H Kötz, 'The jurisdiction of choice: England and Wales or Germany?' (2010) 18 ERPL 1243.

[7] The Law Society of England and Wales and its partners published in 2007 'England and Wales: the Jurisdiction of Choice' (<www.eversheds-sutherland.com/documents/LawSocietyEnglandAndWalesJurisdictionOfChoice.pdf> accessed 31 January 2019) followed in 2016 by 'England and Wales: Global Legal Centre' (<www.lawsociety.org.uk/policy-campaigns/campaigns/global-legal-centre> accessed 31 January 2019), and in 2017 'English Law, UK Courts and UK Legal Services after Brexit - the view beyond 2019' (<www.chba.org.uk/news/brexit-memo > accessed 31 January 2019), the German legal profession published in 2009 'Law made in Germany' (<www.lawmadeingermany.de/Law-Made_in_Germany_EN.pdf> accessed 31 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' (<www.kontinentalesrecht.de/tl_files/kontinental-base/Broschuere_FR.PDF> accessed 31 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) <https://publications.banque-france.fr/sites/default/files/rapport_07_a.pdf> accessed 31 January 2019 (hereafter 'HCJP Recommendations').

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Brexit is however only the top of the iceberg. This paper shows that drivers explaining the development of international commercial courts[10] in France are manifold, and by no means recent. 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 (1). The setting-up of the French international commercial 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 (2). If it remains too early to draw clear conclusions on the impact of these new courts, it is nonetheless 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 future role and possible added value of the European Union (EU) in the context of a multiplication of European business courts should be explored further (3). As a final introductory note, readers should be aware that this paper does not intend to describe all the procedural technicalities of the French international commercial courts. Rather, it focuses on the broader picture, and 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 today clear views on the future of the relationship between the EU and the UK.[11] Even though the post-Brexit scenario remains unknown at the time of writing, it can already 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

[10] In this paper, the term 'international commercial courts' refers to the new international commercial chambers established in pre-existing courts.

[11] 'Counting the Cost of Brexit Uncertainty' (*Financial Times*, 7 September 2018).

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States can be expected in the coming years.[12] As part of a broader research agenda investigating the consequences of Brexit,[13] HCJP launched in December 2016 a working group on the impact of Brexit on judicial cooperation in civil and commercial matters. The final report was published in January 2017.[14] As the report highlighted, the attractiveness of London as dispute resolution forum for commercial litigation can be explained by various factors pertaining to the peculiarities of the English judicial system, 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, French courts 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 explaining why London has become 'a popular and natural jurisdiction for the litigation of high-value cross-border disputes.'[16] 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

[12] H Eidenmüller, 'Collateral damage: Brexit's negative effects on regulatory competition and legal innovation in private law' (2018) 4 ZEuP 868-891; O Patel and A Renwick, 'Brexit: the consequences for other EU Member States' (2016) UCL Constitution Unit Briefing Paper <www.ucl.ac.uk/constitution-unit/research/europe/briefing-papers/Briefing-paper-4> accessed 31 January 2019.

[13] HCJP's opinions and reports on Brexit are available at <hcjp.fr/opinions-and-reports-copier/> accessed 31 January 2019.

[14] HCJP, 'Report on the implications of Brexit on judicial cooperation in civil and commercial matters' (30 January 2017) <https://publications.banque-france.fr/sites/default/files/rapport_05_a.pdf> accessed 31 January 2019.

[15] G Hannotin, 'Réforme de la procédure civile : le modèle anglais comme source d'inspiration ?' [2018] Recueil Dalloz 1213.

[16] E Lein and others, 'Factors influencing international Litigants' decisions to bring commercial claims to the London-based courts' (2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/396343/factors-influencing-international-litigants-with-commercial-claims.pdf> accessed 31 January 2019.

[17] ibid.

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drivers encompassed 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 judgments across the EU, and of EU Member States court decisions in the UK. Businesses are ensured 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 businesses' attitudes,[20] albeit it is still unclear in which ways and to what extent this will happen. Some have taken the view that Brexit will not negatively impact the UK position as main venue for the resolution of international commercial disputes.[21] On the contrary, others 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 highlighted that 'the portability of English judgments and having them automatically recognised within the European Union is a considerable advantage. There is a risk—it

[18] House of Commons, 'Implications of Brexit for the justice system' (22 March 2017) <https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/750/750.pdf> accessed 31 January 2019 (hereafter 'House of Commons Report'); M Requejo, 'Immediate Consequences on the London Judicial Market' (*Conflict of Laws*, 24 June 2016) <http://conflictoflaws.net/2016/brexit-immediate-consequences-on-the-london-judicial-market/> accessed 31 January 2019.

[19] HCJP, 'Report on the implications of Brexit on judicial cooperation in civil and commercial matters' (30 January 2017) (hereafter 'HCJP Brexit Report').

[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?' (2016) 27 EBLR 903; A Dickinson, 'Back to the Future: The UK's EU exit and the conflict of laws' (2016) 12 J Priv Int'l L 195.

[21] Cornerstone Research, *Fighting strong - the annual commercial dispute resolution Survey* (2nd edn, 2016) <www.cornerstone.com/Publications/Articles/Commercial-Dispute-Resolution-Survey-2016> accessed 31 January 2019.

[22] 'HCJP Brexit Report' (n 19) also referring to: Bar Council Brexit Working Group, *The Brexit Papers* (2016) 11 <www.barcouncil.org.uk/media/508513/the_brexit_papers.pdf> accessed 31 January 2019; Eidenmüller, 'Collateral damage: Brexit's negative effects on regulatory competition and legal innovation in private law' (n 12).

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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 this second point of view, a research conducted in Summer 2018 brought evidence of recent shifts in businesses' behaviour, and notably highlighted that around 35% of businesses are now preferring EU courts over the UK due to the uncertainty associated with Brexit.[24]

Anticipating a possible weakening of London as go-to litigation centre for international commercial disputes, HCJP investigated possible tools for increasing the attractiveness of Paris. 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 relationship'.[25] In May 2017, HCJP published 41 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]

[23] 'House of Commons Report' (n 18) 15.

[24] Thomson Reuters, 'The Impact of Brexit on Dispute Resolution Clauses' (July 2018) <www.thomsonreuters.com/en/press-releases/2018/july/35-percent-of-businesses-choosing-eu-courts-over-uk-due-to-brexit-uncertainty.html> accessed 31 January 2019; 'Businesses shun UK courts in drove as Brexit looms' (*Law Society Gazette*, 23 July 2018) <www.lawgazette.co.uk/businesses-shun-uk-courts-in-droves-as-brexit-looms/5066997.article> accessed 31 January 2019.

[25] HCJP, 'Préconisations sur la mise en place à Paris de chambres spécialisées pour le traitement du contentieux international des affaires' (3 May 2017) <https://publications.banque-france.fr/sites/default/files/rapport_07_f.pdf> accessed 31 January 2019 (see *Annexe 1: Lettre de saisine adressée par le Garde des Sceaux-Ministre de la Justice au Haut Comité Juridique de la Place Financière de Paris le 7 Mars 2017*).

[26] O Dufour, 'Justice financière : Paris se rêve place de droit sur fond de Brexit' (2018) 109 Petites Affiches 4; O Akyurek, 'La création de chambres commerciales internationales, outil de renforcement de la place de Paris' (2018) 138 Petites Affiches 18; 'Paris juridiction internationale' (2018) 9 Petites Affiches 3.

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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 regards the necessity to adapt the French legal and judicial system to facilitate the treatment of ever-increasing complex international commercial cases. In 2012, a practitioner for example 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, several reasons may explain France's limited attractiveness. For example, the role of experts is idiosyncratic in France, when compared to 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

[27] T Baudesson, 'Le contentieux international devant les juridictions françaises' [2012] Recueil Dalloz 2232 (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) 21-22 <www.debevoise.com/~/media/email/documents/2017/10_things_us_litigators_should_know_about_court_litigation_in_france.pdf> accessed 31 January 2019.

[29] ibid 26.

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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 an already-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 former President of the Court acknowledged, the official launch of the CIE and its accompanying mediatisation 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

[30] ibid 19.

[31] 'HCJP Brexit Report' (n 19) 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), <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> accessed 31 January 2019. See also E Vasseur and J Bouyssou, 'La France et les diverses initiatives de jurisdictions internationales' (2018) 114 *L'Observateur de Bruxelles* 10-12.

[33] Fondation pour le droit continental, 'Lettre d'information' (December 2010) <www.fondation-droitcontinental.org/fr/wp-content/uploads/2013/12/decembre-2010.pdf> accessed 31 January 2019.

[34] 'HCJP Brexit Report' (n 19) 28.

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of the CIE. The protocol contains clearer rules on (among other things) the use of English at various 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 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 place for arbitration.[36] Recent measures promoting specialised business courts can thus be regarded as similar initiatives, albeit this time happening in the judicial arena. All of them aim at further enhancing the attractiveness of Paris for resolving international commercial disputes.

2. *Procedural changes: innovating without revolutionizing*

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

[35] 'Inauguration de la chambre commerciale internationale à la Cour d'appel de Paris' (*Journal Spécial des Sociétés*, 27 February 2018) <www.jss.fr/Inauguration_de_la_chambre_commerciale_internationale_a_la_cour_d%E2%80%99appel_de_Paris-1187.awp?AWPID98B8ED7F=C6235494BA513C285A321DF587C7D2D445C5731D> accessed 31 January 2019.

[36] M Prada, 'Rapport sur certains facteurs de renforcement de la compétitivité juridique de la place de Paris' (March 2011) <www.textes.justice.gouv.fr/art_pix/1_Rapport_prada_20110413.pdf> accessed 31 January 2019.

[37] A Watson, *Legal Transplants: An Approach to Comparative Law* (University Press of Virginia 1974) 106.

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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] in other words, a chance to revisit existing procedural rules so as to maximise their potential and effectiveness. Ultimately, this is the approach HCJP has prioritized. 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

[38] 'HCJP Brexit Report' (n 19) 29-30.

[39] More generally, about the convergence between Civil Law and Common Law systems, see for example: 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* (Springer International Publishing 2017) 57-83; J Armour and others, 'How legal norms evolve: evidence from a cross-country comparison of shareholder, creditor and worker protection' (2009) 57 AJIL 579-629.

[40] 'HCJP Recommendations' (n 9) 12.

[41] U Mattei, 'Efficiency in Legal Transplants: an Essay in Comparative Law and Economics' (1994) 14 Int'l Rev L & Economics 3-19 (quoting A Schlesinger).

[42] 'HCJP Recommendations' (n 9) 12.

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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 the form of 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 convergence 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

[43] ibid 19

[44] ibid 19-20.

[45] Mattei, 'Efficiency in Legal Transplants' (n 41).

[46] ibid.

[47] R Goodman and D Jinks, 'International Law and State Socialization: Conceptual, Empirical, and Normative Challenges' (2005) 54 Duke L J 983.

[48] Chambre des représentants de Belgique, *Projet de loi instaurant la Brussels International Business Court*, *15 Mai 2018*, <www.lachambre.be/FLWB/PDF/54/3072/54K3072001.pdf> accessed 31 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' (2018) AJ Contrat 148.

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concerning the collection of evidence and organisation of hearings, the latter being clearly inspired by the Common Law tradition.

- 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 key for ensuring multinational corporations' access to the French judicial system. However, the use of English before the French international business courts also required to deal with 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 for 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 needs 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; 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 expenses, arrange for a simultaneous interpretation of oral proceedings held in French; final judgement is delivered in French but is accompanied by a sworn-

[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] Art. 23 of French Code of Civil Procedure.

[52] C Kern, 'English as a Court Language in Continental Courts' (2012) 5 Erasmus L Rev 187-209.

[53] 'ICCP-CA Protocol' (n 1) Articles 2, 3 and 7; 'CIE Protocol' (n 3) Articles 2, 6 and 7.

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English translation to facilitate its immediate enforcement in other jurisdictions.

- 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 regard 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, format of hearings is likely to change significantly. They will be longer, and may expand on 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/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 – 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. One can list some of them below: CIE and ICCP-CA judges will first need to be able to deal with complex business cases swiftly and in English; they will have

[54] 'HCJP Recommendations' (n 9) 25.
[55] 'ICCP-CA Protocol' (n 1) Articles 4 and 5; 'CIE Protocol' (n 3) Articles 5 and 6.
[56] 'HCJP Recommendations' (n 9) 26.
[57] O Dufour, 'Paris part à la conquête du contentieux commercial international' (*Gazette du Palais*, 13 February 2018).
[58] 'ICCP-CA Protocol' (n 1) Art. 5.4.4; 'CIE Protocol' (n 3) Art. 4.4.4.
[59] 'ICCP-CA Protocol' (n 1) Art. 4.3; CIE Protocol' (n 3) Art. 3.
[60] J Richman, 'Give Paris one more chance' (2001)

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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 in 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 key competitive advantage) of the French international business courts might less lie 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 – but rather 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 a specialisation in 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 internatonal commercial courts will, alone, 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 modernize the French legal profession in the eyes of foreign litigants. Since several years, proposals for instance have multiplied

[61] M Lartigue, 'Chambres internationales de Paris : appel à la mobilisation des juristes et des avocats français' (*Gazette du Palais*, 10 July 2018) 8.

[62] A Hamelle and C Jamin, 'Chambres internationales de Paris : encore un effort !' (19 November 2018) Semaine jurdique 2110.

[63] ibid.

[64] ibid.

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for creating a consolidated and renewed French legal profession (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 as 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 trainings 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 some evolutions in the attitude of other French courts. One interesting question will be to see whether CIE and ICCP-CA will act as test cases – one may rather say as *judicial labs* – for modernizing the French judicial system. Will the new judicial practices before the CIE and ICCP-CA remain an isolated phenomenon strictly 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

[65] M Prada, 'Rapport sur certains facteurs de renforcement de la compétitivité juridique de la place de Paris' (n 36) (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).

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system by driving up quality standards for the whole justice system? 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 remains too early to predict whether these innovative business courts will have positive repercussions on 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 suggesting to remove 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 Brussels International Business Court (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 all will compete to attract international disputes.

[66] *Projet de loi de programmation 2018-2022 et de réforme pour la justice*, JUST1806695L, Art.13.

[67] 'Brussels International Business Court May Generate two-speed Justice' (*Brussels Times*, 4 September 2018) <www.brusselstimes.com/belgium/justice/12423/brussels-international-business-court-may-generate-two-speed-justice> accessed 31 January 2019.

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When doing so, they will contribute to a fragmentation of the European offer for resolving international disputes: a patchwork of different rules and practices across jurisdictions will develop. This might impair companies' visibility and intelligibility. 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 suggested to establish a European Commercial Court (ECC).[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 also points out, 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 Member States level.

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 specialized business court in, say, the Netherlands, with expertise in maritime law, IP/patent issues would be handled by a business court specialised in patent and operating in Germany, disputes relating to banking by a specialized business court in France or Belgium, and so on. The GECC would act as the single point of entry for litigants, and then would be charge of channelling international disputes to the competent court(s). Since legal issues

[68] *Building Competence in Commercial Law in the Member States* (Study for the JURI Committe on the European Parliament, PE 604.980, September 2018) <www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2018)604980> accessed 31 January 2019; see also: X Kramer, E Themeli, and G Antonopoulou, 'International commercial courts: should the EU be next ? - EP study buidling competence in commercial law' (*Conflict of Laws*, 23 September 2018) <http://conflictoflaws.net/2018/international-commercial-courts-should-the-eu-be-next-ep-study-building-competence-in-commercial-law/> accessed 31 January 2019.

[69] ibid.

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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 NEBC will be difficult to implement in practice 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 the latter were no longer thought from the perspective of competition but rather as a collaborative process conducted 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 foreign litigants' expectations and concerns. If 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, side-effects of these innovative business courts on the judicial system taken as a whole should be anticipated carefully. In the future, international commercial courts may be used as labs 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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Xandra Kramer*, Georgia Antonopoulou**

Commercialising Litigation: The Case of the Netherlands Commercial Court

1. *Introduction*

The rise of international commercial courts in recent times has been remarkable, drawing the attention of policymakers, legislators, and the academic community. After a few countries in the Middle East set up courts geared to handle investment and financial disputes (including in Dubai and Qatar),[1] the trend to set up international commercial courts also gained ground in Europe (including in France, Germany, and the Netherlands) and in Asia (most notably Singapore and China). Together with the desire and the need to secure specialised courts that are able to deal with complex and often international litigation, economic and competitive considerations play a role as well in the setting up of these court.[2] For instance, the Far-East courts are part of

* Professor at Erasmus University Rotterdam and Utrecht University. This publication is part of the Vici project 'Affordable Access to Justice: towards sustainable cost and funding mechanisms for civil litigation in Europe' (project no VI.C.191.082) which is financed by the Dutch Research Council (NWO). See <www.euciviljustice.eu> accessed 24 November 2022.

** Assistant Professor at Birmingham Law School.

[1] The Dubai International Financial Centre Courts in 2004 and the Qatar International Court in 2009. In 2015 the Abu Dhabi Global Market Courts were established, followed by the Astana International Financial Centre Court in 2018.

[2] See, among others, J Sorabji and XE Kramer, 'Introduction - The International Business of Courts' in XE Kramer and J Sorabji (eds), *International Business Courts: A European and Global Perspective* (Eleven International Publishing 2019) 1; P Bookman, 'The Adjudication Business' (2020) 45 Yale J Int'l L 227, 261-275.

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the special economic zones, and they facilitate investment,[3] while the Chinese International Commercial Court (CICC) evolves from the Belt and Road Initiative and is aimed at building global connectivity and economic growth.[4] In Europe, the leading position of the London Commercial Court – since 2018 the Business and Property Courts[5] – and opportunities to gain a post-Brexit market share has fuelled the setting up of these courts in a number of EU Member States.[6] At the EU level, the idea for a European commercial court has been put forward – but has not yet been followed up – as part of competence building in the EU and to improve competitiveness.[7]

In the Netherlands, the proposal for an international commercial court was put on the agenda by the Dutch Council for the Judiciary in 2015.[8] While the need for such a court was underpinned by the notion of access to justice and economic considerations – as in some other EU Member States – ensuing discussions were also driven by the 2016 Brexit vote and the prospect of competitive advantages.[9] Following debates on the need for and the costs of setting up such a court, the proposal on the establishment of the Netherlands Commercial Court (NCC) was adopted, and the court opened its doors on 1 January 2019. The NCC is an English-language court, set up as a chamber of the Amsterdam District Court. It has competence for international civil and commercial cases, and it operates in accordance with the general rules of Dutch civil procedure coupled with the NCC rules, which aim to facilitate the effective resolution of these disputes. Four

[3] See, among others, T Na'el Al-Tawil and H Younies, 'DIFC: Courts of the Future' in Kramer and Sorabji (n 2) 205; A Dahdal, 'International Commercial Courts: The Qatari Experience' in Kramer and Sorabji (n 2) 235.

[4] N Zhao, 'The CICC: An Endeavour Towards the Internationalisation and Modernisation of Chinese Courts' in Kramer and Sorabji (n 2) 159, 160-163.

[5] M Ahmed, 'A Critical Review of the Business and Property Courts of England and Wales' in Kramer and Sorabji (n 2) 21.

[6] Sorabji and Kramer (n 2) 9-12.

[7] G Rühl, *Building Competence in Commercial Law in the Member States* (STUDY for the JURI Committee, European Parliament, 2018) <www.europarl.europa.eu/RegData/etudes/STUD/2018/604980/IPOL_STU(2018)604980_EN.pdf> accessed 24 November 2022.

[8] Report by the Dutch 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*) (November 2015) <www.rechtspraak.nl/SiteCollectionDocuments/plan-netherlands-commercial-court.pdf> accessed 24 November 2022 (hereafter: 'Plan for the Establishment of the NCC 2015').

[9] E Bauw, 'Commercial Litigation in Europe in Transformation: The Case of the Netherlands Commercial Court' (2019) 12(1) Erasmus L Rev 15-16.

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years after its establishment, the first contours of what this court brings to the dispute resolution table are becoming visible.

This paper focuses on the establishment, key features, functioning, and future perspectives of the Netherlands Commercial Court against the background of the desire to attract international commercial disputes. It assesses the innovations this court has introduced into Dutch and international dispute resolution, the extent to which it has been able to attract and deal with international commercial cases, and whether it may be considered a valuable addition to international commercial litigation. Section 2 sketches the background and ratio of the establishment of the NCC. Section 3 discusses the institutional design as well as the grounds of jurisdiction, and Section 4 zooms in on the key features, innovations, and procedural rules, including costs. Section 5 discusses current practice and functioning. Some conclusions on the attractiveness of the Netherlands Commercial Court and future perspectives are drawn in Section 6.

2. *Background and Rationale of the Netherlands Commercial Court*

Court specialisation and litigation in English are not new in the Netherlands. In addition to court divisions or teams within district courts for specific type of cases, including, for instance, family cases, insolvency, and commercial cases, several types of disputes are allocated to specific courts and chambers. Most important are the Maritime Chamber of the Rotterdam District Court, which has exclusive jurisdiction; the Enterprise Chamber at the Amsterdam Court of Appeal, which has exclusive jurisdiction for specific requests of disputes concerning businesses (e.g. concerning capital, annual reports, mergers, and shareholders); and the Patents Chamber at the District Court in The Hague. Specialisation for these complex and often international disputes is considered to contribute to the quality and efficiency of dispute resolution. The filing of documents or conducting part of the hearings in another language, particularly English, is possible. As regards documents, in 2016 the Supreme Court ruled that generally no translation of evidentiary documents in English, French, or German is required.[10] The Rotterdam District Court started publishing summaries of selected maritime cases in English in 2016, and since then it has provided the option of litigating in English.

[10] Dutch Supreme Court, 15 January 2016, ECLI:NL:HR:2016:65.

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The idea of a designated English-language international commercial court may be traced back to 2003, when the Netherlands Scientific Council for Government Policy recommended that contracting and court proceedings be conducted in the English language as a means to support commerce.[11] In 2014, the president of the Council for the Judiciary advocated that the Netherlands should establish a court for commercial disputes that would give companies a good reason to resolve their dispute in the Netherlands rather than in London or Singapore.[12] A year later, the Council published a report on the establishment of the Netherlands Commercial Court.[13] This report underlined the solid position of the Dutch judiciary in international rankings,[14] the economic advantages of strengthening the market economy, and the positive effect on judicial expertise, efficiency, and the costs of proceedings. It emphasised the expected effects on the competitive position, also in relation to similar courts in other countries, and the importance of the Netherlands enjoying a high ranking both for being arbitration friendly and for having an international commercial court.

The proposal for the NCC was put before Parliament in 2017. In the Explanatory Memorandum to the proposal, however, the competitive advantages, high rankings, and possibilities of attracting more high-value commercial cases that were highlighted by the Council are not mentioned as such.[15] The Memorandum emphasises the importance of strengthening the investment climate and economic prosperity by having high-quality justice as well as English-language court proceedings to facilitate business litigation. It is underlined that international commercial arbitration is expensive, and therefore may not be accessible to small- and medium-sized businesses. Lastly, it points out that the handling of complex and often international commercial disputes calls for specific expertise, and the NCC makes it possible to concentrate these disputes in one

[11] Netherlands Scientific Council for Government Policy (WRR), *The Netherlands A Trade Country, A Transactions Costs Perspective* (*Nederland handelsland, het perspectief van de transactiekosten*) (2003) <www.wrr.nl/publicaties/rapporten/2003/01/30/nederland-handelsland-het-perspectief-van-de-transactiekosten> accessed 24 November 2022.

[12] F Bakker, 'Speech' (*Dag van de Rechtspraak*, 11 September 2014).

[13] Plan for the Establishment of the NCC 2015 (n 8).

[14] In 2022, the Netherlands ranked no. 3 on Civil Justice in the WJP Rule of Law Index. Over the past five years, it has ranked between the first and fourth position.

[15] See also H Schelhaas, 'The Brand New Netherlands Commercial Court: A Positive Development' in Kramer and Sorabji (n 2) 47.

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court.[16] Somewhat unexpectedly, however, after the House of House of Representatives[17] approved the proposal early in 2018, discussions arose in the Dutch Senate.[18] The concerns were threefold, and revolved around whether such a court was necessary, whether court fees should be cost effective and therefore relatively high,[19] and the fear of a two-tiered justice system.[20] The concern about a two-tiered system in particular was a primary reason the Brussels International Commercial Court (BICC) failed to be established.[21] The Minister of Justice and Security explained the importance of the NCC for the Netherlands as a trade country, referring to the establishment of similar courts in other countries, and indicating that the NCC would only be available for cross-border cases, and that the fees were low compared to arbitration and commercial courts in other countries, including in London. This resulted in the proposal being adopted in December 2018, and – half a year later than planned – the NCC opened its doors on 1 January 2019.

3. *Institutional Design and Jurisdiction*

3.1. *Institutional Design*

The NCC is a specialised chamber of the Amsterdam District Court.[22] On second instance, it is complemented by the Netherlands

[16] Parliamentary Papers II 2016/17 (*Kamerstukken II*), 34 761, no. 3, Amendments to the Code of Civil Procedure and the Civil Court Fees Act with regard to the introduction of English-language case law at the international commercial chambers of the Amsterdam District Court and the Amsterdam Court of Appeal (*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*), Explanatory Memorandum (*Memorie van Toelichting*), 2-3 (hereafter: 'NCC Proposal, Explanatory Memorandum').

[17] *Tweede Kamer.*

[18] *Eerste Kamer.* Parliamentary Papers I 2018/2019 (*Kamerstukken I*), 34 761, Report of the Plenary Meeting of 4 December 2018 <www.eerstekamer.nl/verslag/20181204/verslag> accessed 24 November 2022.

[19] For more detail, see Section 4.3.

[20] See also G Antonopoulou, E Themeli, and XE Kramer, 'No Fake News: The Netherlands Commercial Court Proposal Approved!' (*Conflict of Laws*, 11 December 2018) <http://conflictoflaws.net/2018/no-fake-news-the-netherlands-commercial-court-proposal-approved> accessed 24 November 2022.

[21] G van Calster, 'The Brussels International Business Court: A Carrot Sunk by Caviar' in Kramer and Sorabji (n 2) 107.

[22] Art. 30r Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*), available in English in A Burrough and others (eds), *Code of Civil*

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Commercial Court of Appeal (NCCA). Like the NCC, the NCCA is a specialised chamber of the Amsterdam Court of Appeal, and decides on appeals against NCC judgments. The institutional design as a chamber is in line with other international commercial courts, such as the German Chambers for International Commercial Disputes, the Paris International Chambers, the Singapore International Commercial Court, and the China International Commercial Courts, which are similarly structured as chambers or divisions within existing courts and not as self-standing courts. Designing the NCC as a chamber within a court facilitated its speedy and inexpensive establishment.[23] Amsterdam was chosen because it is the financial capital, the location of Schiphol airport, and the Amsterdam court building is modern and technically well equipped.[24]

In addition to ruling on appeals against NCC judgments, the NCCA also has jurisdiction over arbitration-related matters, including setting aside proceedings. The NCCA's competence over arbitration-related matters is aimed at boosting the attractiveness of the Netherlands as an arbitration destination by offering arbitrating parties English-language court proceedings before a specialised court. Lastly, NCC judgments may be appealed on points of law before the Dutch Supreme Court.

The NCC currently has a total of 24 judges, with 15 in the NCC and 9 in the NCCA. Drawn from the Dutch judiciary, the NCC judges were selected based on their experience in international commercial dispute resolution, their expertise in specific fields of law such as competition law or intellectual property disputes, and on their English-language skills. Cases are heard by a three-judge panel. In cases requiring expertise in a specific field of law, the president of the NCC or the NCCA can assign the case to a specific judge, thereby deviating from the otherwise applicable random assignment rules.[25]

Procedure, Selected Sections and the NCC Rules (Eleven International Publishing 2018) (hereafter: 'DCCP'); Art. 1.1.1 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) (December 2020) (hereafter: 'NCC Rules').

[23] Plan for the Establishment of the NCC 2015 (n 8) 4, 9, 12; NCC Proposal, Explanatory Memorandum, 4; Bauw (n 9) 17.

[24] NCC Proposal, Explanatory Memorandum, 3.

[25] NCC Case Assignment Rules (14 January 2020) <www.rechtspraak.nl/English/NCC/Pages/judges-and-Staff.aspx> accessed 24 November 2022.

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3.2. *Jurisdictional Aspects*

3.2.1. *Subject-matter Jurisdiction*

As regards subject-matter jurisdiction, the NCC has jurisdiction over international civil and commercial disputes.[26] By focusing on international civil and commercial disputes, the NCC offers parties increased judicial specialisation as well as court proceedings attuned to the specific needs of cross-border commercial litigation.

The dispute should be a civil or commercial matter in connection with a particular legal relationship that is within the autonomy of the parties. It should not be subject to the jurisdiction of the Subdistrict Court or the exclusive jurisdiction of any other chamber or court. Cases within the jurisdiction of the Subdistrict Court include those related to employment, tenancy, hire purchase, and consumer matters, and cases with a claim of up to €25,000. Therefore, although the NCC's jurisdiction is independent of the value of the claim, the exclusion of cases with claims below the threshold of €25,000 excludes low-value claims from the court's docket. The NCC also lacks jurisdiction over cases within the exclusive jurisdiction of a different chamber, such as the Enterprise chamber of the Amsterdam Court of Appeal or the Patents Chamber of the District Court of The Hague.[27]

The explanatory notes to the NCC Rules clarify that the term civil or commercial should be understood in the sense of Article 1 Brussels Ibis Regulation, although it could be broader. The notes mention contractual disputes, claims in tort, property law disputes, and corporate law matters as examples of civil law disputes. It is added that insurance, finance, intellectual property, public procurement, competition, telecommunications, transportation, government liability, and insolvency-related matters may also qualify as civil and commercial law matters. Thus far, most cases before the court have related to the performance of contractual obligations.[28]

In addition, to fall under the NCC's jurisdiction, the dispute should be an international one. The Explanatory Notes offer various examples of cross-border elements that would lend the dispute

[26] Art. 1.3.1(a) and (b) NCC Rules.

[27] Explanatory Notes to Art. 1.3.1.(a) NCC Rules.

[28] Netherlands Commercial Court, 'The NCC Cases So Far' (*Rechtspraak*, 3 February 2022) <www.rechtspraak.nl/English/NCC/news/Pages/The-NCC-cases-so-far.aspx> accessed 24 November 2022.

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the required internationality. These elements are quite broad, and therefore indicate that the internationality of the dispute can be easily established. A dispute is, in particular, deemed international if at least one of the parties to the proceedings is resident outside the Netherlands, if a company is established abroad or incorporated under foreign law, or if it is a subsidiary of such a company.[29]

The NCC also has jurisdiction over applications for interim measures in summary proceedings, where a single judge decides the application. Thus far, the bulk of the NCC's caseload is comprised of applications for interim measures in summary proceedings.[30] Lastly, in order for the NCCA to be competent with regard to arbitration-related disputes, the place of arbitration should be in Amsterdam, and parties should have expressly agreed in writing to litigate in English before it.[31] However, if one takes into consideration that arbitration proceedings are usually seated in The Hague, then the NCCA's arbitration-related jurisdiction will be established in fewer cases.

3.2.2. *International Jurisdiction*

The NCC's international jurisdiction is based primarily on choice of court agreements. Parties wishing to litigate before the NCC should choose the Amsterdam District Court as the competent court to hear their case. A case may also be brought before the NCC if the Amsterdam District Court has jurisdiction on other grounds provided that the parties have expressly agreed in writing to litigate before the NCC in English.[32] A model NCC clause is available on the NCC's dedicated website.[33]

It becomes apparent that irrespective of the basis for the NCC's international jurisdiction, the parties' agreement to litigate before it is always required. This agreement is necessary because, unlike Dutch ordinary courts, the NCC uses English, a court language foreign to domestic parties. It is also required because, as discussed below in more detail, the NCC charges higher court fees than do the ordinary courts.[34] Given that the NCC is a chamber of the Amsterdam

[29] Explanatory Notes to Art. 1.3.1.(b) NCC Rules.

[30] See Section 5.

[31] Art. 1.3.3.(c) NCC Rules; Explanatory Notes to Art. 1.3.3. NCC Rules.

[32] Art. 30r DCCP; Art. 1.3.1. NCC Rules.

[33] Netherlands Commercial Court, 'Model Clause' <www.rechtspraak.nl/English/NCC/Pages/clause.aspx> accessed 24 November 2022.

[34] G Antonopoulou, 'Procedure before International Commercial Courts and Ordinary Courts: A Comparative Perspective' in S Brekoulakis and G Dimitropoulos

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District Court – namely, a EU Member State court – choice of court agreements in its favour fall under Article 25(1) Brussels Ibis Regulation,[35] and the relevant provisions of the regulation regarding choice of court agreements apply.

4. *Key Features and Innovations*

4.1. *Procedural Rules*

The NCC applies the Dutch rules of civil procedure. In addition to the new Article 30(a) DCCP, which mainly regulates the jurisdiction of the NCC and the NCCA, relevant procedural rules can be found in the NCC Rules. The NCC Rules are described in an English-language translation of the applicable Dutch civil procedure rules, but they also incorporate multiple novel features that improve the administration of cases at the NCC on the model of global best practices.

First, the NCC may order either on its own initiative or at the request of the parties an early case management conference to identify the disputed issues, to discuss fact finding, and to devise a procedural timetable.[36] In order to ensure speed and to enhance efficiency, the same NCC judge remains responsible for the case up to and including the final judgment. Second, the NCC uses the eNCC portal, which was devised specifically for the court. The portal is used for all written communications with the court, and the parties can submit their procedural documents online, without the need for hard copies. The only exception is the original statement of claim, which should be submitted in hard copy to the NCC mailing address.[37] Third, contrary to current Dutch practice, upon the request of the parties to keep a verbatim report of the trial, the NCC may use court reporters.[38]

In contrast to Asian international commercial courts, representation by foreign lawyers is not possible before the NCC. EU lawyers may

(eds), *International Commercial Courts: The Future of Transnational Adjudication* (CUP 2022) 421, 438-439. See, on court fees, Section 4.3.

[35] 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 L351/1.

[36] Art. 7.1. NCC Rules.

[37] Netherlands Commercial Court, 'Communication, Initiating an Action and Next Steps' <www.rechtspraak.nl/English/NCC/Pages/initiating-an-action.aspx> accessed 24 November 2022.

[38] Art. 7.7.1 NCC Rules. See also Bauw (n 9).

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represent clients before the NCC only in collaboration with Dutch lawyers in accordance with the relevant European directive.[39]

4.2. *Litigation in English*

One of the NCC's most innovative features is the use of English as the court language. While in some courts the conducting of hearings in English is possible, as discussed in Section 2, the NCC uses English in all stages of the court proceedings. The use of English as the court language aims at opening court proceedings to foreign parties accustomed to the use of English in arbitration or in foreign court proceedings. Since English is the *lingua franca* of commerce, the conducting of trials in English facilitates communication between domestic parties and their foreign mother companies or subsidiaries, and thereby saves parties from having to pay translation or interpretation costs.[40]

The use of English throughout the proceedings sets the NCC apart not only from the ordinary Dutch courts but also from the rest of the European international commercial courts. While both the German Chambers for International Commercial Disputes and the Paris International Chambers use English as the court language, this is nevertheless limited to specific parts of the procedure, such as documentary evidence, and does not include procedural documents, such as the statement of claim or defence or the publication of court judgments.[41] By contrast, the NCC law provides for the use of English as the court language for the entire proceedings, including publication of its judgments.

In order to safeguard parties' right to a fair trial, the NCC law as well as the NCC Rules entail various provisions that make NCC trials conditional upon the parties' agreement to litigate in English.[42] In this way, the law and the rules ensure that both the initial parties as well as any third parties subsequently added to NCC trials are aware of the use of English and consent to it.[43] Similar to the NCC, the

[39] Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to Facilitate Practice of the Profession of Lawyer on a Permanent Basis in a Member State Other Than That in Which the Qualification Was Obtained [1998] OJ L77/36.

[40] NCC Proposal, Explanatory Memorandum (*Memorie van Toelichting*), 1-2.

[41] Art. 184 Courts Organization Act (*Gerichtsverfassungsgesetz*), Official Journal of the Federal Republic of Germany *(Bundesgesetzblatt)* I, 1077, available in English at <www.gesetze-im-internet.de/englisch_gvg/> accessed 24 November 2022; Protocol - International Chamber of the Paris Commercial Court, Art. 6.1.; Protocol - International Chamber of the Paris Court of Appeal, Art. 3.1.

[42] Art. 30r; Art. 1.3.1. and 2.2.2. NCC Rules.

[43] NCC Proposal, Explanatory Memorandum, 10.

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NCCA also conducts trials in English. Given the significance of the Supreme Court's case law for the development of the law, however, Supreme Court proceedings take place in Dutch.[44] The court may nevertheless accept non-translated English-language documents submitted to the NCC and the NCCA.[45] While the conduct of trials in Dutch before the Supreme Court is sensible in light of the development of the law, and is beneficial for the overall Dutch justice system, it might nonetheless be disadvantageous for the parties in trial who will have to bear the time and costs of translating procedural documents from the English to the Dutch language.[46]

4.3. *Court Fees and Other Cost Arrangements*

From the outset, the legislator opted for a simple court fee system. While in other cases in Dutch courts the fees also depend on the value of the claim, for the NCC there are flat fees that deviate, and that are substantially higher than those for ordinary proceedings in the Dutch courts. The higher court fees aim to ensure that the required investments for an English language court with international expertise do not have an impact on the judiciary, meaning that the NCC must be budget neutral.[47] Channelling complex international litigation to the NCC would relieve other courts.

When the NCC was launched on 1 January 2019, the court fees were set at €15,000 for the first instance, and €7,500 for provisional measures in summary proceedings, to be paid by both claimant and defendant.[48] For appeal at the NCCA, a fixed fee of €20,000 was set (and €10,000 for summary proceedings). In 2022, the fees for the NCC District Court are €15,856 per party (and €7,928 for summary proceedings) and €21,141 per party for the NCCA (and €10,571 for summary proceedings on appeal). Details of these fees as well as information on other costs are available on the NCC website.[49] Added to these are lawyer's fees (representation by an attorney is required), and other costs that may be incurred, including those of the service of documents as well as expenses for witnesses or experts and so on.

As discussed in Section 2, the relatively high court fees of the

[44] Schelhaas (n 15) 52.
[45] NCC Proposal, Explanatory Memorandum, 7.
[46] Schelhaas (n 15) 57.
[47] NCC Proposal, Explanatory Memorandum, 4.
[48] Regulated by Art. 9a Civil Law Court Fees Act.
[49] Netherlands Commercial Court, 'Communication, Initiating an Action and Next Steps' (n 37).

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NCC – compared to those of other Dutch courts – were brought up during the parliamentary debate on the proposal in the Senate. The Minister of Justice rightfully pointed out that compared to the court fees for international commercial courts in some other countries and the costs of arbitration, the NCC fees are, in fact, relatively low. However, in comparison to court fees in an ordinary District Court, the NCC fees are high. At present, for companies' claims in ordinary proceedings the court fee for claims up to €100,000 is €2,837; for claims between €100,000 and €1,000,000 it is €5,377, and for claims with a value over €1,000,000 the court fee is €8,519. For relatively low-value claims – the NCC has jurisdiction for those starting from €25,000 – and for small companies the NCC court fees may be high. This criticism has also been voiced by the Dutch Council for the Judiciary, by the Dutch Bar Association, and in the literature.[50]

Generally, the loser-pays approach applies in Dutch law, though fixed maximum rates for attorneys apply, and the winning party may still have to pay a substantial part of the costs incurred. According to the NCC Rules, parties may make an agreement on the costs.[51] In the absence of an agreement, fixed rates for lawyers' fees apply, and currently range from €1,000 to €12,000 for each act of process.[52] This is higher than in ordinary proceedings, but the adverse cost award will still leave the successful party with costs. As regards funding, while third-party litigation funding is allowed and is increasing in Dutch legal practice, this is mostly the case for collective actions and is still limited in commercial cases.[53]

5. *Practice and Functioning*

At the time of writing, the NCC has rendered 13 judgments in 10 different cases. In February 2022, the NCC released certain data on the types of cases, countries of origin, and the length of the

[50] Schelhaas (n 15) 58-60, with further references.

[51] See also Art. 4.1.3(e) NCC Rules.

[52] NCC Rules, Annex III: Lawyers' fees.

[53] XE Kramer and I Tillema, 'The Funding of Collective Redress by Entrepreneurial Parties: The EU and Dutch Context' (2020) 2 Revista Ítalo-Española de Derecho Procesal 165; R Philips, 'Ch 13: Netherlands' in S Latham (ed), *The Third-Party Litigation Funding Law Review 2021* (5th edn, Law Business Research Ltd 2021) 122 <https://redbreast.com/wp-content/uploads/2022/04/2021-LBR-Third-party-litigation-Funding-Netherlands.pdf> accessed 24 November 2022.

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proceedings covering the first three years of the NCC's existence.[54] According to the statistics, most cases before the NCC involved the performance of contractual obligations, while a single case involved tortious obligations. Most of these cases were applications for summary proceedings, handled by a single judge. All cases to date have involved one or more parties residing in the Netherlands. While it is obviously not required by Article 25 Brussels Ibis that one of the parties be domiciled in the chosen court, it is to be expected that the NCC mostly comes into the picture when one of the parties has its domicile in the Netherlands.

As regards the nationality of foreign litigants before the NCC thus far, most of the foreign litigants were from common law jurisdictions, including the United States of America, the United Kingdom, and Ireland. Interestingly, in 31 percent of the cases the non-Dutch party was from the United Kingdom. Considering the very low number of cases, these statistics are simply an initial indication.

As to the length of the proceedings, the NCC has handled cases expeditiously requiring in most of the cases 8 weeks for the publication of a judgment and no more than 12 months in the rest of cases. However, this is deceiving given that most cases in fact were requests for provisional measures in summary proceedings.

While no extensive data are available, it seems that the experiences of Dutch lawyers litigating before the NCC have so far been very positive. They have emphasised the NCC's specialised judges in complex commercial litigation, the fairly flexible civil procedural rules, the court's collaborative staff, and the overall effective and expeditious handling of cases.[55] The Dean of the Amsterdam Bar Association, Barbara Rumora-Scheltema, was one of the first lawyers to appear before the NCC, and she complimented the court for delivering a judgment within only a few weeks after the proceedings were initiated.[56]

In March 2022, TheLawyer.com, a digital legal news provider, published a report on international firms doing business in the Netherlands, including a commentary on the NCC and its operations to date. The report undertakes a comparison between non-Dutch parties before the NCC and non-UK parties before the London

[54] Netherlands Commercial Court, 'The NCC Cases So Far' (n 28).

[55] Netherlands Commercial Court, 'Lawyers Discuss NCC' <www.rechtspraak.nl/English/NCC/Pages/default.aspx> accessed 24 November 2022.

[56] Netherlands Commercial Court, 'The NCC: A Forum Conveniens for International Commercial Cases?' <www.rechtspraak.nl/English/NCC/news/Pages/Highlights-webinar-The-NCC-a-forum-conveniens-for-international-commercial-cases.aspx> accessed 24 November 2022.

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Commercial Court in the same time frame.[57] According to the report, while building a positive reputation and attracting cases will take time, the NCC has had a promising start, and foreign lawyers are increasingly taking the NCC into consideration as a dispute resolution option.

6. *Concluding Remarks and Future Outlook*

The NCC has been set up primarily with a view to enhancing expertise in international commercial cases and offering opportunities to strengthen the Dutch economy. While some aspects may be criticised, most notably the relatively high court fees for relatively low-value claims and small companies compared to the fees for ordinary court proceedings in the Netherlands,[58] the setting up of the NCC and the applicable procedural rules have clearly been carefully considered. The Netherlands consistently scores well in international rankings on civil justice,[59] and is considered to have a well-functioning justice system in terms of being reliable and efficient. In general, the solid infrastructure and trade position make the Netherlands perhaps one of the countries with the potential to sustain an international commercial court. The experiences of Dutch lawyers in their first litigation before the NCC are reported to be positive.[60]

The number of cases the NCC has handled so far is still very low. Nevertheless, it has only been four years since NCC's inception, so it is too early to reach a firm conclusion on its viability. It is well known that for some time London has been the preferred venue for international dispute resolution, and until now there seems no clear indication that this will change fundamentally post-Brexit despite elements of competition in the international dispute resolution market. Legal practice has been working with English law as the chosen law in many business contracts, including in financial contracts. These choice of law clauses are usually coupled with choice of court clauses for the English courts, which have established a solid reputation in commercial dispute resolution. Standing transaction and litigation practice, built on experience, familiarity, and – to some extent – perception, are unlikely

[57] 'International Firms in the Netherlands' (*TheLawyer*, March 2022) <www.thelawyer.com/signal/report/international-firms-in-the-netherlands-this-is-the-future/> accessed 24 November 2022.

[58] See Section 4.3.

[59] See Section 2.

[60] Section 5.

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to change easily, as has been argued in the literature.[61] However, a 2021 article in *The Economist* suggested that London's business courts are facing growing competition.[62] For this newspaper article, the presiding judge of the NCCA, Duco Oranje, was also interviewed.

The NCC is clearly building on a solid reputation. It has been investing in providing information to lawyers and potential litigants, as is done by some international commercial courts in other countries, including perhaps most notably the Singapore International Commercial Court (SICC). In addition to providing the necessary information, including links to relevant documents, the NCC's English-language website includes a promotional information video, videos of seminars, webinars, and discussions on the NCC as well as news items. Recent news items for instance include the publication of an English translation of the Dutch Code of Civil procedure, a short article describing that NCC judgments can be enforced throughout the EU, and a reference to an article calling the perceived differences between English and Dutch law a caricature.[63] The NCC registry is also active on social media, including LinkedIn and Twitter, to share news items on the NCC. It remains to be seen how many cases the NCC will be able to attract, it may become one of the hubs for international dispute resolution.

While international commercial arbitration is, and will continue to be, of primary importance to complex and high-value commercial litigation, the NCC and other recently set up international commercial courts, may bring about changes in the international dispute resolution market. For all international commercial courts strengthening international collaboration is paramount, and the latest conventions of the Hague Conference on Private International Law are promising in this regard. The number of ratifications of the 2005 Hague Choice of Court Convention is gradually increasing, and this convention serves as the mirror of the almost universally ratified New York Convention. Finally, the entry into force of the long-awaited 2019 Hague Judgment Convention on 1 September 2023 is a first step towards a more global acceptance of foreign judgments.

[61] E Themeli, 'International Commercial Courts Competition in Europe: A Litigation Experience Approach' in Kramer and Sorabji (n 2) 273; E Themeli, 'Matchmaking International Commercial Courts and Lawyers' Preferences in Europe' (2019) 12(1) Erasmus L Rev 70.

[62] 'London's business courts face growing competition' *The Economist* (24 April 2021) <www.economist.com/britain/2021/04/24/londons-business-courts-face-growing-competition> accessed 24 November 2022.

[63] <www.rechtspraak.nl/English/NCC/news/Pages/default.aspx> accessed 24 November 2022.

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Michele Angelo Lupoi*

An International Commercial Court for Italy?

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1. *Introductory remarks on the economic context*

As it is well known, International Commercial Courts (ICC) are being created in several States around the globe. The general idea is to attract cross-border commercial litigation (and, indirectly, foreign business) through the creation of specialized (State) courts in matters of international commercial law, as an alternative to "ordinary" State courts (and possibly to arbitration).

Some European States are among the jurisdictions experimenting with this new approach to adjudicate cross-border disputes, even before Brexit brought a new impetus in this direction.

Italy, so far, has not followed suit and still does not offer anything comparable to an ICC. Arguably, however, the prerequisites exist to begin to conceive the creation of such a court.

As a matter of fact, Italy is among the main economic countries of the world and has a very long juridical tradition. It could therefore offer added value to the new dimension of solving cross-border commercial disputes.

A few data confirm my statement. In 2019, Italian exports reached

* Full Professor at University of Bologna, Department of Legal Studies.

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€ 585 billion (goods and services in total), accounting for 31.7% of national GDP. This data has been constantly growing in the last ten years (in 2010 the weight was 24.9%).

According to the Annual report for 2021 from the Italian Trade & Investment Agency, ICE, Italian exports generate a positive trade balance of € 53 billion. The sectors that contribute most to the balance are: machinery and equipment (which alone 'pays' for the 42 billion national energy import bill), fashion, furniture, and food. Some of the ten countries to which Italy exports most are, among the European Union countries, Germany and Poland, and, among third countries, China, South Korea and Russia.

Italy's market share of world exports is stable at 2.84 %, with large margins of improvement: in 9 of the 15 main world import markets Italy's share is lower than the average market share of our products in the world. It is therefore believed that Italy's exports have potentials for growing both in large international markets (e.g. the USA, Japan and Canada), and in high-growth markets (e.g.: China, India and South Korea).

2. *Existing instruments for the solution of civil disputes in Italy*

In Italy, the main way for resolving disputes that cannot be settled directly between the parties is, at present, recourse to State jurisdiction. Arbitration is also used and, since 2010, ADR are spreading too, also as a law-enhanced "filter" for access to the courts. In particular, in some civil disputes specified by law, prior recourse to mediation, before specific mediation bodies (*Organismi di mediazione*), is a condition for access to the courts ("condizione di procedibilità") (art. 5, para. 1-*bis*, legislative decree n. 28 of 2010). Similarly, for the recovery of debts up to a value of € 50,000.00, before going to court, the creditor must invite the counterparty to an assisted negotiation (*negoziazione assistita*) (art. 3, law decree n. 132 of 2014), that is, a proceduralized negotiation, with the mandatory assistance of lawyers, whose presence guarantees, to the eventual agreement, the value of enforcement title.

As concerns its juridical standing, Italy, as it was mentioned, has a very long tradition, all the way back to Roman Law and through the ages Italian scholars have inspired jurists across the globe. However, as far as the judicial system is concerned, Italy has been for some time facing a problem of excessive workload, which led to an increase in the duration of civil proceedings.

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According to the data released by the General Directorate of Statistics – Ministry of Justice, the total number of civil proceedings pending in all judicial offices as of June 30, 2020 was 3,321,149 units, slightly higher than the 3,312,263 as of June 30, 2019, with a percentage increase of 0.3%. This figure, however, when analyzed in detail, shows that the pending cases in first and second instance Courts (Court of Appeal, First Instance Court and Juvenile Court), excluding the Justice of the Peace where there was a significant increase (+2.9%), decreased overall by 0.9%, with a more marked decrease in the second instance (-7.2%).

On the other hand, there was a not insignificant increase in cases before the Court of Cassation (up 5.6%). This upward trend, on the other hand, was drastically reversed in the second half of 2020, in which, with the end of legislative Covid-restrictions and thanks to the consequent organizational measures adopted by management, productivity rose considerably, so that at the end of the year the growth in pending cases was reduced to 2.5%.

It should, however, be considered that, recently, the pendency figure is steadily decreasing from year to year (as of June 30, 2018, there were 3,480,186 pending proceedings): the figure for June 2020, appears, in other words, referable to the effects of the limitations of the pandemic.

The period 2019-2020 saw a substantial decrease in the registration of new judicial cases: new cases before the Justice of the Peace decreased by 17.5%, those before the *Tribunale* by 15.1%, before the Courts of Appeal by 17.3%, and before the Court of Cassation by 4.8%. These figures were affected by the almost total halt in judicial activity in the first months of 2020, a halt that affected to a lesser extent the Court of Cassation, whose workloads increased significantly as a result of the elimination of appeals in international protection procedures and the provision of only cassation appeals against the relevant decisions of the *Tribunale*.

Data relating to the adjudication of proceedings indicate a significant reduction in productivity (around 10%), registered throughout the country and regardless of judicial office. Analysis of the ratio between new proceedings registered and completed proceedings shows a sign of a retreat in the efficiency rate of judicial offices, primarily attributable to the pandemic crisis.

The data on pending cases, in any case, remain among the highest in Europe, according to the European Commission for the Efficiency of Civil Justice (CEPEJ) report for the two-year period 2017-2018.

The high number of pending cases is one of the causes and at the

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same time a consequence of the excessive duration of Italian civil trials, a phenomenon unfortunately notorious on a global scale and well documented by national and international studies and reports.

In the course of 2019/2020, the duration of civil proceedings was substantially stable, with some reduction for the Courts of Appeal and *Tribunali*, confirming the positive downward trend recorded in previous years. On the other hand, there has been a significant increase in the duration of proceedings for the Juvenile Court (*Tribunale per i minorenni*) and, to a lesser extent, for the Justice of the Peace (*Giudice di pace*).

Despite some recent modest improvements, the CEPEJ report for the two-year period 2017-2018 places our civil justice system in the last places among European countries.

This slowness in the disposal of hypertrophic civil litigation has many consequences in terms of cross-border trade and certainly tarnishes the image of Italian justice, at least as far as its efficiency is concerned. Understandably, litigating in Italy, for a foreign commercial operator may not be a particularly attractive prospect and one to be possibly avoided.

Indeed, the World Bank's 2020 Doing Business report[1] ranks Italy 122nd out of 190 for the category Time and Cost of Litigation (Enforcing Contracts), with a loss of several positions compared to 2018 and, even more so, to 2016 (when Italy ranked 106th). These data need to be contextualized and interpreted and one can also question the parameters used by the Doing Business report to assess the efficiency of a national justice system. The problem, in any case, exists and it is not ignored by the legislator who, for decades, has been trying to resolve it, unfortunately with instruments that up to now have not been adequate (i.e., the simple modification of the text of procedural rules).

As a matter of fact, for at least 25 years, with successive reforms, the legislator has been trying to reduce the excessive duration of Italian civil trials, which makes access to the courts less effective and the prospect of litigation in our country less attractive for foreign litigants. The results, so far, have been rather modest. The drop in pending cases recorded in recent years (see above), in fact, could be more a reflection of the economic crisis than of the effectiveness of the latest procedural innovations.

[1] See R Caponi, 'Doing business come scopo della giustizia civile?' [2015] Foro it, pt V, 10, which stresses the connection between the call for judicial reforms and the pursuit of economic growth.

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3. *Some data concerning mediation of civil and commercial disputes*

Regarding mediation, the data disseminated by the Ministry of Justice for the year 2020 show that fewer mediation applications were filed than in the year 2019, as an apparent consequence of the health emergency from Covid 19, with a recovery in the second half of the year. Specifically, in the period July 2019-June 2020, there was a significant drop in procedures filed compared to the previous year (down 12%), especially during the first half of 2020, with a 41% drop.

Given that 2020 was the year in which the pandemic produced the greatest restrictions on judicial activities, it seems more significant to highlight the data presented by the President of the Cassazione (the Italian Supreme Court) in his Report on the Administration of Justice in the year 2021, with a comparison between the first half of 2019 and the first half of 2021, which shows a 17% increase in proposed applications with national projections.

In any case, mediation applications do not exceed 150,000.00 annually, which confirms the reduced impact of mediation as an alternative to judicial adjudication.

As a matter of fact, as mentioned above, mediation is "mandatory" in several types of civil and commercial disputes, listed in para. 1-*bis* of art. 5 of Legislative Decree n. 28 of 2010. These matters, however, from a statistical point of view, are relatively insignificant compared to the mass of cases pending before the Italian Courts: this means that the general deflationary effect of mediation is limited. In any case, the mediation procedure is compulsory only for the claimant (who cannot apply to the judge without demonstrating that he has at least initiated the mediation procedure). The party invited to mediation, on the other hand, may accept the invitation or not: and in some very important matters, practice shows a widespread tendency on the part of the defendant not to appear before the mediation institution, thus frustrating at the outset any possibility of conciliation. By way of example, while 70% of defendants accept invitations to mediate in probate cases, the percentage drops to 13% in insurance contracts and 39% in financial contracts disputes.

That said, the data show that, in 2020, the number of proceedings in which the invited party appears has increased significantly (from 27% in the first quarter of 2020 to 47.8% at the end of the year). On the other hand, a significant figure is that, in proceedings in which both parties participate, the agreement is reached in 71.3% of cases, which demonstrates the effectiveness of the conciliatory tool when

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the parties have the opportunity to discuss the dispute with the support of a mediator.[2]

Lawyers, however, continue to be very divided on the merits of mediation as a tool for dispute resolution: a large number of legal practitioners, in fact, believe that only judicial adjudication of a dispute satisfies the right of action granted by art. 24 of the Italian Constitution.

The Ministry of Justice, for its part, considers that the conciliatory institute has a deflationary effect on civil litigation; in particular, it appears that the procedures concluded with the reaching of an agreement had an average duration of 143 days in 2019 and 160 in the first half of 2020, much faster, in any case, than the average duration of first instance cases before the *Tribunale* (348 days in the period July 2019-June 2020; 359 days in the previous year).

4. *The role of arbitration*

With reference to arbitration, of course, the data available are much more limited and incomplete and therefore, overall, less significant. The confidentiality that characterizes arbitration makes it difficult to be informed about the number of proceedings initiated each year and their subject matter. Some interesting indications can be drawn from the data released by the Milan Chamber of Arbitration, the most important Italian arbitration institution. The Annual Report for 2020, in particular, shows the filing of 120 new applications during the reference year: an increase of 18% compared to 2019. Of these applications, 17% concern international arbitrations. The total value of disputes handled is more than 836 million, while the average value per arbitration is about € 4 million, with a significant increase compared to the average value of proceedings in 2018 (€ 1,915,162 in 2019).

As for the timeframe, the average duration of arbitration proceedings was 11 and a half months, a decrease of 17% compared to the previous year's figure. It is important to note that, in July 2020, the Milan Chamber of Arbitration began to use a new arbitration procedure, the Simplified Arbitration, which has advantages in terms of reducing both the time of proceedings and costs.

[2] Data provided by the Italian Ministry of Justice, Dipartimento della Organizzazione Giudiziaria, del Personale e dei Servizi, Direzione Generale di Statistica e Analisi Organizzativa, with reference to the period January-September 2021.

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From the Annual Report 2020, moreover, it emerges that the parties that have resorted to arbitration are legal persons in 68% of cases (55% are corporations); among natural persons (32%) there is an increase in the number of professionals (10%). Arbitration was handled by an arbitration panel of three arbitrators in 58% of cases; in 42% by a single arbitrator.

The object of the disputes regards, for the most part, the corporate sector (48%), the contract sector (9%) and that of the rental, sale and transfer of a company branch (7.5%).

5. *Some "perceptions" about the existing instrument to dispose of civil disputes*

I am unaware of any statistical data regarding the level of satisfaction of users with respect to any specific dispute resolution tool offered by the Italian legal system. I can, however, express evaluations that derive from my personal professional experience, comparison with fellow lawyers and magistrates, and academic studies.

Recourse to the State Courts system remains, on an ideal-theoretical level, the instrument most valued by lawyers, many of whom are still convinced that the constitutional right of action requires the conflicting adjudication of rights. In other words, those in the right should not be forced to "negotiate" to get "less" than they are legally entitled to. In practice, the enthusiasm for State jurisdiction, on the other hand, clashes with lengthy proceedings and widespread inefficiency of the judicial system (with significant differences from one venue to another, which highlights the importance of the organizational factor).

Arbitration is not widely used in Italy, as it is perceived as a tool for resolving commercial/corporate disputes of significant value. The high costs also make it unattractive to non-professional litigants. In recent years, on the other hand, it seems to have declined in popularity due to a perceived problem with its actual impartiality, particularly with regard to party appointed arbitrators.

However, arbitration is widely used in Italy in cross-border commercial litigation, where both parties and lawyers have a more favourable approach to this dispute resolution mechanism.

From the opinions collected for this paper, it emerges, indeed, that in recent years there has been a large increase in the use of arbitration to resolve cross-border commercial disputes. In the experience of a lawyer in a well-known international law firm, arbitration is

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used for a third of disputes, which is still a minority compared to ordinary civil proceedings. However, there has been an increase in the number of requests for arbitration clauses (apparently, around 80% of the dispute resolution related clauses are now arbitration clauses). The same professional gives account of a stable increase, in recent months, in cross-border trade disputes, due not so much to the pandemic, but mainly to the supply chain shortage, which has resulted in a 40% increase over the last 5 years (with a spike since the start of the pandemic).[3]

It must also be remarked that even in Italy some legal firms are now almost exclusively dedicating their professional activities to arbitration and to international arbitration in particular.[4] It is confirmed, therefore, that in this matter, the specialization of lawyers and arbitrators is felt as a value of absolute importance. In the long run, this should bring a change in the situation described in this paper.

As Prof. Marco Torsello observes, the use of State jurisdiction in Italy is enhanced by the system of uniform rules initially created by the Brussels Convention of 1968 and then developed, in civil and commercial matters, by EU Regulations n. 44/2001 and 1215/2012. In addition, the authoritative powers available to the judge, which are not available to the arbitrator (who, for example, under Italian procedural law cannot issue interim measures), militate in favor of the judge's adjudication of the dispute.

It should also be considered that, in Italy, the cost of access to the courts is, all in all, modest: apart from the fees for lawyers and other professionals who may be involved, filing a case in court implies the payment of a tax (*unified contribution*), which increases with the value of the dispute but does not exceed, even for disputes of enormous economic value, € 1686.00 at first instance. There is also a widespread judicial tendency to liquidate legal costs charged to the losing party in amounts lower than those which, in any case, the victorious party will have to pay to her lawyer.

For the rest, in the scientific literature and in practice, the elements that make arbitration attractive are those well-known of the reduction of procedural delays, confidentiality, the possibility of detaching the rules for the decision from a single legal system, the specialization of arbitrators.

[3] Data provided by avv. Andrea Tuninetti Ferrari, PhD (Counsel at Clifford Chance) to dr. Diego Torrella.

[4] See the experience of ArbLit in Milan.

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6. *Cross-border cases in Italy: a problem of lack of data*

As far as State jurisdiction is concerned, there is a lack of statistics on international commercial disputes filed or decided each year. More in general, it is impossible to know how many cross-border disputes are filed every year in Italy.

In fact, when a dispute is registered in an Italian judicial office (*iscrizione a ruolo*), a code is attributed to it, with reference to the subject matter, for a better distribution of cases among the various divisions of the competent court and also for statistical purposes. The problem is that there is no code which enhances the presence of foreign parties or the fact that the dispute presents "foreign elements", such as an international trade contract.

On the other hand, the fact that Italian courts are every year invested by numerous cross-border cases is documented by the rich case law on transnational jurisdiction, in particular with reference to the uniform rules of the European space of justice. The Cassation itself, every year, releases numerous decisions on cross-border jurisdiction, which confirms a certain dynamism of Italian civil justice in the field of cross-border litigation.

It is submitted that a specific collection of data would be appropriate, also with a view to conceiving an International Commercial Court in Italy (see below).

Similar considerations apply to mediation (there are no statistics relating specifically to the international nature of a contract in dispute) and arbitration. However, the data published by the Milan Chamber of Arbitration suggests that a few dozen arbitrations involving international contracts are decided in Italy each year.

7. *The need to improve the Italian judicial system as a whole*

With these premises and contextualizations, we can now get to the heart of the matter.

For some years now, there has been a worldwide increase in the number of courts specifically dedicated to international commercial litigation. Compared to this "new wave", Italy appears, at the moment, to be in a situation of flat calm.

Italy, in fact, at the moment, has not conceived an International Commercial Court in the commonly understood sense: therefore, in our country there is no court specialized in international trade disputes, with dedicated judges and procedural rules. Our country,

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in other words, has not joined other European legal systems which, in this way, try to replace (or at least join) London as a center for the solution of cross-border commercial disputes at a global or at least regional level.

As of today, there are no *ad hoc* courts, there are no specific procedural rules, there is no provision for the use of a procedural language other than Italian (apart from the special rules laid down for Trentino Alto Adige, where there is a large German linguistic minority), only lawyers registered with Italian Bar Associations can represent parties in the proceedings (with the exceptions provided for by the uniform European rules) and so on.

This scenario, however, should not discourage innovative ideas for change.

In fact, Italy is well aware of the importance of the consideration of international trade operators in the context of the global market: the (indeed demeaning) conclusions of the Doing Business report mentioned in the preceding pages are carefully analyzed and certainly one cannot ignore the pressure coming from the European Institutions and the European Court of Human Rights for a reduction in the time of trials in the light of art. 6 ECHR.

The Italian judicial system, on the other hand, as we have seen, suffers from well-known structural limits, which make it uncompetitive internationally, compared to other European countries and beyond.

As a matter of fact, for the last three decades, with continuous procedural reforms, the Italian legislature has been trying to reduce the duration of civil proceedings, lately in order to improve its placement in the "Doing business" ranking. The problem of the Italian legislator, in this historical moment, in short, seems to be that of improving the image of the justice system of our country as a whole, so as to gain the trust and confidence of international institutions and trade operators. In the current situation, therefore, even talking about an Italian International Commercial Court could appear to be an unrealistic idea, especially if access to the Court were to depend on the agreement of the parties to the conflict. In order for an ICC to act as a magnet for cross-border commercial litigation, in fact, it must be placed in a context which is globally appreciated by foreign observers at a "systemic" level.

Things could improve in the immediate future: at the end of 2021, the Italian Parliament approved a delegation law for a deep reform of the Italian civil process (*legge* n. 226 of 2021), which was implemented by the Government with legislative decree n. 149 of

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2022, whose new provisions will enter into force on June 30 2023. The declared objective of the reforms thus introduced is to reduce by 40% the duration of civil proceedings in Italy. This is an ambitious and perhaps over-optimistic objective, but the common effort must be aimed at its fulfilment. With the achievement of this objective, in effect, Italian justice could present itself on the world stage with a more attractive and competitive image.

At that point, thinking about the creation of an ICC could take on a whole new meaning.

8. *Constitutional limits to the creation of an autonomous ICC in Italy*

It must be considered that, in Italy, the creation of an ICC as an autonomous and separate Court with respect to the apparatus of ordinary civil justice meets with a serious impediment in the Constitution.

As a matter of fact, according to Art. 102 of the Italian Constitution, jurisdiction to adjudicate is conferred to 'ordinary magistrates' established by law and organized according to the rules of the judicial order (*ordinamento giudiziario*).[5] The same constitutional provision, at para. 2, forbids the creation of special or extraordinary courts.

An "extraordinary court" is one which is instituted after the facts which that court is called to adjudicate upon have happened. The prohibition to create such a court is a reaction to the Fascist regime in power in Italy until the end of Second World War. As a matter of fact, under that dictatorship, "Tribunali speciali" were created to repress the opposition. In general, the independence and impartiality of such courts is questioned.

The notion of "special courts", on the other hand, refers to a court which is created before the facts / events which that court will be called to decide upon have happened, but which has jurisdiction over some specific matters and is not ruled by the ordinary provisions of the Law on the Judiciary (*Ordinamento giudiziario*). In other words, a court is "special" only in so much as it constitutes a separate entity from ordinary courts.

Having set a general rule, the Consitution itself provides for some relevant exceptions: according to Art. 103 Const., in particular,

[5] Regio decreto n. 12 of 31 January 1941.

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the existence of three special jurisdictions is acknowledged and "protected": i.e. administrative, audit (*Corte dei conti*)[6] and military courts.

In the light of Art. 102 Const., therefore, it would be impossible to create an ICC in Italy as a separate judicial entity from the system of "ordinary" courts.

This, however, is not the end of the story.

9. *The role of "specialized divisions" in the Italian judicial system*

The Italian judge is, by definition, a "generalist" judge, in the sense that he or she can be involved in all disputes and cases falling under civil or criminal jurisdiction.

This does not mean that the judge's "specialization" is not valued in any way. As a matter of fact, the entire judicial system is based on a division of competence between two different courts of first instance, i.e. the justice of the peace and the court, to which cases are attributed both on the basis of value and on the basis of subject matter (for example, the justice of the peace cannot decide disputes concerning rights in rem over real estate).

The specialization of the judge is considered an important objective and one to be valued.

In this regard, there are no jurisdictional limits as such. The Constitution, in fact, recognizes the possibility of creating "specialized divisions" (*sezioni specializzate*) within ordinary courts.

In other words, within the Italian judicial system, it is legitimate to set up "divisions" to which the law gives jurisdiction over specific subject-matters, in areas of the law where a particular specialization of the judge is required or appropriate. In other words, these "divisions" are to all intents and purposes part of the ordinary judicial system, composed of ordinary judges but with special requirements for the selection of their members and with the possibility of using lay judges, specialized in non-legal matters, in the light of the characteristics of the relevant matter.

For example, the adjudication of labour disputes, in Italy, is

[6] The *Corte dei conti*, established by Law n. 800 of 14 August 1862, has, *inter alia*, jurisdictional functions in matters of accounting liability within the public administration and as concerns war and ordinary pensions. It now adjudicates cases on a regional basis: See L Montesano and G Arieta, *Trattato di diritto processuale civile* (Cedam 2001) 24.

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entrusted to a specialized division of the ordinary first instance Court (the *Tribunale*), the so-called "Sezione lavoro". Recently, moreover, specialized divisions within the Courts were established to deal with international protection and immigration cases.[7] Legislative decree n. 149 of 2022 (see above), for its part, provides for the establishment of specialized divisions dealing with family, juvenile and personal status matters.

10. *In particular, the* Tribunale delle imprese

With respect to the types of disputes usually decided by an ICC, in particular, the so-called "Business Court" (*Tribunale delle imprese*) is of relevance. This is a "specialized division" of the ordinary court of first instance which has jurisdiction over some important matters included in the Italian notion of "commercial law". Although these competences do not cover disputes deriving from cross-border trade as such, they concern legal rights and relationships which may also involve commercial operators not belonging to the Italian legal system.

Initially, Legislative Decree No. 168 of 27 June 2003 instituted specialized divisions in some *Tribunali* and Courts of Appeal to deal with disputes over industrial and intellectual property rights.[8] A few years later, in an attempt at improving judicial activities in a very sensitive area of civil litigation, Law Decree No. 1 of 24 January 2012, implemented by Law No. 27 of 24 March 2012, created 'Specialized divisions for business disputes' which basically took the place (and absorbed the subject-matter competence) of the existing specialized divisions for intellectual and industrial property disputes, with an extended competence, in particular, over class actions and a variety of corporation disputes.[9]

[7] Law Decree n. 13 of 17 February 2017, converted into Law n. 46 of 13 April 2017.

[8] See G Casaburi, 'Le sezioni distrettuali della proprietà intellettuale ed industriale. Perché poi non si dica "peccato"' [2003] Dir ind 207; G Bonelli, 'Sezioni specializzate di diritto industriale: speranze o illusioni?' [2004] Dir ind 105; G Casaburi, 'L'istituzione delle sezioni specializzate per la proprietà industriale ed intellettuale: (prime) istruzioni per l'uso' [2003] Dir ind 405.

[9] E.g.: the special division of Rome 'covers' five different regions: Marche, Toscana, Abruzzo, Umbria, Lazio. See F Santagada, 'Sezioni specializzate per l'impresa, accelerazione dei processi e competitività delle imprese' [2012] Riv dir proc 1269.

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These new 'Divisions for business disputes' have been created (and became operational in September 2012) in *Tribunali* and Courts of Appeals located in the capital of each Italian region.[10] This innovation has been criticized for bringing courts away from the parties involved in the dispute. Moreover, in order to start proceedings in this "elite" divisions, the parties have to pay a tax (*contributo unificato*) which is double than the average one.

In this context, a special provision on venue is worth mentioning here.

With a rather controversial (and indeed hardly rational) innovation brought by Law Decree n. 145 of 23 December 2013, implemented by Law No. 9 of 21 February 2014, whenever a company whose main seat is located abroad sues or is sued before the *Tribunale delle imprese*, in one of the disputes within the jurisdiction of that division, special venue rules apply and only nine courts have competence for the whole of Italy.[11]

Apparently, the *ratio legis* is that foreign companies should thus find litigating in Italy more 'competitive'. This however appears a *non sequitur*. It is hard to understand, for example, why a French company sued in Italy should find it *per se* more attractive to appear before the Court of Genoa rather than the Court of Bologna. This special venue provision, moreover, make little sense because the courts listed therein do not offer any special feature to the foreign company: the same procedural rules apply, the local judges are selected under the same standards, there is no specific treatment of foreign law or foreign lawyers.

The *Tribunale delle imprese* is a very interesting reference in the context we are dealing with here.

It enhances the specialization of the judge in the relevant matters, providing litigants with a judge which is specifically competent to decide the disputes falling within its jurisdiction. The concentration of the specialized divisions in a reduced number of seats, on the other hand, contributes to the formation of a uniform case law and therefore guarantees greater certainty and predictability of the law in the matters falling within the jurisdiction of the specialized Court.

[10] With some exceptions: e.g., as concerns Val d'Aosta, venue is granted to the courts in Turin.

[11] See M Farina, 'Brevi note sul Tribunale delle società con sede all'estero (art. 10 D. l. 145\2013)' (*Judicium*, 20 February 2014) <www.judicium.it/wp-content/uploads/saggi/552/M.%20Farina.pdf> accessed 26 November 2022.

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11. *A view on future perspectives*

In the previous pages, I have tried to draw a picture of the existing situation, in order to put the topic of this paper in context. It is now possible to deal with the *de iure condendo* feasibility of the introduction of an ICC in Italy.

As we have already seen, at the institutional level, the Constitution does not prevent, indeed expressly provides for possibility to create, within existing "ordinary" courts, a "specialized division" dedicated to the adjudication of cross-border trade cases.

The question that must be asked, at this point, is whether such an innovation would be necessary or desirable and, in any case, "sustainable".

One can certainly question the "necessity" of introducing an ICC in Italy, but, as concerns its desirability, the judgment is favourable. A judge specialized in international commercial litigation, with *ad hoc* procedural rules, also in terms of the languages that can be used in the proceedings, would be a factor of great importance with respect to the international image of the Italian civil justice and the competitiveness of Italian business entities.

The question, then, is whether Italy can afford the creation of a specialized division on cross-border trade: the answer is not obvious. As a matter of fact, such an innovation, in order to be truly effective, would require at least some investments, whose impact on the State's budget would have to be carefully assessed. Indeed, for some critics, this could even be a luxury Italy cannot afford.

All things considered, it is argued that the creation of an Italian ICC would be possible, appropriate and realistic.

As we have seen in the previous pages, the Italian economic system plays an important role in the global market. Even if no data are available as to the number of cross-border commercial disputes brought every year before Italian courts, the rich case law regarding the application of European private international law regulations and international conventions show that we are not dealing with a marginal sector of judicial activities.

As a matter of fact, a debate on this topic has recently started, upon the initiative of the Italian Association of International Lawyers,[12] a lawyers' association recently formed in Italy, which dedicated its first webinar "Towards a process on transnational disputes", in February

[12] <https://www.camerainternazionale.org/home> accessed 26 November 2022.

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2022, to the presentation of a project for the introduction of special procedural rules for transnational disputes, in particular those of international trade. A conference on the same project was then held in November 2022, in Milan, with the participation of Italian and foreign judges and lawyers. With the development of this project, one can foresee that the creation of an Italian ICC could sooner than later be put to the attention of the Italian legislator.

In these pages, I will not examine the Association's project as such. I would rather try to propose some general ideas, from a procedural and institutional point of view.

A realistic approach to the introduction of an Italian ICC could imply, initially and on an experimental basis, the creation of a "working group" (sub-section) of the already existing *Tribunale delle imprese*. As a matter of fact, in the Italian judicial system, the judge's specialization can be promoted also by areas of competence/working groups, according to Art. 57 of the Guidelines on the formation of the tables of the judicial offices 2020-2022.[13] In other words, within an existing *Tribunale delle imprese*, a "working group" could be created, with dedicated judges and a specific territorial and subject-matter jurisdiction.

Even lacking official data, no particular surveys are needed to conclude that the litigation of transnational trade is concentrated in the Italian areas which are most developed in terms of production of goods and provision of services. The experimental phase we are conceiving here could therefore involve the Italian business and financial center, i.e. Milan and the courts located there, which could be granted special nationwide jurisdiction.

Such a choice of venue would be based on solid economic reasons: as it emerges from the Social Report of the Court of Milan, Focus Imprese 2018, in the metropolitan area of Milan about 300,000 businesses are active (corresponding to almost 40% of the 800,000 businesses in Lombardy and just under 7% of those active in the country overall). The metropolitan area of Milan is also noted for the

[13] "*Costituzione di sezioni specializzate: 1. I Tribunali organizzati in più sezioni civili ovvero in più sezioni penali prevedono modelli di specializzazione che accorpino materie in base ad aree omogenee, secondo le indicazioni della presente circolare. 2. Per i Tribunali nei quali il numero di sezioni presenti per ciascun settore non consente l'accorpamento in base ad aree omogenee va favorita la creazione di gruppi di lavoro all'interno della stessa sezione, cui devolvere contenzioso omogeneo per oggetto, distribuito in modo tendenzialmente equilibrato per qualità e quantità, in modo da garantire comunque la trattazione della stessa materia da parte di più di un magistrato*".

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percentage of joint stock companies, compared to the total number of active companies, which is much higher than the data for the rest of Italy and for Lombardy itself. In terms of size, the figure is even more significant: Milan is home to 1,235 companies with a turnover in excess of 50 million euros (i.e. about a quarter of the total in Italy).

In short, without detracting from other geographic areas, the courts of Milan (*Tribunale* and *Corte d'appello*) could rightfully be at the centre of a pilot project for the creation of an Italian ICC.

To concentrate all the jurisdiction of the new CCI in a single national location would not enhance the proximity between the judge and the dispute: on the other hand, in commercial litigation, such "proximity" appears much more neutral than in other areas of the law, such as family or juvenile law. A "centralized" ICC, on the other hand, would guarantee a proportional use of resources.

Over time, however, the experiment could be extended to other courts in Italy, with the creation of ICCs, e.g., also in Rome and Naples.

12. *Some general ideas for an Italian ICC*

It is beyond the scope of this paper to enter into the details of this still imaginary Italian CCI and of the procedural rules which would be applied there. However, it is necessary to give some substance to this "idea" to show how it could positively impact on the future of cross-border litigation in Italy and bring about some real procedural innovation in the Italian system of civil justice.

From an organization standpoint, the judges assigned (even on a non-exclusive basis) to the new (sub)-section should obviously have a specific competence in the field of international trade law and private international law, as well as of soft law and of the so-called *lex mercatoria*.

In Italian civil proceedings, Italian is the official language for both lawyers and judges (with some exceptions related to language minorities in certain areas of the country: see above): art. 122 c.p.c. The basic innovation of an Italian ICC would therefore be the use of English as the language of the whole proceedings, or at least to allow the parties to write their briefs and defences in English and to use documents in English without the need for their translation as well as to enable the court to issue its judgment in English. From a "procedural" point of view, this would only require an ordinary normative provision: as a matter of fact, art. 122 c.p.c., providing for

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the use of the Italian language in civil proceedings, can be derogated from by a "special" rule of equal rank. Arguably, some constitutional issues could arise if the use of the English language was imposed on unwilling parties, but not if the jurisdiction of the ICC and/or the choice of English as the language of the proceedings was voluntarily agreed upon by the parties.

Adopting English as the language of the proceedings before the ICC would require, from the judges assigned to the specialized court, a specific linguistic competence: one of the selective requirements to become a member of such court should be precisely an excellent knowledge of English. To the extent that knowledge of the foreign language is part of the specialization that the judge offers, this requirement should not meet institutional obstacles.[14]

As for the subject-matter jurisdiction of this specialized court, at least in an initial experimental phase, it could be limited to contractual disputes for which the parties, domiciled in different States, have expressed a choice of such forum, with the formal requirements provided for by art. 25 of Regulation 1215 n. 2012. The clause, however, should explicitly grant jurisdiction to the new specialized judge and not to the Italian courts in general.

Over time, however, one could think of expanding the court's jurisdiction, including disputes outside of the traditional notion of commercial litigation, like cross-border insolvency, tort and class actions. This way, the Italian ICC would operate way beyond the borders of international arbitration.

Arguably, simply the use of English as the language of the proceedings would not make the Italian ICC particularly competitive or attractive *per se*, if the ordinary rules of civil procedure would govern those proceedings.

It is proposed therefore that more adventurous procedural solutions be experimented in the new ICC, making good use of comparative law, moving away from the traditional structure of Italian civil proceedings and embracing flexibility and proportionality as the overriding procedural principles, in order to make the proceedings more efficient and to dispose of the case more swiftly.

For example, the "main hearing" model and a collaborative form of case management should be adopted, in order to enable the lawyers and the court to shape the course of the proceedings taking into consideration the specific features of the case at hand. It could

[14] A similar requirement is indeed in place today for EPPO's Deputy European Prosecutors, whose working language is precisely English.

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also be envisaged that the parties have the prerogative, before the start of the proceedings, to enter into agreements regarding at least some procedural features (for example, in the area of evidence).

If one wanted to experiment (as I believe one should, in order to make the Italian ICC a real competitor on the transnational scene), it would also be interesting to explore the possibility to enrol foreign lay judges as (non-adjudicating) members of the court and to allow foreign lawyers to actively take part in the defensive activities (especially the hearings), beyond the existing limitations.

In conclusion, the new Italian ICC could become a laboratory of procedural innovation. This way, the Italian ICC would really become attractive for foreign litigants and it would also stimulate a throughout reform of Italian ordinary proceedings, in line with the evolutionary trends in other European countries.

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Marco Torsello*

The Strange Case of the Italian Specialized Commercial Courts with Jurisdiction over Claims against Foreign Defendants

1. *Introduction*

In recent years, an intense debate has occurred in many jurisdictions regarding the appropriateness and benefits of establishing specialised international commercial courts – that is, national judicial bodies set up to suit the specific demands and needs of international commercial litigation. In Europe, the debate has intensified after Brexit, as several EU member states are now competing through the establishment of specialised commercial courts operating in English to attract part of the transnational dispute resolution business that had previously taken place primarily in London. The underlying assumption is that British judgments' loss of the benefit of automatic recognition and enforcement under the EU regime based on the Brussels I-bis Regulation[1] will induce several EU-based businesses to opt for a different forum in their choice-of-court agreements.

Against this backdrop, this short overview presents the strange case of the Italian (pre-Brexit) reform, which established specialised commercial courts with jurisdiction over cases brought against foreign defendants (foreign-defendant cases) with a view to attracting foreign investments and businesses by assigning the adjudication of disputes in which they are involved to a limited

* Full Professor at University of Verona, Department of Law.

[1] 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 (recast), *OJ L 351, 20/12/2012, p. 1–32*.

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number of highly specialised courts, located in major cities which are easily accessible from abroad. However, the fact that the Italian courts, unlike most other international commercial courts, do not operate in English makes the Italian solution less appealing than others. Moreover, additional confusion for foreign operators stems from the complexity of the mechanism of identification of the competent specialised court. According to the original text of the reform, all civil disputes involving a foreign company that doesn't have a permanent establishment in Italy would have been assigned to the jurisdiction of only three specialised courts, located in Milan (with territorial jurisdiction over northern Italy), Rome (with jurisdiction over central Italy) and Naples (with jurisdiction over southern Italy). However, the solution that was implemented jilted this approach. On the one hand, it limited the subject-matter jurisdiction of the specialised courts with jurisdiction over foreign-defendant cases to claims dealing only with IP rights, antitrust litigation, corporate-related matters, and actions for collective redress. On the other hand, it extended the number of territorial courts with jurisdiction over foreign-defendant cases to most (but not all) specialised commercial courts with jurisdiction over domestic commercial disputes. Finally, to add an extra pinch of complexity to the recipe, a revival of the original project, limiting the number of specialised courts to three, has been implemented with regard only to antitrust disputes.

The result of this confusing overlap of legislative interventions is a questionable patchwork of legal provisions, often difficult to coordinate and interpret, particularly for foreign investors. To some extent, this may be attributed to the fact that the reform was introduced prior to the UK vote on Brexit, meaning that the policy choices were made without consideration of the possibility of competing in attracting post-Brexit transnational commercial litigation. Whatever the reason, what is currently in force is a complex system of jurisdictional rules, which also the recent reform of Italian civil procedure[2] failed to untangle. The system was conceived to attract foreign business. Oddly enough, however, at present, expert guidance is surely needed for foreign businesses operating, or otherwise involved in litigation, in Italy.

[2] Pursuant to guiding legislation adopted by the Italian Parliament by Law No. 206/201 of 26 November 2021, the Government adopted the Reform of Italian civil procedure (amending several provisions of the Italian code of civil procedure and several other relevant provisions) by Decree No. 149/2022 of 10 October 2022.

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2. *Establishment of specialised commercial courts*

Under the current Italian regime of jurisdiction, disputes relating to IP rights, corporate-related matters, and actions for collective redress are assigned to the jurisdiction of 23 specialised courts (more precisely, chambers of the ordinary courts) located throughout the country. The current situation is the result of the stratification of multiple legislative interventions meant to implement a system of highly qualified and specialised commercial chambers of the Italian courts.

The decision to create specialised chambers with jurisdiction over IP-related disputes dates back to Legislative Decree No. 168 of 27 June 2003, which aimed to ensure that these highly technical commercial disputes would be adjudicated by specialised judges.[3] The decree provided that specialised chambers would be established within the first-instance and appeals courts located in 12 major cities (ie, Bari, Bologna, Catania, Florence, Genoa, Milan, Naples, Palermo, Rome, Turin, Trieste, and Venice), which would have jurisdiction over disputes concerning IP-related disputes – namely: national and international trademarks; patents for inventions and for new plants varieties; utility models; designs and models; copyrights; and unfair competition interfering with IP rights.

The judicial system so created in 2003 was modified in 2012 by Law Decree No. 1 of 24 January 2012, finalised by Law No. 27 of 24 March 2012.[4] This new piece of legislation introduced two major innovations

[3] M Barbuto, 'Il ritardo di dieci anni lascia l'Italia in fuorigioco nella corte europea sulla proprietà intellettuale; Rito e collegialità, i nodi ancora da sciogliere' [2003] 30 Guida al dir 18; G Bonelli, 'Sezioni specializzate di diritto industriale: speranze o illusioni?' [2004] 2 Dir ind 105; G Casaburi, 'Le sezioni distrettuali della proprietà intellettuale ed industriale. Perché poi non si dica "peccato"' [2003] Dir ind 207; G Casaburi, 'L'istituzione delle sezioni specializzate in materia di proprietà industriale ed intellettuale' [2003] 4-5 Riv dir ind 251; G Casaburi, 'L'istituzione delle sezioni specializzate per la proprietà industriale ed intellettuale: (prime) istruzioni per l'uso' [2003] Dir ind 405; M Scuffi, 'Le sezioni specializzate di diritto industriale per cooperazione comunitaria ed applicazione decentrata delle regole di concorrenza' [2003] 2 Riv dir ind 213 ss; LC Ubertazzi, 'Le sezioni specializzate in materia di proprietà intellettuale [2003] 4-5/pt. I Riv dir ind 219.

[4] CSM, Delibera 22 February 2012 (Parere, ai sensi dell'art. 10 della legge 24 marzo 1958 n. 195, relativo al testo del Decreto Legge 24 gennaio 2012 n. 1 recante "Disposizioni urgenti per la concorrenza, lo sviluppo delle infrastrutture e la competitività") <https://www.csm.it/documents/21768/92150/parere+su+disposizioni+urgenti+per+la+concorrenza%2C+lo+sviluppo+delle+infrastrutture+e+la+competitività+-+22+febbraio+2012/b0e4f80c-c01a-7cba-f177-d6113bb0a204?version=1.0> accessed 31 January 2023; G Casaburi,

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to Legislative Decree No. 168/2003. On the one hand, it broadened the scope of the subject matter jurisdiction of the specialised commercial chambers to include all corporate-related disputes, as well as antitrust litigation. On the other hand, it increased the number of specialised commercial chambers to 21 (by adding specialised chambers in L'Aquila, Ancona, Brescia, Catanzaro, Campobasso, Cagliari, Perugia, Potenza, and Trento). This was further increased to 22 as a result of the establishment of a specialised commercial chamber in Bolzano, and the territorial jurisdiction over the Valle d'Aosta region was assigned to the specialised commercial chamber in Turin.

More recently, the scope of the subject-matter jurisdiction of specialised commercial chambers was further extended by Law No. 31 of 12 April 2019 (which entered into force on 19 November 2020), which added to the list actions for collective redress under the new law on class actions.[5]

3. *Jurisdiction over claims against foreign defendants*

The system set out in Legislative Decree No. 168/2003 underwent another substantial change in 2013, when the legislature's focus shifted from domestic to transnational litigation. Law Decree No.

'"Liberalizzazioni" e sezioni specializzate' [2012] 1 Dir ind 13; R Catalano, 'Le Sezioni specializzate in materia di impresa: note sul dato normativo e sulle prime decisioni giurisprudenziali' [2014] 1 Rassegna dir pubb europeo 197; ER Crugnola, 'Il funzionamento effettivo delle sezioni specializzate in materia di impresa' in M Cera, PF Mondini, and G Presti (eds), *La riforma del diritto societario nella giurisprudenza delle imprese* (Giuffrè, 2017) 404 Quad giurispr comm 1; MA Iorio, 'Il tribunale delle imprese' (*Judicium*, 25 September 2013) <https://www.judicium.it/wp-content/uploads/saggi/501/M.%20Iuorio.pdf> accessed 31 January 2023; L Panzani, 'Le sezioni specializzate in materia di impresa' (2012) 9 Giur. merito 1785B; C Galli, 'Sezioni specializzate e tribunali delle imprese: inopportunità di un accorpamento' (*Altalex*, 29 February 2012); G Romano, 'Sezioni specializzate in materia di imprese' (*ilsocietario.it*) <https://ilsocietario.it/bussola/sezioni-specializzate-materia-di-imprese> accessed 31 January 2023; G Romano, 'Il Tribunale delle imprese. Aspetti problematici' (*giustiziacivile.com*, 2019/5) <http://giustiziacivile.com/societa-e-concorrenza/approfondimenti/il-tribunale-delle-imprese-aspetti-problematici> accessed 31 January 2023; G Romano, 'Le Sezioni Unite intervengono sul rapporto tra sezioni specializzate in materia di impresa e sezioni ordinarie del medesimo tribunale' [2020] 2 Le Società 228; G Sena, 'Sezioni specializzate' [2012] 3 Riv dir ind 113; M Sandulli, 'La competenza del Tribunale delle imprese in materia societaria' [2013] 8 Il Nuovo Diritto delle Società 8.

[5] G Basilico, 'L'inibitoria collettiva secondo la legge 12 aprile 2019 n. 31' [2020] 1 Il giusto proc civ 123; G Monteleone, 'Note a prima lettura sulla nuova legge sull'azione di classe (legge 12 aprile 2019, n. 31)' [2019] 3 Il giusto proc civ 633.

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145 of 23 December 2013, finalised by Law No. 9 of 21 February 2014, selected 11 of the 23 existing specialised commercial chambers (those based in Bari, Cagliari, Catania, Genoa, Milan, Naples, Rome, Turin, Venice, Trento and Bolzano)[6] and conferred them mandatory jurisdiction over foreign-defendant cases (including foreign companies with a secondary office or a permanent establishment in Italy) in the areas of IP law, antitrust and corporate-related matters.[7]

As an additional layer of complexity, on the occasion of the implementation in Italy of the EU Private Enforcement of Competition Law Directive (Dir. 2014/104/EU of 26 November 2014),[8] by virtue of Legislative Decree No. 3 of 19 January 2017, the legislature further amended Legislative Decree No. 168/2003 by providing that the exclusive jurisdiction for all kinds of antitrust dispute (whether involving validity issues, provisional measures or claims for damages, and whether resulting from the violation of domestic or EU competition law) would lie with the sole specialised commercial chambers of the courts of Milan, Rome and Naples. Moreover, the said provision applies irrespective of the parties' nationality, seat or domicile and therefore also (but not only) in cases where foreign companies are party to the dispute.

As already mentioned, the original proposal to concentrate disputes in all foreign-defendant cases in only three courts was fiercely opposed by many, including the Italian Bar Council and it was ultimately abandoned, with the sole exception of antitrust disputes, in favour of the establishment of a larger number of specialised courts.

As a result, the identification of the court with jurisdiction over foreign-defendant cases now requires a complicated three-step analysis, with a possible fourth variation. First, the general jurisdictional rule must be identified, which localises the territorially competent ordinary court. Second, the corresponding specialised

[6] As mentioned in the introduction to this paper, the original version of Law Decree No. 145 of 23 December 2013 contempleted only three (3) specialized commercial chambers for claims against foreign defendants, namely, Milan, Rome, and Naples.

[7] P Celentano, 'La riforma del "tribunale delle imprese"' [2014] 6 Le Società 713; M Farina, 'Brevi note sul Tribunale delle società con sede all'estero (art. 10 D.l. 145/2013)' (*Judicium*, 20 February 2014) <https://www.judicium.it/wp-content/uploads/saggi/552/M.%20Farina.pdf> accessed 31 January 2023.

[8] G Bruzzone, A Saija, 'Verso il recepimento della direttiva sul "private enforcement" del diritto "antitrust"' [2014] 2 Concorrenza e mercato 257; S Lopopolo, '*Il recepimento italiano della Direttiva 2014/104/UE sul "private enforcement antitrust"*' [2017] 1 AIDA 584.

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commercial chamber must be identified, with jurisdiction over (domestic) commercial disputes (ie, intellectual property, antitrust, corporate or collective redress). Finally, the claimant must check whether the specialised commercial chamber so identified is also competent with regard to foreign-defendant cases; if not, the claimant must identify the competent chamber for disputes against foreign defendants.

For example, in the hypothetical instance of a claim with respect to which the ordinary criteria would lead to the jurisdiction of the court of Modena, if the case fell within the scope of application of domestic commercial (ie, intellectual property, corporate or collective redress) disputes, the specialised commercial chamber of the Bologna court would have jurisdiction. However, in the event of a foreign defendant, the Bologna court (which is not among the 11 courts with jurisdiction in cases brought against foreign defendants) would not have jurisdiction as exclusive jurisdiction over foreign-defendant cases is conferred to the specialised commercial chamber of the Genoa court. Further, if the dispute related to competition law, the special rule on antitrust litigation would apply, which would bestow jurisdiction on the Milan court.

4. *Open issues regarding jurisdiction over claims against foreign defendants*

The difficulty in identifying the territorial commercial chamber to which jurisdiction is conferred in cases against foreign defendants does not exhaust the complexities and uncertainties produced by the new legislation. In particular, the fact that Legislative Decree No. 168/2003 (as amended) refers only to foreign defendants has raised the question of whether the application of the rule at hand may also be invoked in the event of foreign claimants. A literal interpretation of the rule would seem to lead to a negative answer. However, in the absence of relevant case law, several commentators have argued in favour of the opposite solution on the grounds that the rationale of the rule is that disputes with foreign parties be concentrated in a limited number of specialised commercial courts.[9] A similar issue arises as regards the conferral of jurisdiction in multi-party proceedings involving both Italian and foreign defendants or Italian

[9] Farina § 3.

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and foreign claimants. Legislative Decree No. 168/2003 expressly refers to Article 33 of the Code of Civil Procedure (on joinder of multiple co-defendants), to the effect that it is undisputed that in the event of multiple defendants, the claim can be instituted before the specialised chamber of the court having jurisdiction over the foreign defendant, also with regard to the Italian co-defendants. On the other hand, the decree does not expressly address instances in which a foreign company is acting as co-claimant along with an Italian claimant.[10] Again, the answer hinges on whether a literal or a purposive interpretation of the law should be adopted, which is still an open question.

Another relevant issue relates to claims put forward against a foreign company in an action on a warranty or guarantee or other third-party proceedings. This situation is not expressly addressed by the decree, which refers only to Article 33 of the Code of Civil Procedure (on joinder of multiple co-defendants) and not Article 32 on actions on a warranty or guarantee. In the face of a sharp division of scholars on this matter, a recent decision by the Bologna court[11] adopted a literal interpretation, thus allowing the court to retain jurisdiction over the action on warranty against a foreign company (although Bologna is not among the 11 courts on which jurisdiction is conferred for such cases) on the grounds that the opposite solution (ie, allowing for the attraction of the main claim before the specialised chamber of the commercial court with jurisdiction over foreign-defendant cases) would favour dilatory tactics and 'torpedo' strategies. The policy considerations emphasised by the Bologna court should lead to the application of the same rule on *perpetuatio iurisdictionis* in other similar situations, such as the joinder by the defendant of a foreign company in the proceedings or the voluntary intervention of a foreign company in domestic commercial proceedings.

5. *Mandatory nature of jurisdiction and its (in)compatibility with EU Recast Brussels Regulation*

A puzzling issue regarding the Italian rules on jurisdiction under consideration relates to the fact that Legislative Decree No. 168/2003 expressly qualifies the territorial jurisdiction of the specialised commercial courts with jurisdiction over foreign-defendant cases

[10] Farina § 3.
[11] Tribunale di Bologna, 16 March 2018, n 859.

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as mandatory, and thus not subject to derogation. In applying the general principles on mandatory territorial jurisdiction, the lack of jurisdiction in foreign-defendant cases of a court other than one of the 11 specialised commercial courts identified above must be either objected by the defendant in its first brief of defence, under penalty of forfeiture, or raised *ex officio* by the judge no later than the first pre-trial hearing under Article 183 of the Code of Civil Procedure.

However, the situation is more complicated in the event of a choice-of-court agreement derogating to the jurisdiction of the otherwise competent specialised court. From a purely domestic perspective, the rule introduced by Legislative Decree No. 168/2003 seems to lead to the conclusion that such derogating agreement is ineffective in light of the mandatory character of the jurisdictional rule introduced by the decree. However, this conclusion must be reconciled with the Brussels I-bis Regulation (and the 2007 Lugano Convention), keeping in mind the primacy of EU law. Accordingly, the decree cannot prevent an Italian court, other than one of the 11 specialised courts identified above, from entertaining a claim where that court is specifically designated by a valid choice-of-court agreement governed by the EU regulation. Moreover, the decree cannot prevent the court of another EU member state designated by a valid choice-of-court agreement from entertaining a claim in spite of the mandatory jurisdiction of the Italian specialised court, and the latter cannot invoke the mandatory character of the jurisdiction conferred on it by the domestic provision to entertain a claim in disregard of the choice-of-court agreement derogating to its jurisdiction. In other words, notwithstanding the mandatory nature of the rule of jurisdiction set out in Legislative Decree No. 168/2003, parties to a choice-of-court agreement subject to the EU Recast Brussels Regulation may validly stipulate that their disputes (although possibly involving a foreign defendant) may be adjudicated by an Italian court other than one of the 11 specialised ones with jurisdiction over foreign-defendant cases or by the court of another EU member state.

Moreover, issues of compatibility between Italian and EU law on jurisdiction, to be addressed on the basis of the principle of primacy of EU law, may also arise in the absence of a choice-of-court agreement when the EU Recast Brussels Regulation does not merely designate the member state whose courts have international jurisdiction, but also designates which court, within such member state, is entitled to hear the case. This is the case, for instance, in matters relating to contracts (with respect to which jurisdiction

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lies with the court for the place of performance) or matters relating to torts (with respect to which jurisdiction lies with the court for the place where the harmful event occurred or may occur). Should the EU rules, based on a localising factor, result in the conferral of jurisdiction on the Italian courts other than the specialised ones, a conflict may arise between the EU regime and the Italian rules on specialised commercial courts. Although it could be legitimately argued that the scope of the jurisdiction of each of the domestic courts should be a matter to be decided by the national legislature, it seems more convincing to argue otherwise and conclude that, in light of the EU regulation's goal to unify the rules on conflicts of jurisdiction in civil and commercial matters by way of rules that are highly predictable, when the EU rules have double relevance and also designate the domestic court competent to hear the case, that uniform rule must prevail over divergent domestic rules, irrespective of their affirmed mandatory nature.

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Georgios Dimitropoulos*

International Commercial Courts in the Gulf

Table of Contents: 1. Introduction. – 2. Categories of International Commercial Courts and the Courts of the Gulf. – 3. Features of International Commercial Courts in the Gulf. – 4. The Significance of the International Commercial Courts of the Gulf: Institutional Innovation and Contestation. – 5. Conclusion.

1. *Introduction*

The explanatory memorandum of the – now abandoned – project to establish a Brussels International Business Court (BIBC) had called International Commercial Courts (ICommCs) 'exotic novelties'.[1] Contemporary ICommCs started in the Gulf and proliferated from there to the whole of Asia as well as Europe;[2] even more countries are

* Associate Professor of Law and Associate Dean for Academic Affairs at Hamad Bin Khalifa University (HBKU) College of Law, Doha - Qatar (gdimitropoulos@hbku.edu.qa). This Chapter is based on two previous publications: G Dimitropoulos, 'International Commercial Courts in the "Modern Law of Nature": Adjudicatory Unilateralism in Special Economic Zones' (2021) 24 J Int'l Econ L 361; G Dimitropoulos, 'The Design of International Commercial Courts: From Organizational Hybridity to Functional Interoperability' in S Brekoulakis and G Dimitropoulos (eds), *International Commercial Courts: The Future of Transnational Adjudication* (CUP 2022) 251.

[1] See Exploratory Memorandum of the *Projet de loi instaurant la Brussels International Business Court*, 12 <www.dekamer.be/flwb/pdf/54/3072/54K3072001.pdf> accessed 15 November 2022.

[2] See generally P Bookman, 'The Adjudication Business' (2020) 45 Yale J Int'l L 227; MS Erie, 'The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution' (2020) 60 Va J Int'l L 228; A Roberts, 'Introduction to the Symposium on Global Labs of International Commercial Dispute Resolution' (2021) 115 AJIL Unbound 1 (as well as the other contributions in the 'Global Labs of International Commercial Dispute Resolution' symposium); G Dimitropoulos, 'International Commercial Courts in the "Modern Law of Nature": Adjudicatory Unilateralism in Special Economic Zones' (2021) 24 J Int'l Econ L 361 (hereinafter: Dimitropoulos, 'ICommCs in the Modern Law of Nature'); W Theus, 'International

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considering establishing similar fora.[3] ICommCs have found their own place in domestic and international adjudication. The present Chapter focuses on ICommCs in the Gulf.[4]

ICommCs are specialized private and commercial law courts. They are hybrid institutions: they integrate features of traditional courts and arbitral tribunals; they also integrate features of domestic and international courts. The bench of an ICommC is composed of judges who are not necessarily nationals of the host jurisdiction; they use sets of rules other than those used in the ordinary courts of the host jurisdiction; the default language of proceedings is English – not the official language of the host jurisdiction. They co-exist in the jurisdictions that establish them with ordinary courts of the host jurisdiction.[5] While institutionally embedded – in different degrees and organizational constellations – within a national jurisdiction, they serve an international function.[6] This function is two-fold: first,

Commercial Courts: A New Frontier in International Commercial Dispute Resolution? Lessons from the Mixed Courts of the Colonial Era' (Springer 2021) 12 Eur YB Int'l Econ L 275; S Brekoulakis and G Dimitropoulos (eds), *International Commercial Courts: The Future of Transnational Adjudication* (CUP 2022).

[3] One example is Australia; see The Hon Justice AS Bel, 'An Australian International Commercial Court - Not A Bad Idea Or What A Bad Idea?' (ABA Biennial International Conference, Singapore, 12 July 2019) <www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2019%20Speeches/Bell_20190712.pdf> accessed 15 November 2022; another example is Zurich in Switzerland; see PH Haberbeck, 'Will a Zurich International Commercial Court Cannibalize Zurich as a Seat for International Commercial Arbitrations?' (*Inside Law*, 7 November 2020) <https://insidelaw.ch/will-a-zurich-international-commercial-court-cannibalize-zurich-as-a-seat-for-international-commercial-arbitrations/> accessed 15 November 2022. Other countries in the broader MENA Region are now considering of introducing the Dubai model of economic development, including a financial free zone and possibly a court; see J Halfon and M Rustom, 'Rise of the International Financial Center: Can Casablanca Emulate Dubai's Success?' (*Knowledge at Wharton*, 20 December 2013) <https://knowledge.wharton.upenn.edu/article/rise-international-financial-center-can-casablanca-emulate-dubais-success/> accessed 15 November 2022.

[4] See generally FE Nasrallah, 'Applicable Laws in the International Commercial Courts of the Gulf' in Brekoulakis and Dimitropoulos (n 2) 228.

[5] There are specialized commercial courts that are not international in this sense; see Sir W Blair, 'Contemporary Trends in the Resolution of International Commercial and Financial Disputes' (Institute of Commercial and Corporate Law Annual Lecture 2016, Durham University, 21 January 2016); see also The Right Hon. The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, 'Commercial Justice in the Global Village: The Role of Commercial Courts' (DIFC Academy of Law Lecture, Dubai, 1 February 2016).

[6] See generally Dimitropoulos, 'ICommCs in the Modern Law of Nature' (n 2); G Dimitropoulos, 'The Design of International Commercial Courts: From

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ICommCs make up for the absence of dispute settlement fora for the resolution of cross-border disputes among individuals; second, ICommCs are an important feature in government strategies to 'internationalize' their domestic legal orders; internationalization is pursued with a view to attracting Foreign Direct Investment (FDI) and establishing world or region-wide dispute resolution hubs.

I identify three different categories of ICommCs – depending on where they stand organizationally in the overall court structure of the host jurisdiction:[7] First, ICommCs that are attached to a Special Economic Zone. These are the Dubai International Financial Centre (DIFC) Courts, the Qatar International Court and Dispute Resolution Centre (QICDRC), the Abu Dhabi Global Market (ADGM) Courts, and the Astana International Financial Centre (AIFC) Court. All ICommCs of the Gulf are courts of this first category. Second, stand-alone ICommCs that hear 'international' and 'commercial' cases. These are the Singapore International Commercial Court (SICC) and China International Commercial Court (CICC). Third, international chambers within ordinary domestic courts such as the chambers in the courts of Frankfurt, Paris and Amsterdam.

The Chapter is structured as follows: Section 2 presents the three types of ICommCs, and focuses on the ones in the Gulf. Section 3 presents common features of these courts. Section 4 discusses their differences, as well as their overall significance in international dispute settlement. Section 5 concludes.

2. *Categories of International Commercial Courts and the Courts of the Gulf*

There are three main categories of ICommCs. First, ICommCs that form part of a financial free zone, which is a new type of Special Economic Zone.[8] Second, there are stand-alone ICommCs that hear cases that are 'international' and 'commercial' in nature. There are two examples of ICommCs in this category: The Singapore International Commercial Court (SICC) and China International Commercial Court (CICC). Third, there are international chambers

Organizational Hybridity to Functional Interoperability' in Brekoulakis and Dimitropoulos (n 2) 251 (hereinafter: Dimitropoulos, 'The Design of ICommCs').

[7] ibid.

[8] See below section 3.

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within ordinary domestic courts such as the chambers in the courts of Frankfurt, Paris and Amsterdam. The below analysis focuses on courts in the Gulf. All ICommCs in the Gulf belong to the first category.

DIFC Courts: The Emirate of Dubai in the United Arab Emirates (UAE) was the first jurisdiction to establish an ICommCs in 2004.[9] The DIFC Courts are established within the financial free zone of the Dubai International Financial Centre; they now form part of the DIFC's Dispute Resolution Authority (DRA).[10] The DIFC Courts feature a Court of First Instance (CFI) - with a Small Claims Tribunal (SCT), and a Court of Appeal (CA).

The jurisdiction of the DIFC Courts was originally limited geographically to the physical area of the DIFC. The DIFC Courts used to only deal with zone-related disputes. Their jurisdiction was extended in 2011 allowing them to hear any domestic or international commercial dispute with the consent of all parties.[11] DIFC Courts have subject-matter jurisdiction over cases governing civil and commercial matters. Unless otherwise agreed by parties, DIFC law is applicable before the courts. DIFC law is largely based on the English common law.[12]

The bench has an international composition. The original focus was on judges coming from common law jurisdictions. The trend has now been partly reversed. The DIFC Courts have a relatively large number of UAE nationals as judges.[13] The language of proceedings is English.

QICDRC: In 2009, the Civil and Commercial Court was established within the Qatar Financial Centre (QFC) - the Financial Free Zone of the State of Qatar.[14] The QFC Civil and Commercial Court was

[9] See Dubai Law No. 12 of 2004: The Law of the Judicial Authority at Dubai International Financial Centre, as amended. See generally JK Krishnan and P Purohit, 'A Common Law Court in an Uncommon Environment: The DIFC Judiciary and Global Commercial Dispute Resolution' (2015) 300 Am Rev Int'l Arb 497; JK Krishnan, *The Story of the Dubai International Financial Centre Courts: A Retrospective* (Motivate Publishing Company 2018).

[10] See Articles 3 and 8 of Dubai Law No. 9 of 2004: The Law Establishing the Dubai International Financial Centre.

[11] See Article 5 of Law No. (16) of 2011 Amending Certain Provisions of Law No. (12) of 2004 Concerning Dubai International Financial Centre Courts.

[12] A Carballo, 'The Law of the Dubai International Financial Centre: Common Law Oasis or Mirage Within the UAE?' (2007) 21 Arab L Q 91.

[13] <www.difccourts.ae/about/court-structure/judges> accessed 15 November 2022.

[14] See Article 8(3) of the QFC Law – Law No. (7) of 2005 –, as amended by Law No. 2 of 2009 (Amending Certain Provisions of the Qatar Financial Centre (QFC); see generally G Lebovits and D Miller, 'Litigating in the Qatar International Court' (2015) 28(1) NYSBA Int'l L Practicum 54 <https://papers.ssrn.com/sol3/

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rebranded as the Qatar International Court and Dispute Resolution Centre (QICDRC) in 2012. The QICDRC has a First Instance and an Appellate Circuit. The First Instance Circuit has jurisdiction over civil and commercial disputes between parties that have a connection to the QFC. According to Article 8(3) of the QFC Law:[15]

c. The First Instance Circuit of The Court shall have the jurisdiction to hear the following disputes:

c/1- Civil and commercial disputes arising from transactions, contracts, arrangements or incidences taking place in or from the QFC between the entities established therein.

c/2- Civil and commercial disputes arising between The QFC authorities or institutions and the entities established therein.

c/3- Civil and commercial disputes arising between entities established in The QFC and contractors therewith and employees thereof, unless the parties agree otherwise.

c/4- Civil and commercial disputes arising from transactions, contracts or arrangements taking place between entities established within The QFC and residents of The State, or entities established in the State but outside The QFC, unless the parties agree otherwise.

The QICDRC applies as a default the law of the QFC, unless the parties have agreed to the application of the law of a different jurisdiction.[16] The default language of proceedings is English,[17] but the parties may also choose Arabic. The Court's decisions are announced publicly online in English and Arabic on the court's website.[18] The court has judges on its bench that come from all over the world – with an emphasis on England and the broader common law world.[19]

ADGM Courts: The Emirate of Abu Dhabi in the UAE hosts a similar zone, the Abu Dhabi Global Market (ADGM). The ADGM features their own ADGM Courts.[20] ADGM Courts were established in 2013 and have operated since 2015. They also have two instances, a Court of First Instance and a Court of Appeal.

papers.cfm?abstract_id=2616475> accessed 15 November 2022; AM Dahdal and F Botchway, 'A Decade of Development: The Civil and Commercial Court of the Qatar Financial Centre' (2019) 34 Arab L Q 1.

[15] See Article 8(3) of the QFC Law.

[16] Articles 11.1.1. and 11.1.2 of The Qatar Financial Centre Civil and Commercial Court Regulations and Procedural Rules.

[17] ibid, Article 3.2.

[18] See <www.qicdrc.com.qa/the-courts/judgments> accessed 15 November 2022.

[19] <www.qicdrc.gov.qa/courts/court> accessed 15 November 2022.

[20] Abu Dhabi Law No. (4) of 2013 Concerning Abu Dhabi Global Market, as amended.

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The ADGM Courts bear organizational similarities to the DIFC Courts. They hear civil and commercial cases arising out of the ADGM; they moreover have jurisdiction conferred on them by any request of the parties to have the Court of First Instance determine the claim or dispute.[21] A novelty of the ADGM is that the English common law finds direct application in the zone based on the ADGM 'Application of English Law Regulations' 2015.[22] This makes it the default applicable law before the ADGM Courts too. The bench of the courts have an international composition with a focus on judges from England.[23] The language of proceedings is English.

3. *Features of International Commercial Courts in the Gulf*

The ICommCs of the Gulf share many features. First, all four courts mentioned above are established within a SEZ.[24] There is a long tradition in the Arab world of applying multiple legal systems within the bounds of one polity. Different communities that lived in Islamic empires have historically had the right to apply their own laws.[25] More recently, English law found application to foreigners living in the Arab world that was part of the British Empire – including in the Gulf Region.[26] This functional application of foreign law is now taking on new dimensions in SEZs. The Gulf has been moving beyond traditional zones[27] giving rise to new types of zones

[21] Section 16(2)(e) of the ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015.

[22] <https://en.adgm.thomsonreuters.com/rulebook/application-english-law-regulations-2015-0> accessed 15 November 2022.

[23] <www.adgm.com/adgm-courts/judges> accessed 15 November 2022.

[24] According to a World Bank definition, "SEZs are generally defined as geographically delimited areas administered by a single body, offering certain incentives […] to businesses which physically locate within the zone". World Bank, 'Special Economic Zone: Performance, Lessons Learned, and Implication for Zone Development' (April 2008) 2.

[25] See generally M Strong and R Himber, 'The Legal Autonomy of the Dubai International Financial Centre: A Scalable Strategy for Global Free-Market Reforms' (2009) 29 Ec Aff 36, 36-37.

[26] This was mostly in the form of Indo-British common law, and was applied by virtue of the Foreign Jurisdiction Acts (of 1890 and 1913) through Orders in Council; see R Taneja, 'Constitutional and Statutory Provisions Regarding the Appointment and Removal of Judges in the UAE' (2000) 15 Arab L Q 158.

[27] J Tahir, 'An Assessment of Free Economic Zones in Arab Countries: Performance & Main Features' (1999) Working Paper No. 9926 <https://ssrn.com/abstract=216991> accessed 15 November 2022. According UNCTAD, most

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called Financial Free Zones.[28] The aim of these zones is to establish the relevant jurisdictions as global and/or regional financial hubs equivalent to London, Hong Kong or Singapore. All Gulf ICommCs operate within a financial free zone. Hence, the default jurisdiction of the courts refers to cases arising out of the relevant zone.

Second, the bench of the Gulf ICommC is international. The judicial roster is comprised of judges coming from many different jurisdictions. Their benches are mostly composed of eminent judges and practitioners with great experience in their home jurisdictions, particularly in dealing with commercial and financial matters. This does not preclude the appointment of nationals as judges on these courts. Both the DIFC Courts and the QICDRC have nationals of the host jurisdictions on the judicial roster. Third, the default language of proceedings is English. Fourth, their procedural rules are based on the Commercial Court of England and Wales. Fifth, the law of the SEZ is applicable law before these courts. In the case of all Gulf courts, the law of the relevant zone is a transposition of English law or otherwise inspired by English law.[29]

But the courts in the Gulf have some differences too. These are discussed below.

existing SEZs still focus on manufacturing, with services only playing a supporting role – such as providing needed logistics and warehousing services to facilitate trade in goods; UNCTAD, *World Investment Report 2019: Special Economic Zones* (UNCTAD 2019), 192.

[28] The term is drawn from the Constitution of the United Arab Emirates. The Constitution of the UAE was amended in 2004 to allow the creation of financial free zones; see Article 121 of the UAE Constitution (Constitutional Amendment No. 1 of 2003, 10 Jan. 2004). Following the constitutional amendment, federal law allowed the establishment by Federal Decree of a financial free zone in any emirate of the UAE; see Federal Law No. 8 of 2004: Regarding the Financial Free Zones in the United Arab Emirates. Financial free zones have their own legal personality; see Article 2 Federal Law No. 8 of 2004. They are largely exempted from federal civil, and commercial laws; see Article 3 and 4 Federal Law No. 8 of 2004. The financial free zones are not exempt from the federal criminal laws (Federal Law No. 4 of 2002, on the criminalization of money laundering, and the UAE Penal Code), nor any constitutional provision. The seven emirates of the Federation have the power to issue laws pertaining to their financial free zones; see Article 7(3) Federal Law No. 8 of 2004.

[29] See generally DP Horigan, 'A Legal Oasis' (2012) 16 Hawaii B J 19; DP Horigan, 'The New Adventures of the Common Law' (2009) 1 Pace Int'l L Rev Online Companion 1; F Tiba, 'The Emergence of Hybrid International Commercial Courts and the Future of Cross Border Commercial Dispute Resolution in Asia' (2016-2017) 14 Loyola Univ Chicago Int'l L Rev 31; B Reynolds, T Donegan, and O Linch, 'The Value of English Common law for New "Special Zones": A Case Study of Two Contrasting Examples' (2022) 28 T & T 82.

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4. *The Significance of the International Commercial Courts of the Gulf: Institutional Innovation and Contestation*

The Gulf ICommCs have initiated a new wave of institutional innovation in transnational adjudication and beyond.[30]

ICommCs of the Gulf have spearheaded the trend leading to the development of other ICommCs all over Asia as well as Europe. Except for bringing about institutional innovation beyond the host jurisdiction, they have also provided the blueprint for the establishment of more ICommCs of the first category. Kazakhstan bas been closely following the economic, financial and institutional initiatives of the Gulf countries, and has launched its own financial free zone: the Astana International Financial Centre (AIFC). This zone is home to the AIFC Court.[31] The AIFC Court was formally established in 2015, and started operating in 2018. Following the example of the DIFC Courts, it has a Court of First Instance, which has a fast-track procedure for small claims, and a Court of Appeal. The AIFC Court hears commercial and contractual disputes adjudicating all claims arising out of the AIFC and its operations, and other claims in which all parties to the dispute agree in writing to the jurisdiction of the AIFC Court. AIFC law is applicable law; this is essentially English common law. The bench of this court is also composed of foreign judges. In fact, for the time being the judges have been drawn exclusively from the UK. The language of proceedings is English.

The significance of the Gulf countries' ICommC shouldn't only be traced in their similarities. The first major contestation of ICommCs as an institution has also been expressed vis-à-vis one of the Gulf ICommCs.[32] Dubai has been a forerunner of these developments.[33] The DIFC Courts have been partly seen internally as a challenge to the overall domestic court system. This led to frictions, and the

[30] Dimitropoulos, 'ICommCs in the Modern Law of Nature' (n 2).

[31] See Constitutional Statute no. No 438-V ZRK of 7 December 2015: Astana Financial Services Authority (AFSA); AIFC Court; AIFC International Arbitration Centre (IAC); see generally N Zambrana-Tevar, 'The Court of the Astana International Financial Center in the Wake of Its Predecessors' [2019] Erasmus L Rev 122.

[32] See generally L Clover Alcolea, 'The Rise of the International Commercial Court: A Threat to the Rule of Law?' (2022) 13 JIDS 413.

[33] See generally N Saidi, 'The Success of DIFC as an International Financial Centre' (September 2009) <http://nassersaidi.com/wp-content/uploads/2012/08/The-successes-of-DIFC-as-an-international-financial-centre-SEPT-2009.pdf> accessed 15 November 2022.

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eventual establishment of mechanisms of coordination between the the DIFC Courts and the courts of the ordinary jurisdiction.[34] In 2022, three international judges resigned from the DIFC Courts following pressure from groups in their home jurisdictions for alleged human rights violations in the host jurisdiction.[35] The way that the courts themselves and the domestic jurisdictions will be able to handle this type of criticism will be telling about the future of the courts.

It is (also) in their differences that ICommCs innovate and present further examples for institutional innovation. In the traditional model, zone-specific laws generally only apply within the bounds of the zone. Registered companies are also only allowed to operate within the limits of the relevant zones. The QFC expands the limits of the zone beyond geography. The QFC is a functionally and legally defined zone. It is sometimes identified as an 'on-shore zone'; all QFC registered entities are allowed to operate anywhere in the State of Qatar.[36] This makes the QFC the first not geographically-bound zone. The jurisdiction of the QICDRC is thus also functionally – not zonally-territorially – bound. The same example has been followed by the AIFC and the AIFC Courts.

At the same time, the QICDRC only used to hear cases that arise out of the – legally delimitated – zone.[37] The jurisdiction of

[34] See generally J Bailey, 'The Interplay between International Commercial Courts and Ordinary Courts' in Brekoulakis and Dimitropoulos (n 2) 363.

[35] See 'DIFC Courts in spotlight as Irish judges resign under pressure from human rights campaigners' (*The Global Legal Post*, 10 August 2022) <www.globallegalpost.com/news/difc-courts-in-spotlight-as-irish-judges-resign-under-pressure-from-human-rights-campaigners-2007582092#:~:text=10%20Aug%202022-,DIFC%20Courts%20in%20spotlight%20as%20Irish%20judges,pressure%20from%20human%20rights%20campaigners&text=The%20DIFC%20Courts'%20practice%20of,pressure%20from%20a%20leading%20politician> accessed 15 November 2022; 'Exclusive: New Zealand judge Sir William Young resigns from Dubai judges job after pressure over human rights' (*NZ Herald*, 19 August 2022) <www.nzherald.co.nz/nz/exclusive-new-zealand-judge-sir-william-young-resigns-from-dubai-judges-job-after-pressure-over-human-rights/OJEWT6DRLF2EPCQOTHOZFV6TGY/> accessed 15 November 2022. Earlier in 2022, and in the aftermath of the passing of the National Security Law, the two UK Supreme Court representatives on Hong Kong's Final Court of Appeal had also resigned; see 'UK Supreme Court judges resign from Hong Kong's top court over national security law' (*The Global Legal Post*, 30 March 2022) <www.globallegalpost.com/news/uk-supreme-court-judges-resign-from-hong-kongs-top-court-over-national-security-law-1453185755> accessed 15 November 2022.

[36] See Article 2 of the QFC Law.

[37] See section 3 above.

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the QICDRC has been recently extended to hear cases arising out of the Qatar Free Zones.[38] Qatar Free Zones are a more traditional transshipment and manufacturing zone – not a financial free zone. Cases arising out of the Qatar Free Zones are subject to the jurisdiction of the QICDRC.[39]

The spirit of legal innovation, as well as the unique institutional nature of ICommCs is also reflected in the further expansion of the activities of the DIFC Courts. The DIFC Courts launched the 'courts of space' for disputes arising out of commercial space activities; this is part of a broader 'courts of the future' initiative in collaboration with the Dubai Future Foundation (DFF).[40] They now have in place a Space Disputes Guide.[41] Only some months later, the DIFC Courts launched the 'Specialised Court for the Digital Economy'. The aim of the specialized court is to provide a forum for the resolution of civil and commercial disputes relating to the digital economy.[42]

5. *Conclusion*

ICommCs are an institutional innovation in domestic and international adjudication. They present challenges and opportunities. The ICommCs of the Gulf have been at the forefront of contemporary legal and institutional innovation. They can be accused of whitewashing, as they can be heralded for sovereignty-reassertion. In times of crisis, ICommCs and other special jurisdictions such as SEZs can operate as agents for necessary institutional and societal experimentation.

[38] See Qatar Law No. 34 of 2005 on Free Zones.

[39] See ibid, at article 44 (as well as article 14) as amended by Law No. 15 of 2021.

[40] <www.difc.ae/newsroom/news/courts-space-launches-orbit-support-global-space-economy/> accessed 15 November 2022.

[41] DIFC & Dubai Future Foundation, Space Disputes Guide (1st edition, 11 October 2021).

[42] <www.difccourts.ae/media-centre/newsroom/difc-courts-launches-specialised-court-digital-economy> accessed 15 November 2022.

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Gary F. Bell*

The Singapore International Commercial Court

Table of Contents: 1. Introduction. – 2. Overview: why a Singapore International Commercial Court? – 3. Jurisdiction. – 4. The Judges. – 5. Procedure, Evidence, etc. – 6. Foreign Lawyers. – 7. Court Fees. – 8. Enforcement of Judgments. – 9. What Advantages Does the SICC Have over Arbitration? – 10. Conclusion.

1. *Introduction*

Singapore has become a very successful centre for international commercial arbitration and is increasingly attracting investment arbitration as well. Why then has Singapore decided to create an international court which might compete with arbitration?

Arbitration has been the object of many criticisms, particularly investment arbitration. The Court of Justice of the European Union (hereinafter "EU") on 6 March 2018 issued its decision in *Slovakia v. Achmea BV*[1] which held that an arbitration under a Bilateral Investment Treaty (hereinafter "BIT") between two EU countries was incompatible with EU law. In the Free Trade Agreements it negotiated with Canada, Singapore, Vietnam and Mexico, the EU insisted that investment disputes go to a court system rather than to arbitration.

The complaints about international commercial arbitration are not as fundamental or as threatening as those against investment arbitration, but are nonetheless serious. Not all of the complaints are equally valid or can be resolved by recourse to state courts, but there are many valid concerns and criticisms: the length and cost of arbitration,

* Associate Professor at the Faculty of Law of the National University of Singapore (NUS), Secretary-General of the International Academy of Comparative Law (gary.francis.bell@gmail.com).

[1] Case C284/16 *Slovakia v Achmea BV* [2018] <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62016CJ0284&from=EN> accessed 29 December 2022.

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the independence of arbitrators, the lack of common ethical standards for counsel, etc. This could lead some potential litigants to prefer state courts, especially international commercial courts with rules that are better adapted to address such concerns and to the realities of international disputes resolution. Many litigants for example choose to litigate at the English Commercial Court in London which has the advantage of conducting the proceedings in English, the most commonly used language in international commerce today.

The Singapore International Commercial Court (hereinafter "SICC") offers an alternative to arbitration and an alternative in English in Asia to the English Commercial Court.

The SICC website actually lists the ways in which the SICC may have an advantage over arbitration:

"While parties may be able to pursue their claims in international arbitration, they may prefer to resolve their disputes in the SICC to take advantage of a well-designed court-based mechanism which will enable parties to avoid one or more of the following problems often encountered in international arbitration:

1. over-formalisation of, delay in, and rising costs of arbitration;
2. concerns about the legitimacy of and ethical issues in arbitration;
3. the lack of consistency of decisions and absence of developed jurisprudence;
4. the absence of appeals; and
5. the inability to join third parties to the arbitration."[2]

I will, further below, criticise some of these alleged disadvantages, which in some cases may actually also be seen as advantages of arbitration (the absence of appeal for example, is a double-edge sword – an advantage and a disadvantage). It is clear however that some of the promoters of the SICC do see advantages for the parties in using the SICC over arbitration and indeed some of these advantages may be real and attractive for some litigants.

What the SICC brings is a court with some international judges (non-citizens and non-residents of Singapore) and some international lawyers (not members of the Singapore Bar) who can act in many matters before the SICC. It also offers the possibility of more flexible rules of procedure and evidence than in ordinary common law courts, court costs that are less expensive than arbitration costs and the right to an appeal on the substance of the dispute. Since Singapore Courts are very efficient and render their decisions rather

[2] 'Establishment of the SICC' <www.sicc.gov.sg/about-the-sicc/establishment-of-the-sicc> accessed 29 December 2022.

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quickly by international standards this appears at first glance to be an attractive proposition.

2. *Overview: why a Singapore International Commercial Court?*

The idea of creating the SICC was mentioned publicly in January 2013 by Chief Justice Sundaresh Menon.[3] Before and after being appointed Judicial Commissioner, and before being appointed Attorney General, and later Judge of Appeal and finally Chief Justice, Chief Justice Menon was a successful arbitration practitioner who served as Deputy Chairman of the Singapore International Arbitration Centre and on the Governing Board of the International Council for Commercial Arbitration. His commitment to international arbitration cannot be questioned. So what brought such a prominent arbitration practitioner to suggest the creation of an International Commercial Court that would compete with international commercial arbitration?

In 2012, when he was still Attorney General, after describing the golden age of international arbitration, Justice Menon mentioned the challenges that international arbitration faced.[4] He mentioned the lack of appeal which leads to increase costs:

"For our clients, arbitration has become a one-strike proposition leading to the escalation of costs, as parties inevitably chase the best arbitrators and the best lawyers to give themselves the best chance of winning their case. Arbitrators, mindful of the principles of natural justice and the fact that there is no appeal against their decision, are sometimes compelled to endure protracted submissions and responses to submissions on every conceivable point."[5]

He also mentioned the increased judicialization of arbitration processes, the fact that some arbitrators are not always as impartial as they should be.[6] He also mentioned that the ethics of arbitrators and

[3] S Menon, 'Response by Chief Justice Sundaresh Menon' (Opening of the Legal Year 2013 and Welcome Reference for the Chief Justice, 4 January 2013) para 33 <www.sal.org.sg/sites/default/files/PDF%20Files/Speeches/CJ%20OLY%20Welcome%20Reference.pdf> accessed 29 December 2022.

[4] S Menon, 'Keynote Address' in AJ van den Berg (ed), *International Arbitration: The Coming of a New Age? ICCA Congress Series No. 17* (Wolters Kluwer 2013).

[5] ibid 13.

[6] "Unbridled criticisms of how arbitrators are invariably profit-driven and biased, or that they always act strategically so as to be repeat players, are undoubtedly overstated. However, it is undeniable that the typical conditions that assure impartiality in the judicial sphere are lacking in arbitration." ibid 17.

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of counsel in arbitration are unregulated internationally[7] – unlike courts, arbitral tribunals do not have jurisdiction to discipline errant counsel, let alone errant arbitrators. He proposed the adoption of an international framework – a code of conduct – to regulate arbitrators.[8]

Some of the shortcomings of arbitration which he mentioned in 2012 might be taken care of by an international commercial court with state-appointed judges and international lawyers who would be regulated by the same rules of courts and of ethics imposed by that international commercial court.

Also, it is clear that Singapore wanted to attract international cases in the same way the Commercial Court in London attracts such cases.

In 2013 a group was formed "to study the viability of developing a framework for the establishment of the Singapore International Commercial Court".[9] After consultations, a law was adopted[10] and the SICC was created on 5 January 2015.

The SICC is in fact part of the Supreme Court of Singapore. The Supreme Court of Singapore does not actually hear cases as "the Supreme Court" – its judges sit in three superior courts: the High Court, the Appellate Division of the High Court (a new division) and the Court of Appeal (the highest and final appellate court).[11] The SICC is an additional division of the General Division of the High Court,[12] to which international judges can be appointed.[13]" International judges may also sit on appeals from the SICC in the Court of Appeal.[14]

3. *Jurisdiction*

The court originally had jurisdiction over the following cases:

"(1)(a) the action is international and commercial in nature;

(b) the action is one that the High Court may hear and try in its original civil jurisdiction;

(c) the action satisfies such other conditions as the Rules of Court may prescribe."[15]

[7] ibid 18.

[8] ibid 24-25.

[9] Menon (n 4) para 33.

[10] Supreme Court of Judicature (Amendment) Act 2014, Law No. 42 of 2014.

[11] Supreme Court of Judicature Act, Rev Ed 2020, s 3 <https://sso.agc.gov.sg/Act/SCJA1969> accessed 29 December 2022 ('Supreme Court of Judicature Act').

[12] ibid s 18A.

[13] ibid s 5A.

[14] ibid s 5A.

[15] ibid s 18D(1). See also Singapore International Commercial Court

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The *Singapore International Commercial Court Rules 2021* (*SICC Rules*) further define the jurisdiction of the SICC.[16]

As of 1 April 2022, the SICC also has jurisdiction over:

"(2)(c) any proceedings relating to corporate insolvency, restructuring or dissolution under the Insolvency, Restructuring and Dissolution Act 2018, or under the Companies Act as in force immediately before 30 July 2020.

(i) that are international and commercial in nature; and

(ii) that satisfy such conditions as the Rules of Court may prescribe."[17]

As of 1 October 2022, the SICC has also gained jurisdiction:

(2)(a) "to hear any proceedings relating to international commercial arbitration that the General Division may hear and that satisfy such conditions as the Rules of Court may prescribe"[18]

These two developments are significant. First, Singapore is trying to become a centre for transborder insolvency having adopted the *UNCITRAL Model Law on Cross-Border Insolvency (1997)*.[19] It makes sense to give the SICC, which has international judges, jurisdiction over such cases.

Second, the possibility of bringing arbitration issues such as challenges of arbitrators, jurisdiction of tribunal, setting aside of awards and enforcement of foreign awards to the SICC is brand new. It is not without controversy. It will allow foreign judges to apply Singapore's *International Arbitration Act*[20] which to a large extent implements the 1985 version of the *UNCITRAL Model Law*.[21] Some of the international judges come from Model Law jurisdictions[22] but many more come from England, which is not a Model Law country.

Rules 2021, S 924/2021, O.2, r. 1 <https://sso.agc.gov.sg/SL/SCJA1969-S924-2021?DocDate=20211202> accessed 29 December 2022, ('SICC Rules').

[16] SICC Rules (n 16) O.2.

[17] Supreme Court of Judicature Act (n 12) s 18D(2)(c).

[18] ibid s 18D(2)(a).

[19] UNCITRAL Model Law on Cross-Border Insolvency (1997) <https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency> accessed 29 December 2022. Adopted by Singapore through the Companies (Amendment) Act 2017, now incorporated in the Insolvency, Restructuring and Dissolution Act 2018, Statute No. 40 of 2018.

[20] International Arbitration Act 1994, Rev Ed 2020 <https://sso.agc.gov.sg/Act/IAA1994> accessed 29 December 2022.

[21] UNCITRAL Model Law on International Commercial Arbitration (1985) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-54671_ebook.pdf> accessed 29 December 2022 ('Model Law').

[22] From Hong Kong and from Australia for example.

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There is therefore the risk that the Model Law be interpreted in a way that takes into account decisions under the English Arbitration Act rather that under the Model Law, especially since Singapore lawyers have a tendency to refer to English arbitration cases rather than to cases from Model Law jurisdictions such as Hong Kong, Australia, South Korea, Germany etc.

It should be mentioned that although some foreign lawyers may represent parties in front of the SICC,[23] proceedings under Singapore's *International Arbitration Act* are specifically excluded.[24]

A case can reach the SICC in two ways. First, the parties may have chosen the SICC in a choice of court agreement.[25] Second, the case may be transferred from the High Court in accordance with the *SICC Rules*.[26]

From its creation in 2015 until the end of 2021, 83 cases were filed with the SICC: 73 cases were transferred from the High Court (88%) and 10 cases were filed directly by the parties (12%). On average, fewer than 2 cases a year were referred directly to the SICC by the parties through a choice of court agreement.[27]

This being a relatively new court, it is normal that most of the cases heard by the SICC thus far have been cases transferred from the High Court, but one cannot yet see a significant growth of the number of cases where the parties specifically choose the SICC. Seven years after the creation of the SICC, one can still see only, on average, one or two cases referred to the SICC directly by the parties. Thus far, the SICC seems to pose no threat to international commercial arbitration.

4. *The Judges*

All the judges of the Supreme Court (High Court and Court of Appeal) are also judges of the SICC and therefore the majority

[23] See heading "6. Foreign Lawyers" below.

[24] SICC Rules (n 16) O. 3, r. 3 specifically excludes proceedings under the International Arbitration Act from the definition of "offshore cases" in which certain foreign lawyers may appear.

[25] Supreme Court of Judicature Act (n 12) s 18F. See also SICC Rules (n 16) O. 2, r. 1(1).

[26] Supreme Court of Judicature Act (n 12) s 18J; SICC Rules (n 16) O. 2, r. 4.

[27] "As of the end of 2021, the SICC had a docket of 83 first instance matters and of these, 73 were transfers from the Singapore High Court and 10 were fresh filings. It ended the year with 85 first-instance published judgements and 19 written judgements on appeals." *SICC News*, Issue 27 (February 2022) 1.

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of judges sitting at the SICC are Singaporean judges. However, section 5A of the Supreme Court of Judicature Act also allows the appointment of international judges to the SICC. In fact, the constitution had to be amended to take into account the appointment of these international judges.[28] They are not full-time judges and are appointed to specific cases.

What is unique with the SICC is that it sees as one of its advantages the fact that it has foreign judges from both civil and common law jurisdictions. It makes sense for the SICC to have judges from both civil and common law given that it wants to serve Asia where the majority of jurisdictions follow the civil law.

It is however surprising that out of eighteen international judges appointed to the SICC, only two are from civil law jurisdictions.[29] This might be explained by the fact that most of the cases that come to the SICC come through transfers from the High Court and therefore, they would usually be governed by the law of a common law jurisdiction – the parties would entrust the common law courts of Singapore mainly common law cases. The small number of cases governed by the civil law may not justify the appointment of more civil law judges. But on the other hand, will having only two civil law judges sends a sufficiently reassuring signal for civil law lawyers to choose the SICC in contracts governed by the civil law, especially when the language of the documents and of the law is not English and is not the native tongue of either of the two civil law judges? In fact, two civil law judges do not seem to have sat together or alone in a case involving the civil law, meaning that any civil law matter was probably decided by a majority of two common law judges (Singaporean judges) and only one civil law judge. Even if both civil law judges were to sit together on a civil law case so that there be a majority of civil law trained judges, that would leave no civil law judges available for appointment on an eventual appeal on an issue of civil law. It is hoped that more appointments of civil law trained judges will be made in the future to increase the capacity of the SICC to hear cases governed by the civil law.

[28] Constitution of the Republic of Singapore, Rev Ed 2020, art 95 <https://sso.agc.gov.sg/Act/CONS1963?ProvIds=P18-#pr95-> accessed 29 December 2022.

[29] The only two civil law trained judges are Justice Yuko Miyazaki of Japan and Justice Dominique T. Hascher of France. Justice Beverley McLachlin, former Chief Justice of Canada, may have acquired many notions of civil law while hearing Supreme Court cases from Quebec, but she was formally trained only in the common law. <www.sicc.gov.sg/about-the-sicc/judges> accessed 29 December 2022.

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5. *Procedure, Evidence, etc.*

Surprisingly for a court of first instance in a common law jurisdiction, the SICC can sit with one or three judges[30] – common law trial courts usually have a single judge. On appeal there will be three or five judges.[31]

Until recently, the Rules of Court of the SICC were part of the general Rules of Court.[32] As of 1 April 2022, the SICC has its own rules of court: the *Singapore International Commercial Court Rules 2021* ("*SICC Rules*").[33] This document in PDF format is 362 pages long[34] and is therefore definitely part of the common law tradition of long and excruciatingly detailed rules of court. This is as opposed, for example, the 45-page long *Rules of Procedure for the International Commercial Chambers of the Amsterdam District Court*.[35]

The normal rules of evidence applicable in Singapore (including the *Evidence Act*[36] and the rules of evidence found in the *SICC Rules*) apply in SICC cases. However, if the parties have agreed that some Singapore rules of evidence should be excluded and that other rules of evidence should be applied instead, the SICC may so order.[37]

If the parties so agree, the Court could for example follow the *IBA Rules on the Taking of Evidence in International Arbitration*,[38] which purport to be a compromise between civil and common law or the *Prague Rules*,[39] which adopt a civil law approach to evidence.

[30] SICC Rules (n 16) O. 1, r. 10(1) and (2).

[31] ibid O. 1, r. 10(4).

[32] Former Rules of Court, Cap. 322, R 5, O, 110.

[33] SICC Rules (n 16).

[34] <https://sso.agc.gov.sg/SL/SCJA1969-S924-2021?DocDate=20220921&ViewType=Pdf&_=20221208165712> accessed 29 December 2022.

[35] 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), Second Edition, December 2020 <www.rechtspraak.nl/SiteCollectionDocuments/NCC-Rules-second-edition.pdf> accessed 29 December 2022 ('Rules of the NCC').

[36] Evidence Act 1893, Rev Ed 2020 <https://sso.agc.gov.sg/Act/EA1893> accessed 29 December 2022.

[37] SICC Rules (n 16) O. 13, r. 15. Note however that the Court may not exclude O. 13, r. 15.

[38] IBA Council, IBA Rules on the Taking of Evidence in International Arbitration, 2020 <www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b> accessed 29 December 2022.

[39] Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules), 2018 <https://praguerules.com/upload/medialibrary/9dc/9dc31ba7799e26473d92961d926948c9.pdf> accessed 29 December 2022.

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However, if the parties disagree, the Court is not at liberty to choose the most appropriate rules of evidence, the way an arbitral tribunal could. Instead the SICC must apply the Singapore rules of evidence including the *Evidence Act*[40] and the more specific rules of evidence found in the *SICC Rules.* The *SICC Rules*, for example, have specific procedures for the production of documents and for interrogatories.[41]

In my view, in order to attract cases governed by the civil law, it would be preferable to grant the SICC the discretion not to apply common law rules of evidence even if a party does not agree to the use of other rules. It might be inappropriate to apply Singapore's rules of evidence to a case governed by the civil law in which both parties are from civil law jurisdictions only because Singapore lawyers representing one the parties see a strategic advantage in following the common law rules of evidence (including discovery of documents, the adversarial and long cross-examination of witnesses and the parol evidence rule) which often increase the cost and length of litigation and, if I may add, the fees of counsel who are therefore somewhat conflicted when they insist on the full common law gamut.

On the application of a party, the SICC may also order that foreign law may be determined on the basis of submissions rather than through expert opinion.[42] This is often done in international arbitration but usually cannot be done in common law courts where foreign law must be proven as a matter of fact usually through expert witnesses.

The Court may also order that the case be heard *in camera*; that no person may reveal or publish any information or document relating to the case; or that the Court file be sealed.[43]

All the proceedings and documents must be in English.[44] There is no provision for a panel of judges who can understand other languages as is the case in other international commercial courts such as the ones in the Netherlands[45] and in France[46] and as is also obviously the case

[40] Evidence Act (n 37).
[41] SICC Rules (n 16) O. 12.
[42] ibid O. 16, r. 8.
[43] ibid O. 16, r. 9.
[44] ibid O. 1, r. 7:
"(1) All documents filed or used in the Court must be in the English language.
(2) Unless otherwise provided by these Rules or any written law, a document which is not in the English language must be accompanied by a translation in the English language provided by a person competent to do so."
[45] "Dutch case law and scholarly analysis and documents in Dutch, English, German or French need not be translated, except where the court directs otherwise." Rules of the NCC (n 36) art 2.1.2.

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in international arbitration. This is a disadvantage of the SICC and shows its common law influence, English being the language of the common law. Translation costs may be significant. Although English is indeed the most common language of international commerce, it is not by any means its only language.

6. *Foreign Lawyers*

Some foreign lawyers who go through a detailed process of registration may appear in front of the SICC in some cases: "A party to a case in the Singapore International Commercial Court, or to an appeal from that Court, may in accordance with the Rules of Court be represented by a foreign lawyer who is registered in accordance with Part IVB of the Legal Profession Act (Cap. 161)."[47]

The *SICC Rules* do provide some more details[48] and so does the *Legal Profession Act*.[49] It would take far too long to explain the very detailed rules applicable to the registration and regulation of foreign lawyers appearing before the SICC. In principle, registered foreign lawyers can only represent on foreign law, not Singapore law,[50] and as mentioned above, they may not appear in cases under the *International Arbitration Act*.[51] They can only appear in offshore cases i.e. cases that have no substantial connection with Singapore.[52] In those cases, foreign lawyers, once registered, may be authorised to appear in front of the SICC. A restricted registration would only allow the foreign lawyer to make submissions on foreign law. A full registration would allow him or her to make full representation.[53]

[46] The International Chamber of the Commercial Court of Paris authorizes the use of English in certain circumstances: documents (though not pleadings) may be in English without a translation and foreign witnesses, experts etc. may testify in English, see *Protocole relatif à la procedure devant la chambre internationale du tribunal de commerce de Paris*, Paris, 7 February 2017, arts 2.3 and 2.5 <www.greffe-tc-paris.fr/uploads/paris/judiciaire/FOND_REFERES/pdf/protocole_tribunal_de_commerce.pdf> accessed 29 December 2022.

[47] Supreme Court of Judicature Act (n 12) s 18M.

[48] SICC Rules (n 16) O. 3, r. 1.

[49] Legal Profession Act 1966, Rev Ed 2020 <https://sso.agc.gov.sg/Act/LPA1966> accessed 29 December 2022.

[50] ibid O. 3, r. 1(1A)(b).

[51] ibid O. 3, r. 3.

[52] ibid O. 3, r. 3.

[53] Legal Profession Act (n 50) s 36P; see also Legal Profession (Foreign Representation in Singapore International Commercial Court) Rules 2014 <https://sso.agc.gov.sg/SL-Supp/S851-2014/Published/20141226?DocDate=20141226> accessed 29 December 2022.

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This is one of the disadvantages of the SICC over international arbitration in Singapore. In an arbitration case seated in Singapore, a foreign lawyer may represent a party even if the applicable law is Singapore law and even if the case has a connection to Singapore.[54]

7. *Court Fees*

The *Rules* detail the court fees to be paid.[55] The fees are not cheap and are quite detailed. Taking first instance fees as an example, the fees vary depending on whether the SICC sits with a one-judge or a three-judge panel. Here is for example the table for so-called "Milestone Fees":[56]

Table 2: Milestone fees

No.	Millestone event	Amount Payable		Payable by whom
		Main action heard by single Judge	Main action heard by 3 Judges	
	All tracks (pleadings, statements and memorials adjudication tracks)			
1	On filing the Originating Application and the Claimant's Statement	$ 3,740	$ 5,390	The claimant
2	On filing the Defendant's Statement	$ 3,740	$ 5,390	The defendant
3	When a person joined as a party to the action files its first document	$ 3,740	$ 5,390	The joined party
4	When parties receive their first notification of a hearing for directions on case management	$ 4,565	$ 7,865	Each party
5	When a party files an interlocutory application			
	(*a*) Simple or consent application	$ 3,000	$ 4,800	The applicant, unless ordered othewise by the Court
	(*b*) Any other interlocutory application	$ 4,000	$ 8,000	The applicant, unless ordered othewise by the Court

[54] Legal Profession Act (n 50) s 35.
[55] SICC Rules (n 16) O. 26.
[56] ibid O. 26, r. 3.

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Table 2: Milestone fees				
No.	**Millestone event**	**Amount Payable**		**Payable by whom**
		Main action heard by single Judge	**Main action heard by 3 Judges**	
	Additionally for pleadings adjudication track			
6	On the date on which witness statements are ordered to be exchanged (excluding any extensions of time)	$ 19,140	$ 22,440	Each party
7	Upon the setting down of the cause or matter for trial	$ 6,655	$ 8,305	Each party
	Additionally for memorials adjudication track			
8	On filing the Memorial	$ 19,140	$ 22,440	The claimant
9	On filing the Counter-Memorial	$ 19,140	$ 22,440	The defendant
10	Upon the setting down of the cause or matter for trial, if any	$ 6,655	$ 8,305	Each party

There are many other fees for different procedures. What can end up costing a lot are the hearing fees which can be up to $9,000 per day for a single judge or $18,000 per day for three judges.[57] Many other fees must also be paid.

However, unlike under many arbitration rules, most of the fees are not linked to the monetary value of the case and do not seem to take into account the number of hours the judges will have to spend reading documents in preparation for the hearing and writing the judgment. Although the fees may seem high when compared to regular court fees in many courts outside of Singapore, these fees are not that high considering how much an arbitration would cost.

For example, a Singapore International Arbitration Centre arbitration in front of three arbitrators in a case worth twenty million Singapore dollars would cost from an average of $468,000.00 to a maximum of $624,000.00 including administrative and arbitrators' fees.[58] Assuming five days of hearing and an average number of applications and fees, the similar case in front of three judges of the SICC could, in my estimate, cost close to $200,000.00. However, if hearing dates are multiplied, as they often are in court, unlike in arbitration, the fees may be somewhat

[57] ibid O. 26, r. 4.

[58] 'SIAC Fee Calculator' <https://siac.org.sg/fee-calculator> accessed 29 December 2022.

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higher. Nevertheless it seems clear that a case in front of the SICC would cost significantly less than in front of an SIAC tribunal.

One of the issues rarely discussed is the subsidy that seems to be hidden behind the relatively low court fees. High Court judges in Singapore are extremely well paid by international standards (as they should be). It is therefore probably the case[59] that the SICC is not self-financed – the fees are probably insufficient to pay for the salaries of the judges, including the travel expenses of international judges,[60] let alone the facilities and personnel of the court. The SICC is therefore most probably state-subsidised, directly or indirectly to the benefit of its users. States everywhere heavily subsidise their courts to make sure justice is accessible, but should the state heavily subsidize litigation by foreign parties on matters that often have no connection to Singapore? Of course, the country will get some benefits from attracting foreign litigation to Singapore – local lawyers will profit as well as the local economy to some extent. The calculations have most probably been made and the investment has been held to be worth it. Similar calculations have been made with respect to arbitration in Singapore which is also indirectly subsidised by the state.[61] This raises the question of the relative importance of state subsidies to the SICC vs to arbitration? Do indirect state subsidies favour one over the other? A more detailed accounting study would be required to answer that question.

8. *Enforcement of Judgments*

Arbitration has the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (hereinafter "New York Convention")[62] – an arbitral award from a convention country is enforceable in some 170 other countries. Court judgments do not have an equally efficient mean of enforcement abroad. This is one of the greatest advantages of arbitration over court litigation – the relative ease of enforcement of awards (at least in principle).

[59] A budget taking into account the expenses of running the SICC including the judges' salaries and other expenses compared to its revenues is not available.

[60] In arbitration, travel expenses are paid by the parties.

[61] For example, until recently, there were no income tax on the Singapore revenues of non-resident arbitrators and lawyers acting in arbitration, which was an indirect subsidy – the government is foregoing a revenue. There are other tax incentives for foreign firms establishing an arbitration practice in Singapore.

[62] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 U.N.T.S 3 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf> accessed 29 December 2022.

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There are however some ways to enforce the judgments of the SICC in many foreign jurisdictions. The SICC has set its hopes on the *Hague Convention*,[63] which came into force on 1 October 2015. It allows the enforcement of foreign judgments when the parties have entered into a choice of court agreement – it is to court judgments what the New York Convention is to arbitral awards. There are now thirty-two countries that are parties to this *Hague Convention*, including all EU jurisdictions (including the UK which was a member of the EU at the time of ratification),[64] Mexico, Montenegro and Singapore. China and the United States have signed the convention but have yet to ratify it. For the Convention to apply, the parties must have entered into a choice of court agreement, therefore, cases transferred to the SICC without such an agreement may not be covered by the Convention, unless one can argue that the choice of the Singapore High Court includes the choice of the SICC which is simply another division of the same Supreme Court.

Also, under the *Reciprocal Enforcement of Commonwealth Judgments Act*,[65] SICC judgments may be enforced in ten jurisdictions: Australia, Brunei Darussalam, India (except the State of Jammu and Kashmir), Malaysia, New Zealand, Pakistan, Papua New Guinea, Sri Lanka, the United Kingdom,[66] and Windward Islands. There is also the *Reciprocal Enforcement of Foreign Judgments Act*,[67] which covers the Hong Kong Special Administrative Region.

In addition, in many common law jurisdictions, one may start an action on a debt and use a SICC money judgment as evidence of a debt.[68] To facilitate the enforcement of such money judgments by common law courts, the Supreme Court of Singapore has signed Memoranda of Guidance as to the Enforcement of Money Judgments with a few courts.[69]

[63] Hague Convention of 30 June 2005 on Choice of Court Agreements <https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e0972510d98b.pdf> accessed 29 December 2022.

[64] It came into force for Denmark on 1 September 2018.

[65] Reciprocal Enforcement of Commonwealth Judgments Act, Rev Ed 2020 <https://sso.agc.gov.sg/Act/RECJA1921> accessed 29 December 2022.

[66] The U.K. is also covered by the Hague Convention.

[67] Reciprocal Enforcement of Foreign Judgments Act, Rev Ed 2020 <https://sso.agc.gov.sg/Act/REFJA1959> accessed 29 December 2022.

[68] For example, a Singapore judgement was enforced as a debt by the Federal District Court for the Southern District of New York (which comprises New York City). See *Kim v Co-op Centrale Raiffeisen-Boerenleebank B.A*, 364 F. Supp. 2d. 346 (S.D.N.Y. 2005) (U.S.).

[69] For example, Bermuda - Supreme Court of Bermuda; State of Qatar - Qatar

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Finally, in some civil law jurisdictions, it is possible to enforce foreign judgments based on the principle of reciprocity. Singapore judgments have been enforced in Japan[70] and mainland China[71] for example.

It remains however that there are fewer avenues for enforcing a judgment of the SICC than an arbitral award in an arbitration seated in Singapore.

9. *What Advantages Does the SICC Have over Arbitration?*

As I mentioned in the introduction, at its website, the SICC stated what it perceives as five advantages of the SICC over arbitration. I will now address those in turns.

1. Over-Formalisation of, Delay in, and Rising Costs of Arbitration – I am not sure that having recourse to the courts is the solution to an over-formalisation of arbitration. However, it is true that the Singapore Courts are extremely efficient and could probably often be more efficient and faster than many arbitrations.[72] Cost-wise, as mentioned above, the SICC seems to be heavily subsidised and therefore indeed the court fees seem low compared to arbitration. It should be noted however that the majority of the costs for the parties are not the court or arbitration fees but lawyers' fees and there probably will not be much of a difference between the fees lawyers will get paid in court vs. in arbitration. Nonetheless with respect to court/arbitration fees, the SICC in most cases wins over arbitration.

2. Concerns About the Legitimacy of, and Ethical Issues in, Arbitration – As mentioned above, investment arbitration faces

International Court and Dispute Resolution Centre; United Arab Emirates, Abu Dhabi - Abu Dhabi Global Market Courts, United Arab Emirates; Dubai - Dubai International Financial Centre Courts.

[70] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Jan. 19, 2006, Hei 18, 1229 Hanrei Taimuzu [HANTA] 334 (Japan). This author has not consulted the text (in Japanese) of the judgment but found references to it, including in T Kono, 'Country Report JAPAN' in A Chong (ed), *Recognition and Enforcement of Foreign Judgments in Asia* (Asian Business Law Institute 2017) 105, 113.

[71] (2016) Su 01 Xie Wai Ren No. 3 Civil Ruling ((2016) 苏 01 协外认 3 号) (Nanjing Interm. People's Ct. Dec. 9, 2016) (China) - as reported in Singapore International Commercial Court User Guides, 1 October 2022, Note 7: Enforcement of ICC Judgment, para 11 <www.sicc.gov.sg/docs/default-source/legislation-rules-pd/2022-09-26---sicc-user-guides-(wef-1oct2022).pdf> accessed 29 December 2022.

[72] It should be noted however that many arbitral institutions have now amended their rules to allow for an expedited procedure in some cases.

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greater challenges to its legitimacy than commercial arbitration does. Investment arbitration involves sovereign states acting as sovereigns (not as commercial entities) and appearing in front of private individuals, the arbitrators, who are often put in a position to, some would say, second-guess the policy choices of a sovereign state. This has led to a certain perception of illegitimacy, even though in fact the sovereign states in question freely agreed, through bilateral investment treaties, to submit themselves to the jurisdiction of such tribunals. As mentioned above, there has been a movement to propose alternatives to the arbitration of investment disputes though the establishment of a more permanent specialised international court.[73]

The legitimacy of commercial arbitration, however, is not a major issue because states are rarely involved and if a state is involved it usually is through a commercial entity own by the state which engages in commercial activities rather than in sovereign acts. There are instances where arbitral tribunal, in deciding commercial cases must also decide issue of public law and public policy and this may indeed raise issues of legitimacy – why should private individuals appointed by non-state entities decide issues of public law and public policy? However, in the vast majority of commercial arbitration cases there are no such public law issues. In any event the SICC would not have more legitimacy than an arbitration tribunal in deciding issues relating to the public policy of another country.

There may be, however, some ethical issues in arbitration—either with arbitrators or with counsel but they remain the exception rather than the rule. Many of the ethical issues relating to the tribunal are, in any event, within the power of the courts to supervise arbitrations—removal of arbitrator for bias or lack of independence, for example.

As mentioned above, the Chief Justice of Singapore has mentioned in the past that one of the problems with arbitration is that there are no common rules of ethics and common Bar regulations for counsel, and that the tribunal has no or very little power to discipline lawyers. This is certainly true and this may give rise to some serious issues in some instances, however this has not been an overwhelming issue that would convince many parties to avoid arbitration entirely. One must concede however that a court is indeed better equipped to discipline lawyers and even parties, witnesses etc. And no one questions the probity of the Singaporean and international judges

[73] See the discussion of *Slovakia v Achmea BV* (n 2) in the introduction.

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who would enforce such ethical rules. Singapore lawyers appearing in front of the SICC would of course be bound by the rules of their profession. What is interesting is that foreign lawyers appearing before the SICC are also bound by a code of ethics and are subject to disciplinary proceedings for any breach of ethics.[74] This is clearly an advantage of the SICC over arbitration in which counsel are not bound by the same ethical rules.

3. The Lack of Consistency of Decisions and Absence of Developed Jurisprudence – One consequence of the confidentiality of arbitrations (which is one of its advantages) is that indeed most awards are not published and do not form a body of jurisprudence. Even if they were published, in arbitration there is no court hierarchy that would bind one arbitral tribunal to the decision of another as is the case for courts in common law jurisdictions. This could indeed lead to some inconsistency in decisions.

However, courts, internationally, are not necessarily much more consistent with one another. For example, the *UNCITRAL Model Law on International Commercial Arbitration* have been inconsistently interpreted by different courts. Even though decisions on the Model Law by courts of many countries are published, often in English, the courts all over the world rarely cite one another on this very same law.

Of course, if parties consistently come to the SICC and to no other court, and choose Singapore law as the governing law, they could benefit from additional consistency – in fact, the parties' choice of court may take into account the jurisprudence of the SICC. However if the governing law is, for example, Japanese law, it is unclear how a judgment of the SICC published in English would increase the consistency of decisions on Japanese law – it is unlikely that such a judgment would have much impact on the law of Japan.

The reality of international trade, however, is that negotiations will lead sometimes to the choice of this court, sometimes to the choice of that court and sometimes to the choice of this arbitral institution, which means that consistency may not be achievable in practice. Nevertheless, if the choice was always between arbitration and the SICC and no other court, especially when the governing law is Singapore law, then indeed there would be more consistency at the SICC.

[74] See Legal Profession (Representation in Singapore International Commercial Court) Rules 2014, particularly its first schedule - the Code of Ethics <https://sso.agc.gov.sg/SL/LPA1966-S851-2014?DocDate=20181022> accessed 29 December 2022.

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4. The Absence of Appeals – The absence of appeals in arbitration is a double-edge sword. It makes for shorter litigation and faster finality, but it also allows for mistakes of law to go uncorrected. Appeals will therefore be appealing to some and not to others. But given the celerity of appeals in Singapore, some parties might indeed be attracted by the possibility of appealing a decision of the SICC.

It should be mentioned however that, in Singapore, even in an international arbitration, the parties can always choose to keep a limited right of appeal on questions of law by choosing to have their arbitration governed by the *Arbitration Act*[75] (which usually governs only domestic arbitration) rather than the *International Arbitration Act*.[76] Under the *Arbitration Act* a party may, under certain conditions, have a right of appeal to the Court on issues of law.[77] Therefore it has always been possible under certain conditions to have appeals on questions of laws in international arbitrations in Singapore. The fact that parties rarely took advantage of this shows that appeals may not be a very attractive proposal.

5. The Inability to Join Third Parties to the Arbitration – Because arbitration is based on consent, it is often impossible to join a third party to an arbitration. Arbitration rules that seemed to allow for the joining of third parties that are not parties to the arbitration agreement have been held to be overreaching.[78] Since the SICC can join a third party, it may seem like a great advantage of the SICC over arbitration. However, in offshore cases with no link to Singapore, the SICC may hesitate to join a foreign third party who

[75] Arbitration Act 2001, Rev Ed 2020 <https://sso.agc.gov.sg/Act/AA2001> accessed 29 December 2022.

[76] S 15 of the International Arbitration Act (n 21) states:

"15. – (1) If the parties to an arbitration agreement (whether made before or after 1st November 2001) have expressly agreed either – (a) that the Model Law or this Part shall not apply to the arbitration; or (b) that the Arbitration Act (Cap. 10) or the repealed Arbitration Act (Cap. 10, 1985 Ed.) shall apply to the arbitration, then, both the Model Law and this Part shall not apply to that arbitration but the Arbitration Act or the repealed Arbitration Act (if applicable) shall apply to that arbitration."

[77] Section 49 of the Arbitration Act (n 76) (not the International Arbitration Act): "Appeal against award. 49. – (1) A party to arbitration proceedings may (upon notice to the other parties and to the arbitral tribunal) appeal to the Court on a question of law arising out of an award made in the proceedings."

[78] See, e.g., *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 (SGCA) [185], which held that "In the final analysis, we find it difficult to accept that the 2007 SIAC Rules empowered a tribunal to join a stranger to the arbitration agreement as a party to the reference."

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has not consented to its jurisdiction. In offshore cases, it is likely that third parties may not be Singaporean or have connections to Singapore and therefore the courts might be hesitant to join a party that is not within the jurisdiction of Singapore.[79]

Other Comparisons – Other points of comparison not mentioned by the SICC website should be mentioned, most of which are advantages of arbitration over courts.

6. Flexibility of Procedure and Rules of Evidence – Arbitration is much more flexible when it comes to procedure and evidence – unless the parties agree to a procedure and to rules of evidence, the tribunal normally has full discretion in matters of procedure and evidence. As we have seen above, the SICC does not have this flexibility in matters of procedure and evidence: the procedure is fixed by the SICC Rules, and as far as evidence is concerned, in the absence of an agreement by the parties, the SICC must follow Singapore's rules of evidence.

7. Role in Choosing the Arbitrators – Parties often appreciate having a role in constituting the arbitral tribunal, something that is not a possibility at the SICC.

8. Enforcement – As mentioned above, it is still easier to enforce an award in more jurisdictions than it is to enforce a judgment of the SICC.

9. Confidentiality – Although, as mentioned above, the SICC may hear cases *in camera* and order the court files to be sealed,[80] the norm will remain a public trial which would lead some parties to prefer arbitration where the norm is a hearing *in camera*. Some arbitration rules even provide for confidentiality as a default which means that a party has a right to confidentiality of the arbitration and the award unless all the parties agree otherwise.[81]

[79] Singapore International Commercial Court User Guides, 1 October 2022, Note 1: Jurisdiction, paras 10-11 <www.judiciary.gov.sg/docs/default-source/news-and-resources-docs/sicc-user-guides-(as-at-31-dec-2021).pdf?sfvrsn=72096d67_2> accessed 29 December 2022.

[80] SICC Rules (n 16) O. 16, r. 9.

[81] See, e.g., Rule 39.1 of the SIAC Rules 2016 <https://siac.org.sg/wp-content/uploads/2022/06/SIAC-Rules-2016-English_28-Feb-2017.pdf> accessed 29 December 2022:"39.1 Unless otherwise agreed by the parties, a party and any arbitrator, including any Emergency Arbitrator, and any person appointed by the Tribunal, including any administrative secretary and any expert, shall at all times treat all matters relating to the proceedings and the Award as confidential. The discussions and deliberations of the Tribunal shall be confidential."

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10. *Conclusion*

It is still too early to tell whether the SICC will become a preferred venue for dispute resolution among the many International Commercial Courts on the "market". It is also too early to tell whether the SICC will have a negative effect on the popularity of arbitration in Singapore. Thus far most cases have been transferred to the SICC from the High Court and there does not seem to be a great rush by parties to choose the SICC.

My hope is that this paper will have shown some of the differences between the SICC and arbitration and that this will allows parties to make informed choices. I personally view as a positive step the addition of the SICC as a choice the parties may make – parties should be offered different modes of dispute resolution and the SICC is certainly a credible alternative to arbitration and to regular courts.

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Xu Qian*

China's International Commercial Courts
An Interdisciplinary Investigation

Table of Contents: 1. Introduction. – 2. Jurisdictional Challenges. – 3. The Problems of Transnational Enforcement. – 4. Other Viability Issues: Judicial Change and Legal Culture in China. – 5. Solving the right problems: directions for CICC reform. - 5.1. State control matters: the political-economy accounts. -5.2. The role of history and culture in developing the CICC: a sociological perspective. – 6. Conclusion.

1. *Introduction*

In the global development of new international commercial dispute resolution centers, the China International Commercial Court (CICC) represents a genuine innovation in China's legal history. The CICC aims to become a dispute resolution "one stop shop" (combining litigation, arbitration, and mediation) for Belt and Road Initiative (BRI) related disputes. Despite its name and ambition, however, the CICC operates more like a domestic court. The CICC's stringent jurisdictional requirements and conservative institutional design show that the CICC cannot serve its stated objective of attracting new investment opportunities or foreign parties to the Chinese forum.[1] These defects are not fatal but will have to be addressed for the CICC to reach its full potential of hybridization of litigation and arbitration both in and beyond

* Associate Professor & "Hundred Talents Program Fellow" at Guanghua Law School, Zhejiang University, Zhejiang, China. This article draws partially on Xu Qian 'The Legitimacy of the China International Commercial Court (CICC): Historical, Geopolitical and Legal Reflections' (2020) 28(2) APLR 360; J Chaisse and X Qian, 'Conservative Innovation: The Ambiguities of the China International Commercial Court' (2021) AJIL Unbound 17.

[1] Z Yongjian, 'Towards a Fair, Efficient and Convenient Dispute Resolution Mechanism for B&R-related International Commercial Disputes: China's Practice and Innovation' (*CICC*, 2 July 2018) <https://cicc.court.gov.cn/html/1/219/199/203/831.html> accessed 31 January 2023.

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China. The BRI will encounter significant challenges given that the contracting parties are from diverse legal systems, and the countries along the BRI are at different stages of development. Most studies have focused on the need for, and merits of, the establishment of the CICC, noting that it is "potentially most innovative in providing multiple mechanisms for dispute resolution," considering its function as a "one-stop shop" dispute resolution platform.[2] While some may see the "one-stop shop" more as a branding exercise, many other international commercial courts have the same type of ambition.[3] Commentators also highlight the challenges faced by the CICC in terms of its procedural limitations and general functioning.[4]

China has been influenced by the sophisticated international models of difference between common law and civil law through its participation in the international economy and fulfilling its international commitments. The principle of the rule of law is increasingly taking a more prominent position in the country; in this connection, the BRI will undoubtedly change China's role in international relations in a comprehensive manner.[5]This essay analyzes whether the creation of the CICC will fulfil the dispute resolution functions required for the successful operation of the BRI by focusing on two key challenges it will face: the court's jurisdiction and the enforceability of its judgments. The broader conceptual framework of this article is drawn from political-economy and sociological analysis, because it helps to understand the philosophy behind the establishment of the CICC and its limitations. The article demonstrates that the CICC should be positioned as a mechanism for domestic reform in purpose (i.e. object to be reached) and function (i.e. what the CICC does or is used for).

[2] MS Erie, 'The China International Commercial Court: Prospects for Dispute Resolution for the "Belt and Road Initiative' (Aug. 31, 2018) 22(11) ASIL Insights. See also M Feldman, '"One-Stop" Commercial Dispute Resolution Services: Implications for International Investment Law' in J Chaisse and others (eds) *Handbook of International Investment Law And Policy* (Springer Singapore 2020) 2.

[3] S Finder, 'Comments on China's International Commercial Courts' (9 July 2018) SPC Monitor.

[4] W Cai and A Godwin, 'Challenges and Opportunities for the China International Commercial Court' (2019) 68 ICLQ 837.

[5] See general J Chaisse and X Qian, 'The China International Commercial Court - Architecture, Pitfalls, and Promises' in S Brekoulakis and G Dimitropoulos (eds), *Hybrid Dispute Resolution Fora and Global Governance* (Cambridge University Press 2021).

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2. *Jurisdictional Challenges*

The CICC does not enjoy universal or broad subject-matter jurisdiction. On the contrary, its jurisdiction is narrowly crafted to cover disputes related to international commercial and civil matters. This does not include investor-state disputes or inter-state trade disputes.[6] The CICC only has jurisdiction over the five main types of commercial and civil disputes that are provided for in the 2018 judicial interpretation issued by the Supreme People's Court (Judicial Interpretation on the CICC).[7]The CICC may assume jurisdiction either based on the parties' consent or pursuant to a referral by the Higher People's Court with the approval of the Supreme People's Court (SPC). Article 2(1) and Article 2(4) of the Judicial Interpretation on the CICC specify that the CICC's jurisdiction over disputes with a monetary value of over RMB 300 million is based on the written consent of the parties. This consent is only valid in the case of disputes that have an actual connection to China.[8] Articles 2(2), 2(3) and 2(5) of the 2018 Judicial Interpretation on the CICC allow for alternative ways for the CICC to establish jurisdiction, for instance, through referral from higher courts, or at the behest of the SPC if the cases have significant national impact. However, at this stage, it is still unclear how the SPC will exercise this judicial discretion. As of late 2020, the CICC had only heard cases referred from the lower courts rather than on the basis of the

[6] Justice Yongjian, (n 1).

[7] Namely, cases in which the parties have chosen the jurisdiction of the SPC with an amount in dispute of at least 300 million Chinese yuan; cases which are subject to the jurisdiction of the higher People's courts that nonetheless considers the cases should be tried by the SPC; cases that have a "significant nationwide impact"; cases involving applications for preservation measures in arbitration, for setting aside or enforcement of international commercial arbitration awards; and, finally, any other international commercial cases that the SPC considers "appropriate" to be tried by the International Commercial Court. See Zuigao renmin fayuan guanyu sheli guoji shangshi fating ruogan wenti de guiding (最高人民法院关于设立国际商事法庭若干问题的规定) [Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court] issued by the Supreme People's court, June 25, 2018 and effective July 1, 2018, (hereinafter 'Judicial Interpretation on the CICC'), art 2.

[8] The origin of this rule is Article 34 of Chinese Civil Procedure Law, which stipulates that the court chosen by the parties must have an actual connection with the dispute. See Zhonghua renmin gongheguo minshi susongfa (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China], promulgated by the Standing Committee of the National People's Congress on Apr. 9, 1991 and revised on Jun. 27, 2017, (hereinafter 'CPL'), art 34.

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consent of the parties. Moreover, none of the cases published on the CICC's official website have been BRI-related disputes.

It is also noteworthy that the CICC's jurisdiction is limited to international commercial disputes. According to Article 3 of the Judicial Interpretation on the CICC, a commercial case is international if it passes the "three-element test" in defining a "foreign element", that is, either the parties, subject matter, or factual circumstances has a connection with a foreign jurisdiction.[9] The CICC is part of the SPC and before the creation of the CICC, parties were not allowed to choose the SPC to hear international commercial disputes. In this respect, the SPC referring matters to the CICC may prove attractive, especially if the parties are inclined to submit their disputes to a Chinese court, or if the cases are already under Chinese jurisdiction. If consent to the CICC's jurisdiction becomes a precondition for Chinese investment along the BRI, the CICC may quickly gain prominence.[10] However, such a jurisdictional approach poses many difficulties in practice.[11]

3. *The Problems of Transnational Enforcement*

The enforceability of court judgements in a foreign jurisdiction is a major issue for all courts. There is no international treaty on the recognition and enforcement of foreign court judgments comparable to the New York Convention for the recognition of foreign arbitral awards. This means that if a Chinese party prevails against a foreign party in the CICC, the Chinese party would likely have trouble getting the Chinese court judgment recognized and enforced by a court outside China. This is not the situation when the disputes are resolved by arbitration institutions under the CICC, as the enforcement of arbitral awards is guaranteed under the New York Convention. At the international level, China has signed but not

[9] Judicial Interpretation on the CICC, art 3. See also Z Huo, 'Two Steps Forward, One Step Back: A Commentary on the Judicial Interpretation on the Private International Law Act of China' (2013) 43 Hong Kong L J 692.

[10] It is arguable whether consent to the CICC's jurisdiction will become a precondition for BRI projects as many BRI cases are not investment cases, they are construction disputes. Whether the CICC has the capacity to handle a high volume of cases also depends on local law and the bargaining power of the parties. See generally S Finder, 'Some Comments on the China International Commercial Court Rules' (11 February 2019) SPC Monitor.

[11] See general, Chaisse and Qian (n *).

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ratified the Hague Convention on Choice of Court Agreements. The enforcement of court judgments is based on bilateral judicial assistance treaties in civil and commercial matters under conditions of reciprocity. As of August 2018, China has signed thirty-nine bilateral treaties on judicial assistance in civil and commercial cases, thirty-seven of which have already come into effect.[12] In practice, this covers only a small number of the BRI countries and regions. To improve enforceability, China may consider ratifying the Hague Convention in the future. Reciprocity, however, is unlikely to provide a reliable basis for seeking enforcement of CICC judgments abroad, since the issue of reciprocity would be determined solely by the court in the foreign jurisdiction. This uncertainty may hinder the development of the CICC, as parties will not be able to predict with confidence whether a foreign jurisdiction will recognize a CICC judgment.

At the local level, the enforceability of the CICC's judgments is guaranteed by Article 15 of the Judicial Interpretation on the CICC, which stipulates that all judgments and orders made by the CICC are legally binding. There is no appeals system under the CICC, as it is part of the SPC, the highest court in China, so the judgments are final. In this respect, the CICC is not without attraction, especially when the defendant is a Chinese SOE with assets located primarily in China. If the dispute is resolved by mediation the CICC can, at the parties' request, convert the mediation agreement into a court order to facilitate its enforcement.[13] Considering the CICC's fundamental objective to be a "one-stop shop" for dispute resolution for BRI related disputes, the enforcement issue relating to SOEs in China could be a pragmatic or even instrumental means to facilitate the wider acceptance of the use of the CICC in BRI disputes.

4. *Other Viability Issues: Judicial Change and Legal Culture in China*

Much is still unclear about how the CICC will function. Article 9 of the Judicial Interpretation on the CICC provides the rules of evidence. Evidence can be submitted before the CICC in English

[12] L Dongchuan, 'Consultation, Cooperation and Common Development - Keynote Speech at the First Seminar of the International Commercial Expert Committee' (*CICC*, 26 August 2018) <https://cicc.court.gov.cn/html/1/219/199/203/1063.html>.

[13] Judicial Interpretation on the CICC, arts 11-13.

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and without translation upon the parties' consent, a rule that is laudable at first sight as it aims to reduce translation costs for the parties. However, the proceedings will be conducted in Chinese, and hence English-language evidence will need to be translated, introducing some degree of uncertainty.[14] In addition, parties to the proceedings are not permitted to appoint foreign lawyers, which might be preferable to litigants of foreign nationalities (and when the applicable law is foreign law as agreed by the parties).

On a different but related matter, it is noteworthy that only Chinese citizens can serve as judges on the CICC,[15] even if the applicable law is foreign law, and only Chinese-admitted lawyers can act as legal representatives. To "internationalize" itself (both within China and beyond throughout the BRI), the CICC has established an expert committee as an institutional innovation within a rigid and traditional legal system. While the practical value of this committee remains to be seen, the CICC faces the challenge of not being able to attract leading international experts and not using sufficiently flexible rules of representation for foreign lawyers. Furthermore, CICC judges are surprisingly only appointed to the court on a part-time basis. They will continue to have ongoing responsibilities in the SPC and will be simultaneously burdened with cases in other fora.[16]

5. *Solving the right problems: directions for CICC reform*

Clearly, the CICC was not established to compete for the best international practice for commercial arbitration. Due to its design and procedural limitations, much is still unclear about how the court will function. In this connection, there arises a broader conceptual question: how do the Chinese authorities want to frame the CICC to address its limitations and serve the adjudicative needs of the

[14] Zhonghua renmin gongheguo minshi susongfa (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China], promulgated by the Standing Committee of the National People's Congress on Apr. 9, 1991 and revised on Jun. 27, 2017, (hereinafter CPL), art 11, art 162

[15] Zhonghua renmin gongheguo faguanfa (中华人民共和国法官法) [Judges Law of the People's Republic of China], promulgated by the Standing Committee of the National People's Congress on Feb. 28, 1995 and revised Apr. 23, 2019, art. 12(1).

[16] See S Finder, 'China International Commercial Court Starts Operating' (14 January 2019) SPC Monitor (identifying Judge Zhang Yongjian as having three simultaneous administrative roles, as the Deputy Chief Judge of the First Circuit Court of the SPC, head of the SPC Fourth Civil Division and head of the First CICC).

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BRI? Different reform suggestions follow from each conception. In this section, this article analyses general trends in terms of how the Chinese authorities may perceive the CICC: namely, the political-economy and sociological perspectives.[17] In subsection A, we will discuss likely reforms from a political-economy perspective; in subsection B, we will look at the reforms from a sociological perspective.

5.1. *State control matters: the political-economy accounts*

Political realism considers 'the principal actors in the international arena to be states, which are concerned with their own security, act in pursuit of their own national interests, and struggle for power'.[18] According to Waltz, the states in international systems are like firms in a domestic economy and have the same fundamental interest, which is to survive.[19] Internationally, 'the environment of states' actions, or the structure of their system, is set by the fact that some states prefer survival over other ends obtainable in the short run and act with relative efficiency to achieve that end'.[20] In a subsequent work, the political realist Keohane accepts Waltz's general assumption that states' self-interested actors rationally pursue their goals, but employing game theory, he shows that states can broaden their perceived self-interest through economic cooperation and involvement in international institutions.[21] This political-economy account explains why states behave in a similar way despite their different forms of government and diverse political ideologies — the similarities are due to their growing interdependence. This may also help to explain the phenomenon of emerging international

[17] Z Mollengarden, '"One-Stop" Dispute Resolution on the Belt and Road: Toward an International Commercial Court with Chinese Characteristics' (2019) 36(1) UCLA Pac Basin L J 65, 72. Mollengarden argues that 'there is a middle way - an approach that interprets China's international commercial dispute resolution policies as a product of continuity as well as change, influenced as much by internal dynamics as external imperatives'. A nuanced understanding of 'China's ambitions for, and the likely functioning of, an ICC with Chinese characteristics requires proceeding from China outward and from the international arena inward'.

[18] JW Korab-Karpowicz, 'Political Realism in International Relations', *The Stanford Encyclopedia of Philosophy* (7 July 2010) <https://plato.stanford.edu/entries/realism-intl-relations/> accessed 22 May 2020.

[19] ibid.

[20] K Waltz, *Theory of International Politics* (McGraw-Hill 1979) 93.

[21] See generally, RO Keohane, *International Institutions and State Power: Essays in International Relations Theory* (1st edn, Westview 1989).

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commercial courts, the diverse patterns of governance among states notwithstanding.

In this respect, China's policies towards international commercial dispute resolution are responding to the same ambitions and imperatives as are any other state'.[22]In line with its rapid economic growth, China in 1998 endorsed the 'Going Out' policy, which aims at positively exploring international markets, taking advantage of resources abroad, and strengthening the development impetus and potential of the Chinese economy.[23] The BRI marks such reform, and in this case, the political-economy school contributes to an understanding of China's investment policies. Indeed, some scholars describe China as embracing international standards in its treaty-making practices for investment protection.[24] Nonetheless, China needs to retain some control in order to manage the risks associated with the 'Going Out' strategy for Chinese transnational corporations. When it comes to the CICC, China needs to strike a balance between parties' autonomy, as appreciated in international commercial arbitration, and state control in the dispute resolution process. The CICC's jurisdictional and internationalization limitations are the result of such considerations. Another pertinent example can be found in the Fifth Forum on China-Africa Cooperation (FOCAC) - a legal forum which was jointly hosted by the China Law Society and the Attorney-General's Office of the Republic of Angola, where delegates discussed the development of a dispute resolution mechanism 'with Chinese and African characteristics'.[25]

5.2. *The role of history and culture in developing the CICC: a sociological perspective*

The alternative, sociological account argues that any analysis of the CICC should refer to China's history and culture. In a modern legal landscape, international commercial arbitration is perhaps the best subject for a case study of interactions between culture and aw.[26] On

[22] Mollengarden (n 17) 72.

[23] C Cai, 'Outward Foreign Direct Investment Protection and the Effectiveness of Chinese BIT Practice' (2006) 7 J World Invest & Trade 621, 627.

[24] W Shan, N Gallagher, and S Zhang, 'National Treatment for Foreign Investment in China: A Changing Landscape' (2012) 27 ICSID Review 120, 141.

[25] A Osman, 'China's Maritime Silk Road and the Future of African Arbitration' (2017) 3 Transnational Dispute Management 9.

[26] J Karton, 'Beyond the "Harmonious Confucian": International Commercial Arbitration and the Impact of Chinese Cultural Values' in C Lo, NNT Li and T Lin

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the one hand, this field is highly globalized, with standard practices widely followed, and on the other, the variety of national laws and flexible procedures enable parties to shape proceedings to suit their preferences.[27] There is tremendous literature on Chinese people's traditional reluctance to litigate and the preference for informal and private mechanisms for dispute resolution in international commercial affairs.[28]

This sociological perspective attempts to explain the characteristics that 'Chinese-style' dispute resolution is purported to have, and explores the factors which have influenced those identified characteristics. Commentaries have focused on the Chinese practice of combining mediation with arbitration in a single proceeding. However, to what extent this characteristic is unique to dispute resolution remains arguable, as reaching a higher degree of settlement is not a peculiarly Chinese characteristic.[29]

In terms of the BRI, the sociological account contemplates how the CICC will allow China to bring its preference for disputes under the BRI, and hence predicts that mediation and consultation are likely to play the most prominent roles.[30] Such thinking may well be reflected in the 'one-stop shop' dispute resolution platform. This provides a full menu for parties to choose their preferred method for resolving a dispute, while only operating with Chinese institutions.

6. *Conclusion*

International commercial courts and their very design features may allow them to facilitate cross-border commercial transactions. However, these also point to a larger contradiction between the 'rule of law' and non-democratic governments, as they can never fully eclipse state politics. An interdisciplinary enquiry based on political-

(eds), *Legal Thoughts Between the East and the West in the Multilevel Legal Order* (Springer 2016) 520.

[27] ibid 521.

[28] C Vera, 'Arbitrating Harmony: Med-Arb and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China' (2004) 18 Col J Int'l L 149; G Kaufmann-Kohler and K Fan, 'Integrating Mediation into Arbitration: Why It Works in China' (2008) 25 J Int'l Arbit 479; F Kun, 'Glocalization of Arbitration: Transnational Standards Struggling with Local Norms Through the Lens of Arbitration Transplantation in China' (2013) 18 Harv Neg L R 175.

[29] Karton (n 26) 521.

[30] Mollengarden (n 17).

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economy and sociology can help us understand the underlying logic of creating such international commercial courts. From a political-economy perspective, the creation of self-interested international commercial courts is not surprising; what truly matters is whether the mechanism fully corresponds to the legislation in serving unstated political objectives. Under the current Chinese legal framework, as discussed earlier, the extent to which the CICC will serve the needs of the BRI is highly questionable.

As has been noted, national companies have access to cheap credit because they are backed by subsidies and administrative help. In such cases, they are less concerned about short-term returns and are willing to take more risks. Therefore, they can plan for long-term investment instead of short-term ones, and hence the bids they offer can be higher than those of their competitors, the privately owned companies. Despite the fact that many governments have used judicial institutions to maintain control, to govern and to enhance political capital while not altering the character and sovereignty of their society, the key is to have a stable and predictable rule of law system firmly in place.

The limitations of the CICC are not mere technical defects. Rather, they are the direct result of how the Chinese authorities perceive the CICC. Different perceptions follow the various trajectory explanations of the CICC's creation and legitimization. In the long run, this also affects how the CICC will function and determines whether reforms will be successful, rather than positioning CICC as a miniature engine for extra-governance strategy. This article argues that the CICC could have a positive impact on China's efforts to create a predictable, fair and transparent dispute resolution mechanism as long as it is understood as an engine for domestic reform.

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Salvatore Mancuso*

The OHADA Common Court of Justice and Arbitration (CCJA)

Table of Contents: 1. Introduction. – 2. The role of the Common Court of Justice and Arbitration. – 3. Conclusions.

1. *Introduction*

For a long time, the economic operators have been suspicious toward sub-Saharan African countries due to the legal and judicial insecurity prevailing there. Legal insecurity coming from the antiquity of the laws in force in almost all those countries, the inadequacy of such texts with respect to the needs of the modern economy, the extreme delay or even the absence of publication of legal rules. Judicial insecurity coming from the decay in doing justice due to the slowness of the cases, to the unpredictability of the courts, the corruption of the judicial system, the difficulty in the enforcement of the judgments.

Due to the consequent lack of investments, the need for a complete rebuilding of the judicial system in the area of business law has been felt to entrust again the economic operators towards the African countries.[1] In this view the idea of the unification of African laws has been considered as the unique solution to eliminate such obstacle to the development amounting to the judicial difference.[2]

* Associate Professor at University of Palermo, Department of Political Sciences and International Relationships, Italy. Honorary Professor of African Law at Center for African Laws and Society, Xiangtan University, P. R. of China. Visiting Professor at Somali National University, Somalia.

[1] K Mbaye, 'Avant propos' (2000) 827 (numéro spécial OHADA) Revue Penant 125.

[2] The problem of diversity of laws has been always considered an important issue with reference to African law. Since the attainment of independence, the issue of harmonization of laws in Africa has been addressed: Professor Anthony Allott observed that "*the move towards integration or unification of laws has been a consequence of independence, of the desire to build a nation, to guide the different*

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Then the Organization for the Harmonization of African Business Laws (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires* - OHADA)[3] was established by a Treaty among African countries mainly in the French-speaking area[4] and belonging to the Franc zone, signed in Port Louis, Mauritius, on 7 October 1993 and entered into force on July 1995.[5] The objective is the implementation of a modern harmonized legal framework in the area of business laws in order to promote investment and develop economic growth. The Treaty calls for the elaboration of uniform acts to be directly applicable in member states notwithstanding any provision of domestic law. According to Article 3 of the OHADA Treaty as revised in 2008, OHADA consists of the Conference of the Heads of States and Government (*Conférence des Chefs d'Etat et de Gouvernement*) of the member countries, a Council of Ministers assisted by a Permanent Secretary,[6] a Common Court of Justice and Arbitration (*Cour Commune de Justice et d'Arbitrage* - CCJA),[7] and a training school for judicial personnel and lawyers (*École Régionale Supérieure de Magistrature* - ERSUMA).[8]

In particular, uniform law takes concrete form with the adoption of texts called uniform acts. These acts are prepared by the Permanent Secretariat of OHADA in consultation with the governments of the states parties to the Treaty through the local OHADA Commissions. The Council of Ministers, a body established under the Treaty which includes the ministers of justice and finance of the member countries, discusses and adopts the acts on the advice of the Common Court of Justice and Arbitration (CCJA). It is useful to keep in mind that national parliaments are excluded from the proceedings for adopting uniform acts. The Council of Ministers has sole competence in this area. This makes it possible to avoid the drawbacks of indirect procedures that could lead to the adoption of conflicting legal texts

communities with their different laws to a common destiny". See AN Allott, 'Towards the unification of laws in Africa' (1965) 14 Int Comp L Quart 366.

[3] See the OHADA's website at <www.ohada.com> where the full text of all Uniform Act, as well as the related cas law and a selected bibliography can be found.

[4] 15 out of the 17 present member countries are French-speaking countries.

[5] Today 17 countries have joined OHADA, namely Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Republic of Congo, Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Ivory Coast, Mali, Niger, Senegal and Togo. Membership negotiations are underway with Burundi and Madagascar that showed interest in joining OHADA.

[6] The Permanent Secretariat is based in Yaoundé, Cameroon.

[7] This Court is based in Abidjan, Ivory Coast.

[8] The school is located in Porto Novo, Benin.

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that would be difficult to implement. The acts become effective after their publication in the Official Gazette of OHADA,[9] without the need for additional domestic legislation from the States parties. They are directly applicable and binding in all OHADA countries, notwithstanding any contradictory provisions in existing or future national laws.[10] All the domestic legislations that are not in compliance with the OHADA Uniform Acts in the same matters are repealed by the same enactment of the new Uniform Act.[11]

The institutional organization provided by the OHADA Treaty is quite simple and all the competences are well defined. Anyway, despite its high level of integration very close to the one of legal uniformization, the OHADA leaves to the role of the member states an extreme importance: their domestic legal systems remain fully in force apart from what is covered by the uniform acts, and the determination and imposition of criminal sanctions set forth in the uniform acts remains of competence of such member states. It is then correct to say that we are in the presence of a "*harmonisation fortement uniformisante*".[12]

Up to now, the Uniform Acts that have been adopted relate to General Business Law, Company Law and Pooling of Economic Interest, Organization of Securities, Bankruptcy Law, Debt Collection and Enforcement Law, Accounting Law, Arbitration, Contracts for the Carriage of Goods by Road, Mediation, and Cooperative Companies.[13] This legislation is affecting business operations that are of particular interest for foreign investors.

The OHADA experience showed the ability of the Council

[9] Unless otherwise provided in the text of the uniform act, the uniform acts enter into force 90 days after their publication in the OHADA Official Journal.

[10] See S Mancuso, *Diritto commerciale africano* (ESI 2009).

[11] Article 10 of the OHADA Treaty provides that "*Les Actes uniformes sont directement applicables et obligatoires dans les Etats parties nonobstant toute disposition contraire de droit interne, antérieure ou postérieure*" The text of all OHADA Uniform Acts are available at <www.ohada.org>. See M J Vital Kodo, *L'application des Actes uniformes de l'OHADA* (Bruylant - PUR 2010); J Issa-Sayegh, 'La portée abrogatoire des Actes uniformes de l'OHADA sur le droit interne des Etats-Parties' (2001) 40 Rev Burkinabe Dr 51.

[12] This definition is from R Masamba, 'L'OHADA et le climat d'investissement en Afrique' (2006) 855 Revue Penant 137.

[13] The bibliography on the OHADA is now extremely wide. The law journal "Revue Penant" dedicates most of each quarterly issue to doctrine and cases related to OHADA. For a general overview on the OHADA see: 'L'organisation pour l'harmonisation en Afrique du droit des affaires (OHADA)' 205(13 octobre 2004) Petites Affiches; J Issa-Sayegh, 'L'intégration juridique des Etats africains dans la zone franc' (1997) 823 and 824 Revue Penant 5 and 120; J Issa-Sayegh, 'Quelques aspects techniques de l'intégration juridique : l'exemple des actes uniformes de l'OHADA'

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of Ministers to enact norms of high quality, and of the CCJAA to properly deal with solutions to the conflicts of laws. The harmonization work is very active and properly supported by the member states.

This new legal framework also provides a mechanism for the settlement of disputes, one of the goals of the Treaty being to establish judicial security in the countries involved.[14] The CCJA is the highest level of jurisdiction for all matters involving the application of the Treaty, as well as the Uniform Acts. It has jurisdiction over judicial (it rules on decisions rendered by the Courts of Appeal of the member states) and arbitration matters (supervisory role to the appointed arbitrators and granting enforceable status to the award), thus ensuring the harmonized interpretation of the Treaty, Uniform Acts and corresponding regulations and arbitration agreements.[15]

Today there are also initiatives already in place in the OHADA environment with reference to the adoption of uniform acts on the law of specific contracts,[16] labour law, and (possibly) procurement law.

(1999) 4 Unif L Rev 5; G Kenfack Douajni, 'L'abandon de souveraineté dans le traité OHADA' (1999) 830 Revue Penant 125; J-J Raynal, 'Intégration et souveraineté: le problème de la constitutionnalité du traité OHADA' (2000) 832 Revue Penant 5; B Boumakani, 'Le juge interne et le droit OHADA' (2002) 839 Revue Penant 133; M Kirsch, 'Dixième anniversaire de la signature du Traité concernant l'harmonisation du droit des affaires en Afrique (Libreville, 17 octobre 2003)' (2003) 845 Revue Penant 389; L Benkemoun, 'Quelques réflexions sur l'Ohada, 10 ans après le Traité de Port-Louis' (2003) 843 Revue Penant 133; C Sietchoua Djuitchoko, 'Les sources du droit de l'organisation pour l'harmonisation en Afrique du droit des affaires (OHADA)' (2003) 843 Revue Penant 140. The website <www.ohada.com> has a wide collection of articles doctrine about OHADA, as well as many other website established at local level.

[14] P Meyer, 'La sécurité juridique et judiciaire dans l'espace OHADA' (2006) 855 Revue Penant 151.

[15] Issa-Sayegh, 'Quelques aspects techniques' (n 13) 12

[16] This is the choice that the Permanent Secretariat decided to pursue after that the project to prepare a uniform act on contract law has been abandoned. Further to a request by the Council of Ministers of the OHADA to UNIDROIT to provide its expertise in preparing a draft law in the light of the UNIDROIT Principles of International Commercial Contracts, Professor Marcel Fontaine, the Belgian member of the UNIDROIT Principles working group, undertook to prepare, on behalf of UNIDROIT, a draft OHADA Uniform Act on Contract Law. On this project see M Fontaine, 'Le projet d'acte uniforme OHADA sur les contrats et les principes d'UNIDROIT relatifs aux contrats du commerce international' (2004) 9 Unif L Rev 253; F Onana Etoundi, 'Les Principes d'UNIDROIT et la sécurité juridique des transactions commerciales dans l'avant-projet d'Acte uniforme OHADA sur le droit des contrats' (2005) 10 Unif L Rev 683; S Kofi Date-Bah, 'The UNIDROIT Principles of International Commercial Contracts and the Harmonisation of the Principles of Commercial Contracts in West and Central Africa' (2004) 9 Unif L

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2. *The role of the Common Court of Justice and Arbitration*

The OHADA Treaty established the Common Court of Justice and Arbitration (*Cour Commune de Justice et d'Arbitrage* - CCJA) whose task is to "*[…] rule on, in the Contracting States, the interpretation and enforcement of the present Treaty, on such Regulations as laid down for their application, and on the Uniform Acts. […] By way of appeal, the Court shall rule on the decisions pronounced by the appellate courts of Contracting States in all business issues raising questions pertaining to the application of Uniform Acts and to the Regulations provided for in the present Treaty. […] The Court will rule as above with regard to non-appealable decisions delivered by any national court of the Contracting States which pertains to those matters brought to the attention of the Court by virtue of the above paragraphs. While sitting as a court of final appeal, the Court can hear and decide points of fact*".[17] The CCJA plays then a jurisdictional role when acting as court of last instance or arbitration court for business law cases, and an advisory role when secures the common interpretation and application of the Treaty and the Uniform Acts under request of the member countries, the Council of Ministers, and the national courts.[18]

The CCJA is a supranational jurisdictional court whose decisions became *res judicata* and are enforceable in the territory of each member state.[19] It is a sort of "supranational court" created through the agreement among the OHADA member states to work as their supreme court in all matters falling within the application of the Treaty and the Uniform Acts. Consequently, all the Supreme Courts of the member countries are deprived of their judicial power whenever the application of OHADA business law is involved. Any supreme court of the member states resorted to adjudicate on issues where the application of any OHADA Uniform Act is involved

Rev 269. The project has been criticised by many scholars from OHADA countries for being too far from the French regulation of contract law and challenged by a counter-project promoted by the Fondation Droit Continental. None of them has been finally adopted.

[17] See art 14 of the OHADA Treaty.

[18] On the CCJA in general see I Said, *Le rôle de la CCJA dans l'architecture juridique de l'OHADA*, (Editions Universitaires Europeennes 2014); C Moore Dickerson, 'The OHADA Common Court of Justice and Arbitration: Its Authority in the Formal and Informal Economy' in K J Alter, L R Helfer, and M R Madsen (eds), *International Court Authority* (OUP 2018), 103.

[19] See G Kenfack Douajni, 'Les conditions de la création dans l'espace OHADA d'un environnement juridique favorable au développement' (1998) (1 janvier-avril) Rev Jur Pol Ind Coop 39.

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shall declare itself incompetent in favor of the CCJA,[20] and some attempts to restore the old national sovereignty rules through the denial of such new jurisdictional principles have been immediately censored and blocked.[21] In any case a decision adopted by a national judge who declared itself competent in lieu of the CCJA is declared by the Treaty as *ultra vires*, and therefore null and void.[22]

The powers provided to the CCJA are wider than those normally proper of a national supreme court and represent one of the main characteristics of the CCJA. When resorted, the CCJA ensures the common and official interpretation of the Treaty and the Uniform Acts, but it is also the judge of last instance for the case, and it can adjudicate also on the merits. Therefore, a relevant part of the powers normally proper of the national supreme courts is renounced with reference to business law cases. The only part left to the sovereignty of the national jurisdictions is the determination of criminal sanctions; since some uniform acts contain rules that identify facts considered as crimes but leave to each member state the power to determine the punishment according to the rules of criminal law of each state.[23] The CCJA competence is fully attractive with reference to the adjudication power of national cases, up to the point that the CCJA can decide also matters where national law shall be applied in connection with the application of OHADA Uniform Acts and the case is brought to the decision of the same CCJA.

In order to exactly determine the area of competence of the CCJA and – consequently – the ambit of the renunciation of sovereignty by the member States in the subject matter it shall be remembered that "*litigation regarding the implementation of Uniform Acts is settled in the first instance and on appeal within the courts and tribunals of the Contracting States*",[24] who respectively keep therefore their full

[20] See Article 51 of the Rules of Procedure of the CCJA, available at <https://www.ohada.com/uploads/actualite/3247/CCJA_Procedural_Rules_EN_Reviewed_Foubla.pdf> accessed 17 October 2022.

[21] In Guinea in the past, the lawyers systematically refused to resort the national Supreme Court in favor of the CCJA in affairs related to business law.

[22] See Article 18 paragraph 3 of the OHADA Treaty. On the relationship between the CCJA and the national supreme courts see RM Assi N'Guessan, 'La collaboration entre la CCJA et les juridictions nationales de cassation dans le cadre du droit OHADA' (Thèse de doctorat en Droit des affaires, Université de Perpignan 2018).

[23] Anyway, it should be noted that discussions on the revision of the OHADA Treaty involve the possibility to grant to the Council of the Ministers the power to also determine the criminal sanctions, in view of securing the same treatment for the same event in all the Contracting States.

[24] See art 13 of the OHADA Treaty.

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competence to adjudicate business law cases, being renounced only the power of adjudicate at national level the cases for the last instance.

The competence attributed by the Treaty to the CCJA deprives the national supreme courts of their power of final ruling in all matters falling within the area of application of the Treaty. In this area the competence of the CCJA is absolute and the only intervention of the national authorities is reserved to affix the execution of judgment order, where their activity is merely limited to check the authenticity of the document.[25] Also, with reference to the arbitration procedure, it is equally provided that the award pronounced in compliance with the rules provided in the Treaty shall have final and conclusive authorities in the territory of each member state as judgment delivered by its national courts; such decisions may be enforced and executed by an order of exequatur and only the CCJA has jurisdiction to pronounce an order of exequatur.[26]

Therefore, even if the national courts of first and second instance keep their competence on business law cases under Article 13 of the Treaty, it is undoubted that with the attribution to the CCJA of the exclusive competence as court of last instance as well as the power to pronounce an order of exequatur in case of arbitral awards, there is an important transfer of competence from the national jurisdictions to a supranational jurisdiction. Then the OHADA Treaty – always further to a decision taken by the same member states – deprives the member countries of part of their judicial power, and introduces a limitation to their sovereignty, being the exercise of such power on of its fundamental expressions.[27]

Surely the exercise of the judicial power through the national courts is set forth in almost all the constitutions of the OHADA member states, but those rules have essentially internal effect and do not prevent the country to participate to a judicial institution not contemplated among those to which the exercise the judicial power is referred at a level different from the national, as it has been noticed by the constitutional courts of Benin and Senegal.[28]

With reference to the composition of the CCJA, after a series of revisions, the Court presently has thirteen judges selected by the

[25] See Article 46 paragraph 1 of the Rules of Procedure of the CCJA

[26] Article 25 paragraphs 1, 2 and 3 of the OHADA Treaty.

[27] Raynal, 'Intégration et souveraineté' (n 13) 10.

[28] See the Decision of the Constitutional Court of Senegal n. 3/C/93 of 16 December 1993 and the Decision of the Constitutional Court of Benin n. DCC 19-94 of 30 June 1994, both available through the website <www.ohada.com>.

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Council of Ministers of OHADA among the nationals of the member countries for a term of seven years non-renewable.[29] The judges shall elect a President and two Vice-Presidents for a non-renewable term of three years and a half. The Court currently has three panels (two of five judges and the third of three judges). The OHADA Treaty, supplemented by the Rules of Procedure, organizes the functioning of the Court and the status of its judges.

In the area of arbitration, the CCJA exercises both an administrative and a jurisdictional function. As it will be described in the next paragraph, the CCJA manages the development of the arbitration procedure, and it has the sole competence to issue the order of *exequatur* for the enforcement of the arbitral award.[30] With reference to the rules applicable to arbitration, First, there is the OHADA Treaty, which provides for institutional arbitration under the auspices of the CCJA, in accordance with the CCJA Rules of Arbitration. Second, there is the Uniform Act on Arbitration which contains the rules applicable to any arbitration when the place of the arbitral tribunal is set in one of the member countries, or when the parties of the contract have chosen it as the applicable procedural law even if the place of the arbitration is not in one of the member states, therefore replacing the domestic rules on arbitration in all member countries. There are essential differences between the arbitration under the Uniform Act and the arbitration further to the Treaty and the CCJA Rules of Arbitration, like – for example – with reference to the appointment of arbitrators, appeals, and enforcement procedures.

3. *Conclusions*

African countries became aware of the necessity to harmonize commercial laws to promote trade and investment within their territories by creating a suitable legal environment. This can also give the opportunity to avoid the imposition of foreign national laws and contractual obligations with which their entrepreneurs and companies are unfamiliar, or which put the same in a disadvantaged position towards their foreign counterparts.

[29] The Council of Ministers increased the number of judges to thirteen, by Decision No. 04/2014/CM/OHADA of July 24, 2014, in order to enable the Court to deal effectively with a continuously increasing number of litigations.

[30] On these two functions of the CCJA see *amplius* N M Mbaye, *L'arbitrage OHADA: réflexions critiques*, (Mémoire, DEA, Université Paris X, Juin 2001); G Kenfack Douajni, *L'arbitrage OHADA* (PUPPA 2014).

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The realization of the objective of establishing fair and equitable rules for the governance of international business transactions may sometimes necessitate the promotion of the harmonization initiatives, especially when the existing legal framework on which they will be inserted does not reflect the desirable level of fairness, confidence, and international compromise.

The OHADA process for the harmonization of commercial laws is playing a remarkable role having undoubtedly gaining a high degree of success and respect at different levels. The text of the uniform acts already adopted want to reflect the economic reality and the life of African companies in order to foster trade and make it save for all economic operators, particularly individual traders, companies and the judges or arbitrators who will have to ensure their implementation.

Scholars and legal professional are strongly contributing to the knowledge and the diffusion of the OHADA system. One of the most famous and old journals in French on African law – Revue Penant – is now almost entirely dedicated to contributions related to OHADA and to the analysis of the related case law. Conferences and seminars are often organized even in Europe to enhance the awareness of the OHADA framework by legal professionals and business actors; a lot of books have been published on different aspects of OHADA law.

Other countries showed their strong interest in joining the OHADA Treaty and adopting the uniform acts already in place: talks are underway with Burundi and Madagascar to explore the possibility of their adhesion to the OHADA Treaty. A case law on OHADA matters is available for scholars and practitioners interested in studying OHADA law, and the member countries are very active in promoting the harmonization of further sector of business law. This is the best evidence of the quality and the success of the project.

The OHADA countries anyway provided themselves with new instruments of justice and arbitration through which a new jurisprudence will be developed in the area of African business law: such jurisprudence will enlighten the legal specificities of business operations in Africa in line with the existing legal framework.[31]

It is undoubted that in the present moment of globalization the private sector is leading the development process, and the states do have to adapt their domestic legal instruments accordingly, especially

[31] B Tchikaya, 'L'entrée historique des pays d'Afrique dans la jurisprudence internationale' (2004) 1(2) Miskolc J Int'l L, 242.

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in the economic field. The economic operators invest only where they find a reliable legal and judicial environment that welcomes them; the OHADA countries understood this and developed a harmonized legal system to increase their level of reliability.

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Jacopo Monaci Naldini*

International Commercial Courts and International Arbitration. Two Ways of Resolving Disputes in International Construction

Table of Contents: 1. What are International Commercial Courts? – 2. Why do they exist? – 3. Who are the users of International Commercial Courts? – 4. Conclusions. - 4.1. Work on an EU International Commercial Court in Investment Matters. – 5. Websites.

When a complex construction project involves contractors from different states, there is a tendency to propose arbitration as a method of resolving the relevant disputes; that is due to two main reasons: one is the possibility of establishing the seat of arbitration in a country that is neutral with respect to the countries where the contractors are based; the other reason is that a complex project often involves disputes whose understanding and efficient handling requires the intervention of experienced professionals.

If these requirements are needed – neutral forum and international construction specialists – there might seem to be no alternative to arbitration.

Instead, the alternative does exist and it is provided by the so-called International Commercial Courts that offer commercial and investment dispute resolution services.[1]

* LL.M, FCIArb - JMU Law Firm. This contribution has been already published in 'AIA Online' Newsletter of the Associazione Italiana dell'Arbitrato (2022) 4.

[1] For a further analysis of the issues addressed in this paper, see: D Ruckteschler and T Stooss, 'International Commercial Courts: A Superior Alternative to Arbitration?' (2019) 36(4) J Int'l Arb 431 <https://kluwerlawonline.com/journalarticle/Journal+of+International+Arbitration/36.4/JOIA2019022>; G Dimitropoulos, 'International Commercial Courts in the 'Modern Law of Nature': Adjudicatory Unilateralism in Special Economic Zones' (2021) 24(2) J Int'l Econ L 361 <https://doi.org/10.1093/jiel/jgab017>; Sir W Blair, 'The New Litigation Landscape: International Commercial Courts And Procedural Innovations' (2019) 2 Int'l J P L 212 <https://sifocc.org/app/uploads/2020/04/The-New-Litigation-Landscape-International-Commercial-Courts-and-Procedural-Innovations.pdf>; M Witkamp, 'Internationalizing Domestic Courts

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1. *What are International Commercial Courts?*

These are state-run courts that offer technical and complex dispute resolution services for certain specific matters. Their special feature is that they accept to settle disputes with foreign parties.

In essence, International Commercial Courts provide a service similar to arbitration but are integrated into a state's judicial system.

2. *Why do they exist?*

One reason why they exist may simply be business related: to create a hub that sells – like the institutions that administer international arbitrations – a qualified dispute resolution service.

Then there may be a reason to promote a country's reputation by supporting an attractive environment for international commercial dispute resolution, as might be the case with the Technology and Construction Court in England and Wales (TCC) or the *Chambre Internationale du Tribunal de Commerce de Paris* in France (TCP).

Another reason may be to establish courts that present themselves as neutral, in countries where direct investments flow. It is well known by contractors how difficult or impossible it is to agree with the client, often state-owned, to settle disputes in a *forum* that is foreign to the one where the client is based.

The range of International Commercial Courts offers, on one side of the spectrum, state courts that are specialised sections of the national judicial system and thus governed by the rules and formalities of that state system; and on the other side, courts that are part of the judicial system but with more autonomous rules of procedure, thus resembling arbitration. Examples of the latter category are the Courts of the Dubai International Financial Centre (DIFC) and the Court of the Astana International Financial Centre (AIFC). The courts are located in so-called financial free zones.

Among the main peculiarities of the International Commercial

in Europe: A Comparative Analysis on Procedure, Function, Organization' <https://www.rechtspraak.nl/SiteCollectionDocuments/internationalizing-domestic-courts-europe.pdf>; I Bantekas, 'The Rise of Transnational Commercial Courts: The Astana International Financial Centre Court' (2020) 33(1) Pace Int'l L Rev 1 <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1403&context=pilr>; M Requejo Isidro, 'International Commercial Courts in the Litigation Market' (2019) 2 Max Planck Institute Luxembourg for Procedural Law Research Paper Series <https://deliverypdf.ssrn.com/delivery.php

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Courts are: simplified rules and a body of judges composed of professionals experienced in complex international disputes. With a

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094115065027118017100008073066071099&EXT=pdf&INDEX=TRUE>; JQ Loh, 'The Rise of International Commercial Courts - A Threat to Arbitration?' in M Gebauer, T Klötzel, and RA Schütze (eds) *Festschrift für Roderich C. Thümmel zum 65. Geburtstag* (De Gruyter 2020) 501 <https://www.degruyter.com/document/doi/10.1515/9783110631395-036/pdf>; SI Strong, 'International Commercial Courts in the United States and Australia: Possible, Probable, Preferable?' in *Global Labs of International Commercial Dispute Resolution* (CUP 2021) 115 AJIL 28 <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/international-commercial-courts-in-the-united-states-and-australia-possible-probable-preferable/8AA73F9F612DA6D9510B4CA58DA64C93>; G Rühl, 'The Resolution of International Commercial Disputes– What Role (If Any) For Continental Europe?' in *Global Labs of International Commercial Dispute Resolution* (CUP 2021) 115 AJIL 11 <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/F4A393A9BD22B50149B72E25F4496433/S239877232000080Xa.pdf/the-resolution-of-international-commercial-disputes-what-role-if-any-for-continental-europe.pdf>; E Themeli, X Kramer, and G Antonopoulou, 'International commercial courts: should the EU be next? EP study building competence commercial law' (*Conflict of laws*, 23 September 2018) <https://conflictoflaws.net/2018/international-commercial-courts-should-the-eu-be-next-ep-study-building-competence-in-commercial-law/?print=pdf>; X Dan and W Chengjie, 'Do International Commercial Courts Compete with International Arbitration? - The Experience of China International Commercial Court' (*TDM*, 2020) <https://www.transnational-dispute-management.com/article.asp?key=2750>; O Sendetska and M. Bär, 'Checking In With Competition In Europe: Where Do International Commercial Courts Stand?' (*Kluwer Arbitration Blog*, 26 April 2021) <http://arbitrationblog.kluwerarbitration.com/2021/04/26/checking-in-with-competition-in-europe-where-do-international-commercial-courts-stand-2/>; The Honourable Justice JE Middleton, 'The Rise of the International Commercial Court' (The 2018 Hong Kong International Commercial Law Conference, *Fedcourt.gov.au*, 21 September 2018) <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-middleton/middleton-j-20180921>; X Kramer and J Sorabji, 'International Business Courts in Europe and Beyond: A Global Competition for Justice?' (2019) 1 Erasmus L Rev 1 <https://www.elevenjournals.com/tijdschrift/ELR/2019/1/ELR-D-19-00023>; L Ang, 'International Commercial Courts and the Interplay Between Realism and Institutionalism: A Look at China and Singapore' (2020) Harv Int'l L J <https://harvardilj.org/2020/03/international-commercial-courts-and-the-interplay-between-realism-and-institutionalism-a-look-at-china-and-singapore/#:~:text=Introduction,jurisdictions%20over%20the%20last%20decade>; R Jaballah, 'Law & Order: the rise of international commercial courts in the Middle East' <https://www.tamimi.com/law-update-articles/law-order-the-rise-of-international-commercial-courts-in-the-middle-east/>; E Peetermans and P Lambrecht, 'The Brussels International Business Court: Initial Overview and Analysis' (2019) 1

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few exceptions, the use of the English language is always provided for (the TCP allows the use of the English language without the obligation of translation, but requires certain fulfilments to be in French).

Those International Commercial Courts that are more closely controlled by the national judicial system (e.g. TCC and TCP), are governed by simplified national rules of civil procedure. International Commercial Courts that are more independent of the state's judicial system (e.g. DIFC Court and AIFC Court) are governed by *ad hoc* rules. The AIFC has adopted a simplified form of the English system's rules of civil procedure.

The simplification of the trial rules allows the parties to avoid many formalities that are burdensome features of international litigation in state courts, such as lawful service of writ abroad, authentication of signatures, registration of the case in the court's office and payment of the relevant stamp duties or taxes, the need to appoint a lawyer admitted to defend the case in the country of the court, hearing dates decided unilaterally by the judge, strict formalities for filing documents and for the gathering of evidence, translations of large documents, closure of the court due to pandemic, impossibility of conferring with the judge for clarification, etc. It should be specified that each court has gone to different extents towards simplification and that in the International Commercial Courts integrated into the judicial system, not all the formalities typical of state court trial disappear.

3. *Who are the users of International Commercial Courts?*

Before understanding the extent to which International Commercial Courts can offer a useful service to certain users, it must be clarified what are those features that are deemed to be advantageous when said courts are used.

(i) One or more parties to an international project may dislike arbitration or may have had a negative experience with it. It is then

Erasmus L Rev 42 <http://www.erasmuslawreview.nl/tijdschrift/ELR/2019/1/ELR-D-18-00025>; PH Haberbeck, 'Will a Zurich International Commercial Court cannibalize Zurich as a seat for international commercial arbitrations?' (*Inside Law*, 2020) <https://insidelaw.ch/will-a-zurich-international-commercial-court-cannibalize-zurich-as-a-seat-for-international-commercial-arbitrations/>.

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conceivable, in the contract negotiation phase, to select a state court for dispute resolution, possibly neutral with respect to the nationality of the parties.

(ii) There are cases where an investor or general contractor, or contractor, etc. is unlikely to be able to choose its preferred *forum* to resolve disputes. This happens in cases where the client represents the state and where the project is inextricably governed by domestic public procurement rules. In addition to this, disputes concerning a construction project often concern investigations that have to be carried out at the place where the project is located and require the examination of evidence (including public administration documents) and witnesses who are on site. Well, in such cases, it is clear that the contractor will prefer the use of an international court located on the territory, composed of judges of international extraction, rather than the national state court. The state-owned employer would find it difficult to oppose such a choice, since an international court operating in its country is also set up for the purpose of attracting investment by offering investors a more neutral, more reliable dispute resolution system.

(iii) In International Commercial Courts there are judges and, in the case of International courts more independent of the national judicial system, also arbitrators, with extensive experience in complex international disputes. These are judges who are familiar with sophisticated case management methods and its typical tools (one example among others is the use of the Scott Schedule <https://www.justice.gov.uk/courts/procedure-rules/civil/standard-directions/general/scott-schedule-note>).

(iv) International Commercial Courts usually offer the possibility to appeal the first instance decision.

(v) International Commercial Courts should be better placed to handle joinders of third parties and consolidation of different proceedings.

(vi) Parties applying to an International Commercial Court can understand the court's orientation in advance because their case law is publicly available.

(vii) In certain International Commercial Courts, the *iura novit curia* principle would apply, which may be appreciated by the parties.

Again, to understand who the users of the International Commercial Courts are, one must wonder whether the benefits offered by them represent an exclusive service or whether the same service can be found elsewhere 'on the market'. The comparison is obviously with international arbitration.

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Without going into a detailed comparison between the two systems here, it can be said that the services offered by the International Commercial Courts can also be found in arbitration, bearing in mind that, theoretically, the parties can tailor the arbitration in accordance with their needs, including the possibilities – albeit unusual and perhaps difficult to deal with at the time of drafting the arbitration clause – of appealing with a second arbitration (see, for example, the Optional Appellate Arbitration Rules of the AAA <https://www.adr.org/Rules>) or of requesting the arbitrators to apply the principle *iura novit curia*.

As to the possibility of grasping a court's orientation by examining case law, it should be noted that, at present, the case law produced by International Commercial Courts is rather limited and that, in any case, there is always the possibility of departing from cases previously decided by the same court. It should also be noted that, in international arbitration, there are collections of awards such as the ICCA Yearbook Commercial Arbitration (<https://www.arbitration-icca.org/icca-yearbook-commercial-arbitration>), the ITA Arbitration Report (<https://www.cailaw.org/Institute-for-Transnational-Arbitration/publications/ITA-Arbitration-Report/index.html>) and the ICC *recueils* that serve as guidance for the parties and arbitrators; in addition, arbitrators must carefully consider the principles expressed in cases decided by state courts that the parties submit to them during arbitration.

With regards to the handling of joinders or consolidation, it seems correct to argue that these powers are exercisable by the International Commercial Courts within state borders. As to the possible exercise of powers of these courts abroad, reference is made to the difficulties that characterise out-of-country court actions such as anti-suit injunctions and anti-arbitration injunctions (a matter debated in the European Union), for which no coercive power over foreign parties is available.

Other aspects that do not make a difference, especially when referring to arbitration administered by reliable institutions, are those of the independence and impartiality of the arbitrators and support for the administration of the case.

Finally, on the costs of the procedure, it seems unlikely that the International Commercial Courts are able to find, without jeopardising the quality of service, substantial savings margins in the management of complex international disputes that the institutions that administer international arbitrations have not already sought and adopted.

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4. *Conclusions*

In light of the foregoing, the following conclusion could be proposed:

International Commercial Courts do not offer a true alternative service to international arbitration except in the following cases:

– When one of the parties refuses to resort to arbitration
– When the request for arbitration is a deal-breaker
– When the investor in a foreign country, perhaps faced with the impossibility of more comfortable solutions, accepts the 'country risk' because that country offers the service of a reliable International Court
– When the project involves several players (employer, general contractor/contractor, subcontractors, suppliers, sub-suppliers, consultants…) who subject themselves to the jurisdiction of the same court. Although such a prospect is also possible with arbitration, the International Court may be more efficient in the case of a joinder or consolidation.

It should be noted that International Commercial Courts cannot avail themselves of the recognition of their decisions abroad that arbitration benefits from thanks to the 1958 New York Convention. A practical example: in a dispute between the employer and the contractor in an International Commercial Court integrated into the system of the country where the employer is domiciled, a victorious contractor can proceed expeditiously to the enforcement phase against the employer. The victorious employer in the same court, on the other hand, may need to have the decision recognised and enforced in the country where the contractor is domiciled or where its assets are located, with complex procedures, long delays and the risk, among others, that with the passage of time the contractor no longer exists or has become insolvent.

The International Commercial Courts are of recent birth, there are several of them and others will be set up. Thus, the possibilities for international forum shopping are set to expand, and only in the years to come will it be possible to understand the take-up of this offer.

4.1. *Work on an EU International Commercial Court in Investment Matters*

It is well known that a process is underway at the EU level to establish a multilateral investment dispute resolution court (<https://eur-lex.europa.eu/resource.html?uri=cellar:df96826b-

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985e-11e7-b92d-01aa75ed71a1.0001.02/DOC_1&format=PDF>) and to consolidate the idea that investment disputes in the EU are non-arbitrable. It cannot be ignored that this EU tendency is based on the idea, not exempt from criticism, that arbitration lacks the necessary transparency and that conflicting awards may be rendered (<https://www.europarl.europa.eu/thinktank/it/document/EPRS_BRI(2020)646147>).

5. *Websites*

Here below, some links to International Commercial Courts websites.

International Commercial Courts part on the national judicial system

- Technology and Construction Court in England and Wales (1998) <https://www.gov.uk/courts-tribunals/technology-and-construction-court>
- Singapore International Commercial Court (2015) <https://www.sicc.gov.sg/>
- Chamber for International Commercial Disputes, Landgericht Frankfurt/Main (2018) <https://ordentliche-gerichtsbarkeit.hessen.de/ordentliche-gerichte/lgb-frankfurt-am-main/lg-frankfurt-am-main/chamber-international>
- International Chamber, Paris Tribunal de Commerce/Cour d'appel (2018) <https://www.tribunal-de-commerce-de-paris.fr/en/home>
- China International Commercial Court (2018) <http://cicc.court.gov.cn/html/1/219/208/209/1316.html#>
- Netherlands Commercial Court (2019) <https://www.rechtspraak.nl/English/NCC/Pages/default.aspx>

International Commercial Courts established in free trade zones

- Dubai International Financial Centre Courts (2004) <https://www.difccourts.ae/difc-courts/services/specialised-divisions/technology-and-construction-division>
- Qatar International Court (2009) <https://www.qicdrc.gov.qa>
- Abu Dhabi Global Market Courts (2015) <https://www.adgm.com/adgm-courts>
- Astana International Financial Centre Court (2018) <https://court.aifc.kz/>

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Attila Tanzi*

International Commercial Courts and Foreign Investment Law

Table of Contents: 1. Introduction. – 2. The rise and ostensible demise of investor-state dispute settlement. – 3. Contract claims and treaty claims: Theoretical divide and practical entanglement. – 4. The revival of international contract law in foreign direct investment protection. – 5. The prospect of the 2016 Unidroit Principles of International Commercial Contracts (UPICC) being separately re-stated in adaptation to investment contracts.

1. *Introduction*

This chapter discusses the role of international commercial courts in light of the ongoing evolution of foreign investment law and dispute resolution in its domain.

It will move in five parts: after this introduction, Part 2 will illustrate the backdrop against which evolving trends in foreign investment law unfold, with special regard to the narrative of the rise and ostensible demise of investor-state dispute settlement, thereby showing how this process of change might come into play and sow the seeds for greater reliance on contract-based arbitration, as well as on international commercial courts, as opposed to treaty-based arbitration. Part 3 will corroborate this prospect, building on the increasingly blurred distinction between contract claims and treaty claims within investor-state arbitration, in particular with regard to those problems concerning the establishment of jurisdiction and the determination of the law to be applied in the resolution of the dispute. Part 4 will, in turn, discuss the revival of international contract law in relation to Foreign Direct Investment (FDI). In particular, it will refer to the trends in the contractual practice in this domain, focussing on issues such as the incorporation of environmental and sustainability concerns, which, it is submitted, lends itself to the development of a body of practice which would be ripe for application by international commercial courts. Finally, by way of proactive conclusion, reference will be made in Part 5 to the significance of the UNIDROIT Principles of International Commercial Contracts and their potential in dispute resolution in this area.

For the purposes of the present discussion, two clarifications

* Full Professor at University of Bologna, Department of Legal Studies.

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are necessary. The first is concerned with the type of contracts with which this contribution is concerned. Thus, references to contracts are to be read as references to *long duration contracts*, the features of which give effect to the requirements for an investment to qualify for legal protection under international investment law. More specifically, and aside from references to relevant criteria identified in investment jurisprudence, this contribution will focus on three specific types of contracts. These are

1) *Concession Agreements*, by which terminology we refer to those contracts entitling the investor to the exploitation of natural resources or the supply of utilities in exchange for the payment of royalties.[1]

2) *Production Sharing Agreements* (PSA), widespread in the petroleum sector, which entitle the investor to a share of the output in raw materials in exchange for the supply of financial or technical services to the state-owned entity carrying out the exploitation of the natural resource in question.[2]

3) *Build-Operate-and-Transfer Agreements* (BOT), which ordinarily concern the construction and/or operation of large infrastructure such as a dams, power plants, or electricity supply grids, generally for extended periods of time. During such periods the investor, after assuming the bulk of the burden for the setting up of the infrastructure, is entitled to operate it for profit up until the expiration of the contract, after which date it will hand over the facility to the state or state-owned-enterprise concerned.[3]

It follows from this list that this contribution will only address a relatively narrow, but undeniably important, slice of the more variegated universe of commercial disputes.

The second clarification has to do with the narrative of the decline of investor-state dispute settlement and with the question of what alternatives might possibly replace it should it encounter

[1] On concessions agreements and their role in development see KS Carlston, 'International Role of Concession Agreements' (1957) 52 North U L Rev 618; ME Dickstein, 'Revitalizing the International Law Governing Concession Agreements' (1988) 6 Int'l Tax & Bus Law 54; N Miranda, 'Concession Agreements: From Private Contract to Public Policy Note' (2007) 117 Yale L J 510.

[2] For a classic reference work on PSAs see K Bindemann, *Production-Sharing Agreements: An Economic Analysis* (Publisher's version, Oxford Institute for Energy Studies 1999) <https://ora.ox.ac.uk/objects/uuid:3ba0589f-8c3a-43b9-b034-24f7dae7e0c5> accessed 13 October 2022.

[3] There exists an abundant literature on the topic of build-operate-transfer models as a tool for infrastructure development. See, *inter alia*, CM Tam, 'Build-Operate-Transfer Model for Infrastructure Developments in Asia: Reasons for Successes and Failures' (1999) 17 Int'l J P Mgmt 377.

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its eventual demise. This contribution supports the contention that one such alternative could be found in international commercial courts. However, it does so with the caveat that these mechanisms may be seen as vulnerable to the same problems that are in some quarters singled out as weaknesses of the investor-state dispute settlement system, thus, one cannot expect that they will be immune from the backlash that has targeted it. As Schultz and Bachmann put it, international commercial courts, much like any instrument of 'privatized justice', may be eventually seen as 'reinforc[ing] a specific social order against which people term benefits these developments might bring to its industry'.[4]

This approach will not be followed here, as this contribution remains committed to the idea that, at least in these matters, the pursuit of perfection might run counter to the maintenance of the good. In other words, one remains convinced that investor-state dispute settlement, international commercial arbitration, and international commercial courts all have a role to play as tools for the promotion of foreign direct investment through the balanced protection of foreign private interests and the public concerns of host States.

2. *The rise and ostensible demise of investor-state dispute settlement*

Among the reasons why foreign direct investment has been deterred, uncertainties concerning the legal environment of the host state—including, more specifically, its judiciary—have factored heavily. Foreign nationals and firms entertaining the possibility of investing abroad simply had to come to terms that they would likely have little leverage against the host state or a state-owned entity when doing so. Even before the actual deployment of the investment, their lack of contracting power would have likely prevented them from prevailing in any attempt to include an arbitration clause in the contracts governing their investments. This was a central feature of the investment climate in the 1960s or 1970 and remains a concern to this day.

The most immediate consequence of this setup was that, should a dispute arise in the dealings between the investor and the host

[4] T Schultz and C Bachmann, 'International Commercial Courts: Possible Problematic Social Externalities of a Dispute Resolution Product with Good Market Potential' in G Dimitropoulos and S Brekoulakis (eds), *International Commercial Courts: The Future of Transnational Adjudication* (Cambridge University Press 2022) 54.

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state, resort would only be allowed to domestic dispute resolution mechanisms. It was only after exhausting them that the investor could petition its State of nationality to take on its case and initiate a claims process on the international plane, through the process known as 'diplomatic protection'.[5] Diplomatic protection, however, was an entitlement of the State, rather than of the national, and it remains so to this day, even if practice has recognised some limited fetters to governmental discretion.[6]

It was against this background that the World Bank, through the 1965 ICSID Convention,[7] promoted the conclusion of what was to become a rather dense network of investment promotion and protection treaties.[8] This international treaty framework, which boomed during the 1990s, following the Fall of the Berlin Wall, was aimed at the internationalisation of foreign investment contracts, both in terms of applicable law and dispute settlement through arbitration.[9]

[5] On diplomatic protection in general see CF Amerasinghe, *Diplomatic Protection* (Oxford University Press 2008); AMH Vermeer-Künzli, 'The Protection of Individuals by Means of Diplomatic Protection : Diplomatic Protection as a Human Rights Instrument' (Leiden University 2007) <https://hdl.handle.net/1887/12538> accessed 16 October 2022; G Gaja, 'The Position of Individuals in International Law: An ILC Perspective' (2010) 21 Eur J Int'l L 11.

[6] *Mavrommatis Palestine Concessions (Greece v United Kingdom)* PCIJ Series A No 2, 12; *Nottebohm (Lichtenstein v Guatemala)* (Second Phase) [1955] ICJ Rep 4, 24; *Interhandel (Switzerland v United States)* (Judgment) [1959] ICJ Rep, 28; *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3, 43, para 85. *Elettronica Sicula (United States v Italy)* (Judgment) [1989] ICJ Rep 15, at 43, para 52. For the proposition that a refusal to exercise diplomatic protection on behalf of a national could be justifiable if irrational or contrary to legitimate expectation see *Abbasi & Anor, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs & Secretary of State for the Home Department [2002] EWCA Civ 1598* (EWCA (Civ)) para 104. This practice has been incorporated in Article 19 of the International Law Commission (ILC) Draft Articles on Diplomatic Protection, which provides that the State 'should […] give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred'. It bears noting, however, that the Commentaries to the Draft Articles make clear that the provision 'must be seen as an exercise in progressive development'. See ILC, 'Report of the International Law Commission on the Work of its 58th Session' (1 May-9 June and 3 July-11 August 2006), UN Doc. A/61/10, at 53-54.

[7] Convention on the settlement of investment disputes between States and nationals of other States (adopted 18 March 1965, entered into force 14 October 1996) 575 UNTS 159 ('ICSID Convention').

[8] This is not the place for an in-depth discussion of the diplomatic protection process. As an authoritative reference work see Amerasinghe (n 5).

[9] For a discussion of the effect of the Cold War and its end on foreign investment protection law in general see M Sornarajah, 'Mutations of Neo-Liberalism

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The Convention was conceived to yield to party autonomy, both at the level of the relevant bilateral or multilateral investment treaty in conjunction to which it operates or the contract governing the investment relationship. Its applicable law provisions to be applied in arbitrations refer to 'such rules of law as may be agreed by the parties' and, 'in the absence of such agreement, […] the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable'.[10] Although the specific boundaries of the law to be applied by tribunals remain the subject of some controversy,[11] in practice the domestic law of the State hosting the investment (including investment contracts governed by domestic law) will in principle become subservient to the inter-State treaty provisions and be complemented, sometimes flattening differences across regimes,[12] by rules of international law.[13]

in International Investment Law Special Issue: Third World Approaches to International Law' (2011) 3 Trade L & Dev [xix]; J Hepburn and others, 'Investment Law before Arbitration' (2020) 23 J Int'l Econ L 929.

[10] ICSID Convention, Article 42.

[11] Within the vast literature on applicable law in investment treaty disputes, see for example A Giardina, 'International Investment Arbitration: Recent Developments as to the Applicable Law and Unilateral Recourse' (2006) 5 LPICT 29; AR Parra, *Applicable Law In Investor-State Arbitration* (Brill Nijhoff 2008) <https://brill.com/view/book/9789047440437/Bej.9789004167384.i-336_002.xml> accessed 12 October 2022; Z Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009) Chapter 2; Y Banifatemi, 'The Law Applicable in Investment Treaty Arbitration' in K Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press 2010); H Elisabeth Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law* (OUP Oxford 2013); AK Bjorklund, 'Applicable Law in International Investment Disputes', in C Giorgietti (ed), *Litigating International Investment Disputes* (Brill Nijhoff 2014) <https://brill.com/view/book/edcoll/9789004276574/B9789004276574_010.xml> accessed 12 October 2022; CP Alberti and DM Bigge, 'Ascertaining the Content of the Applicable Law and Iura Novit Tribunus: Approaches in Commercial and Investment Arbitration' (2015) 70 Disp Resol J 1; MV Benedettelli, 'Determining the Applicable Law in Commercial and Investment Arbitration: Two Intertwined Road Maps for Conflicts-Solving' [2022] ICSID Rev.

[12] See eg A Guzman and J Dalhuisen, 'The Applicable Law in Foreign Investment Disputes' [2013] < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2209503> accessed 12 October 2022.

[13] The Report of the Executive Directors makes it clear that the reference to 'international law' in Article 42 of the ICSID Convention should be understood 'in the sense given to it by Article 38(1) of the Statute of the International Court of Justice, allowance being made for the fact that Article 38 was designed to apply to inter-State disputes'. See Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965), at para 40.

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Within this framework, the chief dispute settlement method is international arbitration against the host State, which can be triggered unilaterally by private investors before an ICSID tribunal—under ICSID Rules—or an *ad hoc* tribunal, usually, under UNCITRAL rules, possibly administered by the Permanent Court of Arbitration or another *ad hoc* tribunal. The system was never exempt from criticism, and developing countries in particular have a long history of distrust in a system that appeared to have a pro-investor bias built in.[14] However, the system is now caught in the crossfire, as criticism is levelled at it from all sides—be it in pursuit of nationalist and unilateralist agendas, purporting to defend the State's regulatory space, or more broadly concerned with the rising power of transnational corporations. This criticism is no longer comes from developing countries alone:[15] in fact, it often originates in developed, industrialised countries and scholars from the Global North.[16]

This shift in perception has been accompanied by tangible modifications to the investment protection regime. Thus, beyond—and, sometimes, in combination with—the EU self-defeating *Achmea* saga in relation to arbitration arising from intra-EU bilateral investment agreements,[17] several international investment agreements

[14] Jan Paulsson resituates the issue within the broader problem of the general distrust of developing countries for international arbitration, also noting the comparative delay with which the first 'South-South' claim was brought to ICSID in the 1986 dispute of *Dr. Ghaith R. Pharaon v. Tunisia* (ICSID Case No. ARB/86/1). See J Paulsson, 'Third World Participation in International Investment Arbitration' (1987) 2 ICSID Rev 19; See also IT Odumosu, 'The Antinomies of the (Continued) Relevance of ICSID to the Third World' (2006) 8 San Diego Int'l L J 345; C Bellei Tagle, 'Arbitraje de inversiones en América Latina: de la hostilidad a la búsqueda de nuevas alternativas' in A Tanzi and others, *International Investment Law in Latin America/Derecho Internacional de Las Inversiones En América Latina: Problems and Prospects/Problemas y Perspectivas*, vol 5 (BRILL 2016) 98. Given the full awareness by Latin America countries of the importance of offering a reliable legal environment to foreign investors in order to attract FDI where needed, even those states that have withdrawn for investment treaties, observe the latter on the basis of their sunset clauses, thus, defending themselves before investment arbitration tribunals and complying with the awards where they find for the claimant.

[15] See eg M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press 2015).

[16] G Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (OUP 2013); G Van Harten, *The Trouble with Foreign Investor Protection* (Oxford University Press 2020).

[17] This is not the place to provide an-in depth discussion of the implication of the ruling. Suffice it so say that the European Court of Justice has ruled that Articles 267 and 344 of the Treaty on the Functioning of the European Union 'must be interpreted as precluding a provision in an international agreement concluded

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have now been terminated—though some continue to apply through 'sunset' clauses[18]—while new generation ones frequently include public interest protection clauses addressing environmental and social sustainability concerns, or incorporate procedural provisions aimed at 'rebalancing', so to speak, the perceived one-sidedness of the relationship between the investor and the host state, reintroducing the requirement of the exhaustion of local remedies an admissibility requirement.[19] At the end of the spectrum are those agreements which simply do away with the possibility of having recourse to (treaty) arbitration as a dispute settlement method and simply restrict themselves to providing a framework for investment facilitation.

This climate of uncertainty provides good reasons to suggest that international investment contracts will return to play an essential role in the promotion and protection of foreign direct investment.[20] It follows that disputes arising out of such contracts could be appropriately settled through international commercial arbitration as well as through international commercial courts. The latter, in particular, might be well suited to reconcile the international nature of the disputes in question with certain trends towards legal nationalism and the legitimacy concerns discussed above.

between Member States […] under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept'. See *Slowakische Republik v Achmea BV* [2018] ECJ Case C-284/16. The principle was later upheld to cover arbitration arising from the Energy Charter Treaty. See ECJ Case C-741/19 *République de Moldavie v Komstroy LLC* [2021].

[18] On this topic, see T Voon and AD Mitchell, 'Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law' (2016) 31 ICSID Rev 413.

[19] See for example Article 15.2 of the India Model Bilateral Investment Treaty, which provides for dispute settlement to be available only if 'after exhausting all judicial and administrative remedies relating to the measure underlying the claim for at least a period of five years from the date on which the investor first acquired knowledge of the measure in question, no resolution has been reached satisfactory to the investor'.

[20] It bears noting that this possibility was anticipated by some scholars. See, for example, 122-123 Sornarajah (n 15) ('Investment treaty arbitration was an interloper, which reduced the significance of the original role of the ICSID. It could well happen that the role of the ICSID in contract arbitration could come back into favour, if treaty-based arbitration declines as a result of disenchantment with the system.'). See also C Leben, 'La Théorie Du Contrat d'état et l'évolution Du Droit International Des Investissements' Recueil des cours. t. 302 (2003) 197; B Demirkol, 'Non-Treaty Claims in Investment Treaty Arbitration' (2018) 31 Leiden J Int'l L 59.

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3. *Contract claims and treaty claims: Theoretical divide and practical entanglement*

These are not merely policy considerations. As a practical matter, foreign direct investment is operationalized through the conclusion of contracts. These are international contracts, this quality following from the foreign nationality of the investor, irrespective of whether they operate in the host state through the proxy of a locally incorporated entity.[21] Three commonly employed categories of such contracts have been listed above, and may be recalled here: Concession Agreements, Production Sharing Agreements (PSA), and Build-Operate-and-Transfer Agreements (BOT).

In the context of any such investment relationship, it is essential to establish whether the conduct that is alleged to breach the investor's entitlement falls within the scope of application of an international investment agreement. It is only where this condition is satisfied that a dispute capable of arbitration under the provisions of the investment agreement—of 'investment arbitration', so to speak—will be found to exist, thereby allowing the submission of claims before an international arbitral tribunal and the subtraction of the same from the purview of the domestic forum. Through this process, a dispute is therefore 'internationalised', but still remains insulated from the realm of interstate claims and consequent politicisation.[22]

[21] Much has been written on the topic of state contracts, and it would be impossible to offer a complete bibliography. It is however appropriate to recall some of the early works that helped shape the understanding of this complex field. See FA Mann, 'State Contracts and State Responsibility' (1960) 54 AJIL 572; RY Jennings, 'State Contracts in International Law' (1961) 37 Brit YB Int'l L 156; P-Y Tschanz, 'The Contributions of the Aminoil Award to the Law of State Contracts' (1984) 18(2) Int'l Lawy; AFM Maniruzzaman, 'State Contracts with Aliens' (1992) 9 J Int'l Arb 141.

[22] On whether investor-state dispute settlement really does depoliticise disputes see, *inter alia*, Ibrahim FI Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' (1986) 1 ICSID Rev 1; IFI Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' (1986) ICSID Rev 2; M Paparinskis, 'The Limits of Depoliticisation in Contemporary Investor-State Arbitration' (2010) 3 Sel Proc Europ Soc'y Int'l L; D Schneiderman, 'Revisiting the Depoliticization of Investment Disputes' (2010) 11 YB Int'l Invest L & Pol'y 693; U Kriebaum, 'Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes' in K Fach Gomèz, A Gourgourinis, and C Titi (eds), *International Investment Law and the Law of Armed Conflict* (Springer 2019) Eur YB Int'l Econ L; G Gertz, S Jandhyala, and LN Skovgaard Poulsen, 'Legalization, Diplomacy, and Development: Do Investment Treaties de-Politicize Investment Disputes?' (2018) 107 World Dev 239.

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A tribunal tasked with resolving one such dispute would in principle entertain its jurisdiction over conduct amounting to a breach of an investment contract in two scenarios. The first would be realised where the alleged breach, in and of itself, or in combination with other elements of State conduct, amounts to a breach of the treaty. The second would instead come about by virtue of the operation of a so-called 'umbrella clause' contained in the investment agreement (or, potentially, in another investment treaty and read into it first through the additional layer of a most-favoured nation clause contained therein).[23] Umbrella clauses are so named because they cover, in very broad and vague terms, all commitments or undertakings entered into by the host state in relation with the investment, including by way of contract.[24]

On these matters, the jurisprudence of investment tribunals is not entirely consistent. On the one hand, investment tribunals have become increasingly reluctant and strict as to the admissibility of claims based on breaches of contract.[25] Secondly, additional uncertainties may follow from the complicated interplay between the sources of applicable law indicated by the investment agreement—namely, the treaty itself, the domestic law of the host state, and international law.[26]

[23] For the position that most-favoured nation clauses allow to import the protection granted by the umbrella clause contained in another treaty, see *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23 (Award) 11 June 2012, para. 931-933; *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23 (Award) 9 April 2013, paras 395-396; *Consutel Group S.P.A. in liquidazione v. People's Democratic Republic of Algeria*, PCA Case No. 2017-33 (Award) 3 February 2020, paras 931-932.

[24] Much has been written on the origins and meaning of the umbrella clause, see AC Sinclair, 'The Origins of the Umbrella Clause in the International Law of Investment Protection' (2004) 20 Arb Int'l 411. On the application of such provisions, see ibid; S Lemaire, 'La mystérieuse « umbrella clause » (Interrogations sur l'impact de la clause de respect des engagements sur l'arbitrage en matiére d'investissements)' [2009] Rev Arbitrage 479; J Antony, 'Umbrella Clauses Since SGS v. Pakistan and SGS v. Philippines - A Developing Consensus' (2013) 29 Arb Int'l 607; S Hamamoto, 'Parties to the "Obligations" in the Obligations Observance ("Umbrella") Clause' (2015) 30 ICSID Rev 449.

[25] The jurisprudence of investment tribunals is also replete with references to the general proposition that 'a breach of contract does not per se trigger a breach of treaty protection'. See eg *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16 (Award) 1 November 2013, para 291. For an example of the complex interplay between multiple causes of action and the inclusion in the investment contract of a dispute resolution provision see *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20 (Award) Award, 19 December 2016, para 243.

[26] See n 17 and accompanying text.

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An illustration of the difficulties offered by such scenarios is offered by the *Cerro Negro* case, which concerned the unilateral termination on the part of the government of Venezuela of an oil concession agreement between a state-owned entity and Exxon Mobil in 2007 soon after the election of Hugo Chávez as President of the country in 1998. In 2014, a learned Tribunal tasked with deciding the dispute awarded the claimant USD 1.6 billion in compensation upholding its claim that an outright expropriation had taken place.[27] Its decision on the quantum was grounded on those provisions of the investment agreement, which provided for 'just compensation' based on market value in combination with the general principles of international law on compensation concerning the breach of an internationally wrongful act—such as the breach of a standard of treatment provision contained in the investment agreement.[28] It bears noting that the Tribunal operated its selection of the law to be applied by looking at the combination of sources listed in the relevant provisions of the investment agreement and concluding

Accordingly, the Tribunal will apply the BIT and the other agreed sources of law where appropriate. Article 9(5) of the Treaty does not allocate matters to any of those laws. *Accordingly, it is for the Tribunal to determine whether an issue is subject to national or international law.* Further, if and when an issue arises, the Tribunal will determine whether the applicable international law should be limited to general principles of international law under Article 9(5) of the BIT or whether it includes customary international law. Moreover, with respect to the interpretation of the BIT, the Tribunal will resort to the Vienna Convention on the Law of Treaties, which both States have ratified, as a 'relevant Agreement between the Contracting Parties'.[29]

Three years later, an ICSID annulment Committee annulled the part of the Tribunal's Award dealing with compensation on the basis that the Tribunal had manifestly exceeded its powers for failure to apply the proper law. According to the *ad hoc* Committee, the Tribunal had, perhaps in its eagerness to stress the fundamental

[27] *Venezuela Holdings BV v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/27 (Award) 9 October 2014, para 404.

[28] Ibid, para 306. See Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Venezuela, adopted on 22 October 1991, Articles 6 and 9.

[29] *Venezuela Holdings BV v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/27 (Award) 9 October 2014, para 223 (emphasis added and footnotes omitted).

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principle of international law whereby a State cannot invoke provisions of internal law as justification for its failure to perform a treaty,[30] failed to apply the proper law.[31] The *ad hoc* Committee took the view that 'the exclusive sources of law for the determination of the dispute brought to arbitration are those listed in extenso in Article 9(5) of the BIT'[32] and that the Tribunal had instead pushed the 'implication that there exists notionally and *in spe* a given quantum of compensation for expropriation imposed 'by international law' from which it is not possible to detract by domestic legal means or by any other form of action other than on the international plane'.[33] By doing so, it had manifestly exceeded its powers by holding that customary international law, rather than the provisions in the investment agreement, regulated the determination and assessment of the compensation.[34]

In more pragmatic terms, according to the *ad hoc* Committee, from the mistake in the identification and selection of the applicable law flowed significant consequences, namely the failure to apply the 'liability cap' included in the agreement governed by Venezuelan law between the original claimant and the relevant State-Owned Entity. While the *ad hoc* Committee took great pains to clarify that its decision was not to be read as determinative of the way in which the 'liability cap' operated, it effectively wiped out USD 1.4 billion out of a USD 1.6 billion award.[35]

It should be clear from this short summary that the complex issue of the proper law to be applied to the dispute is rife with implications. Yet, cases such as the one discussed above may be seen as outliers

[30] Ibid para 25, referring to the statement of the principle contained in the Vienna Convention on the Law of Treaties. See Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT), Article 27.

[31] *Venezuela Holdings BV v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/27 (Decision on Annulment) 9 March 2017.

[32] Ibid, para 159.

[33] Ibid, para 187.

[34] Ibid, para 188.

[35] Ibid, para 190. On the deference paid to tribunals by annulment committees see AJ Marcopoulos, 'Revisiting the Risk of Undesired Appeal in Investment Treaty Arbitration: Is Deference to the Tribunal's Award Still Less Likely in the ICSID Context?' (2021) 37 Arb Int'l 685. For additional comments discussing the award and annulment in the context of alleged justificatory inconsistencies in very large compensation awards see M Paparinskis, 'A Case Against Crippling Compensation in International Law of State Responsibility' (2020) 83 Mod L Rev 1246; M Paparinskis, 'Crippling Compensation in the International Law Commission and Investor–State Arbitration' (2022) 37 ICSID Rev 289.

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when contrasted with the increasing trend of declining jurisdiction over contract claims, upholding defendant's exception whereby, by entering into an investment contract providing for a commercial arbitration or a domestic jurisdictional clause, the investor has waived the right to resort arbitration as provided by the international investment agreement. Such elements of unpredictability, add to the backdrop against which a claim for the continued—or, rather, renewed—relevance of contract as an instrument of foreign direct investment protection can be made.

4. *The revival of international contract law in foreign direct investment protection*

As a matter of policy, the ability to resort to dispute settlement mechanisms in relation to foreign direct investment appears desirable for all the parties concerned, be they states or investors. It follows from this proposition that, as a matter of principle, the parties would benefit from broad coverage of dispute settlement mechanisms. Thus, it appears desirable that, whatever fate treaty-based foreign investment protection and arbitration might eventually meet, the internationalisation of these disputes be maintained and extended to the level of contract. In this regard, international commercial courts may be seen as representing a fallback solution, or a compromise between arbitration, whether investor-state or simply commercial, and the recourse to domestic courts. However, even without repeating the points made above concerning their potential vulnerability to the same criticism that has afflicted investor-state dispute settlement, it remains to be seen whether these hybrid institutions will succeed in living up to their promise. The comparative dearth of established practices and case law in most international commercial courts and the significant differences between them, may hinder the recourse to this dispute settlement mechanism.

Turning now to the issue of the applicable law, including the material law provisions contained in the contract, one notable development is the emerging trend to embed provisions aimed at the protection of public interest concerns into investment contracts. This process appears to reflect parallel developments unfolding in the new generation of international investment treaties,[36] as well as in the

[36] See for example Agreement Between The Argentine Republic and Japan for the Promotion and Protection of Investment, Article 17 ("The Contracting Parties reaffirm

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broader discourse concerning corporate social responsibility (CSR).[37] Reference can be made here, for example, to the OECD Guidelines on Multinational Enterprises,[38] the ILO Tripartite Declaration concerning Multinational Enterprises and Social Policy,[39] the UN Global Compact[40] and the UN Guiding Principles on Business and Human Rights.[41] Similarly, it is possible to refer to the growing contractual practice aimed adapting contract to sustainability goals relating to the ecological transition under discussion these days, both in private and public law quarters.[42]

The development of this type of contractual standards in relation to foreign direct investment may well flow from marketing considerations aimed at curbing international competition deemed unfair based on what could be labelled 'CSR dumping'. By the same token, public procurement requirements so established could have a tangible impact on the contractual dimension of the relationship between the investor and the relevant State-owned entity.[43]

the importance that each of them encourages enterprises operating within its Area or subject to its jurisdiction to voluntarily incorporate into their internal policies those intonationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Contracting Party').

[37] See for all, L Chiussi Curzi, *General Principles on Business and Human Rights* (Brill-Nijhoff 2020), and the references therein.

[38] OECD, 'Declaration on International Investment and Multinational Enterprises' (21 June 1976) OECD/LEGAL/0144.

[39] International Labour Organization, 'Tripartite Declaration of Principles Concerning Multinational Enterprises and Social adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) and amended at its 279th (November 2000), 295th (March 2006) and 329th (March 2017) Sessions.

[40] 'Towards Global Partnerships' United Nations General Assembly, Resolution 56/76 (24 January 2002) UN Doc A/RES/56/76.

[41] Report to the UN Human Rights Council on 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', UN Doc. A/HRC/17/31, 21 March 2011 (Annex).

[42] Obviously, the relevance of this matter is not limited to the protection of foreign investment, but instead extends to several issues of contract law or procurement. See, among others, A Beckers, 'Using Contracts to Further Sustainability? A Contract Law Perspective on Sustainable Public Procurement' (30 March 2015) <https://papers.ssrn.com/abstract=2637491> accessed 15 October 2022; C Poncibò, 'The Contractualisation of Environmental Sustainability' (2016) 12 ERCL 335; J Salminen, 'Sustainability and the Move from Corporate Governance to Governance Through Contract' (6 May 2019) <https://papers.ssrn.com/abstract=3383397> accessed 15 October 2022; V Ulfbeck and Hansen, 'Sustainability Clauses in an Unsustainable Contract Law?' (2020) 16 ERCL 186.

[43] See Beckers (n 42); MA Corvaglia, *Public Procurement and Labour Rights: Towards Coherence in International Instruments of Procurement Regulation*

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The combined unfolding of these processes is theoretically capable of leading to a new breed of *lex mercatoria* — more precisely, to a *sustainable lex mercatoria* that would be suitable for application by international commercial courts tasked with the decision of such disputes covering matters having relevance for foreign direct investment protection and public interest concerns in the host state. Wondering how such a body of law be arrived at, one possible path emerges from the application of uniform principles of contract law enjoying broad acceptance. It is to this prospect that this contribution now turns.

5. *The prospect of the 2016 Unidroit Principles of International Commercial Contracts (UPICC) being separately re-stated in adaptation to investment contracts*

Principles geared towards the drafting and interpretation of investment contracts, which would balance private and public interest concerns might not be unattainable after all: indeed, a proposal was made by the International Chamber of Commerce's (ICC) Institute of World Business Law and UNIDROIT for the inclusion of the category of investment contracts in the UNIDROIT 2023-2025 Work Programme. As summarised in a memorandum of by the UNIDROIT Secretariat, the proposal is aimed at exploring how such contracts 'can be modernized, harmonized, and standardized, particularly in light of the UNIDROIT Principles of International Commercial Contracts (UPICC) and ICCs standards'.[44] The proposal specifically mentioned the deep reforms undergone by international investment law in recent years, as well as the adoption of 'a 'new generation' of International Investment Agreements (IIAs) that impose conditions on foreign investors regarding corporate social responsibility and sustainability standards'. As summarised by the Secretariat, '[t]hese developments [made] the question of how to strike a balance between principles regarding the promotion and protection of investment, on the one hand, and principles regarding

(Bloomsbury Publishing 2017). For a review of the relevance of CSR in foreign investment protection see K Yannaca-Small, 'Corporate Social Responsibility and the International Investment Law Regime: Not Business as Usual Innovative Strategies for Conflict Management: Improving Investor-State Relations to Propel Global Growth Symposium' (2020) 17 Univ St. Thomas L J 402.

[44] Proposals for the New Work Programme for the triennial period 2023-2025, UNIDROIT 2022 C.D. (101) 4 rev. Original: English May 2022, at para 70.

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the protection of general (societal and environmental) interests, on the other hand, more pertinent than ever'.[45] The Governing Council has agreed to recommend the inclusion of this project in the 2023-2025 Work Programme to the General Assembly with high priority.[46] The General Assembly will decide about the inclusion of this project in December and almost certainly endorse the recommendation made by the Council.

This turn of events should not surprise. As a matter of policy, investment contracts had long been considered a *species* of the broader category of long-term commercial contracts, a topic which UNIDROIT had tackled before, resulting in the publication of the UPICC.[47] More specifically, the Governing Council had previously considered conducting work concerning investment contracts specifically in their work concerning the UPICC, but had ultimately elected not to do so due to the limited availability of resources, preferring instead to focus in its 2016 update to the principles on long-term commercial contracts as a more comprehensive category that could also cover investment contracts.[48] As a matter of practice, arbitral case law provides ample evidence of the applicability and success of the UPICC in the context of foreign direct investment, with several investment awards citing and applying them.[49]

[45] Ibid, at paras 72-73.

[46] Governing Council 101st session Rome, 8-10 June 2022, UNIDROIT 2022 C.D. (101) 21 Original: English September 2022

[47] The literature on UPICC is plentiful. As general reference works see, among others, JM Perillo, 'Unidroit Principles of International Commercial Contracts: The Black Letter Text and a Review' (1994) 63 Fordham L Rev 281; MJ Bonell, 'UNIDROIT Principles of International Commercial Contracts: Why What How' (1994) 69 Tul L Rev 1121; KP Berger, 'International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts' (1998) 46 Am J Comp L 129; MJ Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (Martinus Nijhoff Publishers 2009); S Vogenauer and J Kleinheisterkamp, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford University Press 2015).

[48] Ibid, para 97 (statement of Ms Thijssen).

[49] This phenomenon has been subject to the some scholarly scrutiny. See Berger (n 51); G Cordero-Moss, 'Limitations on Party Autonomy in International Commercial Arbitration' Recueil des cours. t. 372 (2015) 129; A Reinisch, 'The Relevance of the Unidroit Principles of International Commercial Contracts in International Investment Arbitration' (2014) 19 Unif L Rev 609; R Michaels, 'The Unidroit Principles as Global Background Law' (2014) 19 Unif L Rev 643; P Bernardini, 'Unidroit Principles and International Investment Arbitration' (2014) 19 Unif L Rev 561; J Hepburn, 'The UNIDROIT Principles of International Commercial Contracts and Investment Treaty Arbitration: A Limited Relationship'

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Thus far the application of the principles has mostly been aimed at clarifying general principles applicable in commercial dealings. For example, in the recent *Tethyan Copper v Pakistan*, the principles were cited in the context of a discussion of the calculation of compensation and damages in international investment law as an authority for the proposition that borrowing rate of the claimant can be taken as a reference rate for pre-award interest.[50] Similarly, in *Renco v Peru*, the principles were invoked to show the generality of the principle whereby judicial proceedings are liable to cause an interruption or suspension of a limitation period.[51] However, several examples exist of the principles being used directly as a means of interpreting the investment contract itself or integrate the law of the host state.[52]

It is therefore to be expected that the proposed UPICC adaptation could prove highly attractive to contracting parties public and private. From the vantage points of both the investor and the State or State-owned entity, it is easy to see the value in the added legal certainty and the foreseeability and clarification of the delineation, through contract, of the most relevant public law requirements and concerns potentially impacting the investment relationship. Potential drawbacks might lie in the negotiation of such important relationships through a diffused contractual practice which, with its potential to impact a future contractual dispute in a tangible manner,

(2015) 64 Int Comp L Quart 905; A Carlevaris, 'The Use of the UNIDROIT Principles and Other Transnational Principles of Commercial Law in Treaty Arbitration: Hazards and Opportunities' (2021) 36 ICSID Rev 592.\\uc0\\u8216{} The Unidroit Principles as Global Background Law\\uc0\\u8217{} (2014

[50] *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1 (Award) 12 July 2019, para 1794.

[51] *The Renco Group Inc. v. Republic of Peru II*, PCA Case No. 2019-46 (Decision on Expedited Preliminary Objections) 30 June 2020, para 216. The paragraph is also notable for citing in a footnote the preamble to the UPICC principles, stating that they 'intend to reflect general principles of transnational law'. It must also be noted that the dissenting arbitrator objected to the reference, stating that he '[did] not subscribe to the view that it is appropriate to refer to a general principle of international law or to a decision of an international court or tribunal which has decided a limitation issue in the context of a different treaty framework'. See Dissenting Opinion of J Christopher Thomas QC, para 83.

[52] *African Holding Company of America Inc and Société Africaine de Construction du Congo SARL v La République Démocratique du Congo*, ICSID Case No. ARB/05/21 (Sentence sur les déclinatoires de compétence et la recevabilité) 29 July 2008, para 35; see also the *Suez, Sociedad General de Aguas de Barcelona & Vivendi Universal v Argentina & AWG Group v The Argentine Republic*, ICSID Case No. ARB/03/19 and Ad Hoc UNCTIRAL Arbitration (Decision on Liability) 30 July 2010, Separate Opinion of Pedro Nikken, at para 48.

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would place a significant due diligence burden also on the public managers or authorities charged with negotiating the investment contract.

International commercial courts could provide a suitable forum to adjudicate disputes arising from such contracts. Moreover, their output could enrich the current understanding of and ultimately reinforce the increasingly shared public environmental and social sustainability legal standards, at the same time giving effect to the business community marketing and legal discourse pointing to the development of a sustainable *lex mercatoria*. Indeed, it has been proposed that such courts would be 'substantially better suited to drive a harmonizing agenda in commercial law than is arbitration' as they would be able to combine the attractive features of arbitration in terms of flexibility with a more robust institutional framework and control on the output,[53] with the potential to create a 'freestanding body of commercial law'.[54] This possibility appears particularly attractive, especially in those scenarios where disputes that would normally be classified as relating to investment have been 'domesticated' through the application of a specific legal framework and demoted to the status of simple commercial disputes with characterised by privity of the parties.[55]

[53] M Durovic and F Lech, 'Harmonization of Commercial Law Based on Common Law: The Role of International Commercial Courts' in Stavros Brekoulakis and Georgios Dimitropoulos (eds), *International Commercial Courts* (1st edn, Cambridge University Press 2022) 224–225 <https://www.cambridge.org/core/product/identifier/9781009023122%23CN-bp-8/type/book_part> accessed 8 July 2022.

[54] See Report of the Singapore International Commercial Court Committee, November 2013, available at < https://www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/-report-of-the-singapore-international-commercial-court-committee-_90a41701-a5fc-4a2e-82db-cc33db8b6603-1.pdf>, accessed 16 October 2022. See also A Godwin, I Ramsay, and M Webster, 'International Commercial Courts: The Singapore Experience' (2017) 18 MJIL 219.

[55] See, with reference to China's Belt and Road Initiative, M McLaughlin, 'Investor–State Mediation and the Belt and Road Initiative: Examining the Conditions for Settlement' (2021) 24 J Int'l Econ L 609, 612; J Chaisse and J Kirkwood, 'Chinese Puzzle: Anatomy of the (Invisible) Belt And Road Investment Treaty' (2020) 23 J Int'l Econ L 245.

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