

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

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## Abstract

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

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

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## 1 Introduction

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

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

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

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

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

4. Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ L 351/1.
5. Senate (Eerste Kamer), Report of the meeting of 4 December 2018 (Verslag van de vergadering van 4 december 2018) (2018/2019 nr. 10); Parliamentary Papers I 2017/18 (Kamerstukken I 2017/18), 34 761, B Reply to the Statement of Objections (Memorie van Antwoord), at 3-5; Parliamentary Papers I 2017/18 (Kamerstukken I 2017/18), 34 761, C Detailed Report from the first Commission for Justice and Security (Nader voorlopig verslag van de vaste commissie voor Justitie en Veiligheid), at 2-3; Parliamentary Papers I 2018/19 (Kamerstukken I 2018/19), 34 761, D Further Reply to the Statement of Objections (Nadere Memorie van Antwoord), at 3-5. All available at: [https://www.eerstekamer.nl/wetsvoorstel/34761\\_engelstalige\\_rechtspraak](https://www.eerstekamer.nl/wetsvoorstel/34761_engelstalige_rechtspraak) (last visited 20 December 2018).
6. Inter alia T. Handschell, ‘English als Gerichtssprache?’, *Zeitschrift für Rechtspolitik* 103 (2010); A. Piekenbrock, ‘Englisch als Gerichtssprache in Deutschland?’, *Europäisches Wirtschafts- und Steuerrecht* 1 (2010); C. Stubbe, ‘English als Gerichtssprache?’, *Zeitschrift für Rechtspolitik* 195 (2010); A. Flessner, ‘Deutscher Zivilprozess auf English – Der Gesetzentwurf des Bundesrats im Lichte von Staatsrecht, Grundrechten und Europarecht’, *Neue Juristische Online-Zeitschrift* 1913 (2011); C. Bisping, ‘Conquering the Legal World: The Use of English in Foreign Courts’, *European Review of Private Law* 541 (2012); W. Hau, ‘Fremdsprachengebrauch durch deutsche Zivilgerichte – vom Schutz legitimer Parteiinteressen zum Wettbewerb der Justizstandorte’, in R. Michaels and D. Solomon (eds.), *Liber Amicorum Klaus Schurig* (2012) 49, at 61-62; H. Roth, ‘Modernisierung des Zivilprozesses’, *Juristenzeitung* (2014) 801, at 805.
7. G. Dalitz, ‘Justizinitiative Frankfurt – too little too late?’, *Zeitschrift für Rechtspolitik* 248 (2017). See also the high ranking of both countries in civil justice in World Justice Project, Rule of Law Index 2017-2018 available at: <http://data.worldjusticeproject.org/#table> (last visited 14 July 2018).

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

## 2 The Jurisdiction of the NCC

### 2.1 Agreements in Favour of the NCC

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

- able at: <http://data.worldjusticeproject.org/#table> (last visited 14 July 2018).
8. Official Gazette of the Kingdom of the Netherlands (Staatsblad van het Koninkrijk der Nederlanden), 475 Decree of 18 December 2018 determining the date of entry into force of the Act of 12 December 2018 amending the Code of Civil Procedure and the Act on court fees for civil cases in connection with making English-language jurisprudence possible at the international trade chambers of the Amsterdam District Court and the Amsterdam Court of Appeal (475 Besluit van 18 december 2018 tot vaststelling van het tijdstip van inwerkingtreding van de Wet van 12 december 2018 houdende wijziging van het Wetboek van Burgerlijke Rechtsvordering en de Wet griffierechten burgerlijke zaken in verband met het mogelijk maken van Engelstalige rechtspraak bij de internationale handelskamers van de rechtbank Amsterdam en het gerechtshof Amsterdam) available at: [https://www.eerstekamer.nl/behandeling/20181220/publicatie\\_inwerkingtreding/document3/f=/vkuf4m88czxa.pdf](https://www.eerstekamer.nl/behandeling/20181220/publicatie_inwerkingtreding/document3/f=/vkuf4m88czxa.pdf) (last visited 20 December 2018).
9. Senate (Eerste Kamer), Senate approves the Netherlands Commercial Court (Eerste Kamer steunt Netherlands Commercial Court) available at: [https://www.eerstekamer.nl/nieuws/20181211/eerste\\_kamer\\_steunt\\_netherlands](https://www.eerstekamer.nl/nieuws/20181211/eerste_kamer_steunt_netherlands) (last visited 20 December 2018).
10. Council for the Judiciary (Raad voor de Rechtspraak), Plan for the establishment of the Netherlands Commercial Court (Plan tot oprichting van de Netherlands commercial court, Inclusief kosten-batenanalyse), November 2015, at 4 available at: <https://www.rechtspraak.nl/SiteCollectionDocuments/plan-netherlands-commercial-court.pdf> (last visited 14 July 2018).

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

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

Furthermore, the NCC is competent when the parties have designated the Amsterdam District Court as the competent forum or the Amsterdam District Court has jurisdiction on another ground.<sup>18</sup> Since English is the language of proceedings before the NCC and since the NCC applies its own set of procedural rules, the parties should, moreover, have expressly agreed in writing on the use of the English language and the application of the NCC Rules.<sup>19</sup> By agreeing on the NCC Rules, the parties also implicitly agree on bearing the higher NCC court fees, amounting to 15,000 Euros in first instance

and 20,000 Euros on appeal.<sup>20,21</sup> Lastly, the agreement of the parties to litigate before the NCC shall be included in the originating document.<sup>22</sup>

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

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

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

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

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

11. *Ibid.*, at 5; Explanatory Memorandum 2017, at 1-3.

12. Available in English in A. Burrough, S. Machon, D. Oranje, L. Frakes & W. Visser (eds.), *Code of Civil Procedure, Selected Sections and the NCC Rules* (2018).

13. Council for the Judiciary (Raad voor de Rechtspraak), Rules of Procedure for the International Commercial Chambers of the Amsterdam District Court (NCC District Court) and the Amsterdam Court of Appeal (NCC Court of Appeal), NCC Rules/NCCR, December 2018, available at: <https://www.rechtspraak.nl/English/NCC/Pages/rules.aspx> (last visited 20 December 2018).

14. Art. 30r (1) Rv; Art. 1.3.1. (a) and (b) NCC Rules.

15. Art. 30r (1) Rv; Art. 1.1.1. NCC Rules.

16. Art. 30r (1) Rv in combination with Art. 93 Rv; Art. 1.3.1. (a) NCC Rules; Explanatory notes to Art. 1.3.1 (a) NCC Rules.

17. Explanatory Memorandum 2017, at 14; Art. 1.3.1. (a) NCC Rules; Explanatory notes to Art. 1.3.1 (a) NCC Rules. See also Council for the Judiciary, Plan, above n. 9, at 12.

18. Art. 30r (1) Rv; Art. 1.3.1. (c) NCC Rules; Explanatory notes to Art. 1.3.1 (c) NCC Rules.

19. Art. 30r (1) Rv; Art. 1.3.1. (d) NCC Rules.

20. Art. 9a Act on court fees for civil cases (*Wet griffierechten in burgerlijke zaken*); Explanatory Memorandum 2017, at 17.

21. See the article of E. Bauw in this issue of *Erasmus Law Review*.

22. Art. 4.1.2. (b) NCC Rules.

23. Parliamentary Papers I 2018/19 (Kamerstukken I 2018/19), 34 761, D Further Reply to the Statement of Objections (Nadere Memorie van Antwoord), at 6. See also Explanatory Memorandum 2017, at 5-6; D. J. Oranje, 'The Coming into Being of the Netherlands Commercial Court', *Tijdschrift voor Civiele Rechtspleging* 122, at 123-24 (2016).

24. See also P. E. Ernste and F. E. Vermeulen, 'The Netherlands Commercial Court – an Attractive Venue for International Commercial Disputes?' *Tijdschrift voor Civiele Rechtspleging* 127, at 127-28 (2016).

25. Art. 4.1.5. NCC Rules; Explanatory notes to Art. 1.3.1 (c) NCC Rules. See also Ernste and Vermeulen, above n. 24, at 127-29.

26. Art. 30r (1) Rv; Art. 1.3.1. (d) NCC Rules.

27. Explanatory notes to Art. 1.3.1 (d) NCC Rules.

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

### 3 The Jurisdiction of the KfiH

#### 3.1 Agreements in Favour of the KfiH

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

States may agree on the creation of common and, therefore, centralised KfiH.<sup>33</sup>

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

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

28. For the definition of an international dispute in the NCC Rules see G. Antonopoulou, 'Defining International Disputes – Reflections on the Netherlands Commercial Court Proposal', *Nederlands Internationaal Privaatrecht* 740 (2018).  
 29. Explanatory Memorandum 2017, at 6, 14, 16; Art. 30r (4) Rv; Arts. 1.3.4, 6.2 and 10.1 NCC Rules.  
 30. Explanatory Memorandum 2017, at 10-11, 14. See also Oranje, above n. 23, at 124-25.  
 31. Legislative Proposal 2018.  
 32. German Parliament (Deutscher Bundestag), Legislative proposal for the establishment of Chambers for International Commercial Disputes (Entwurf eines Gesetzes zur Einführung von Kammern für internationale Handelssachen), Drucksache 17/2163 of 16 June 2010 available at: [dipbt.bundestag.de/dip21/btd/17/021/1702163.pdf](http://dipbt.bundestag.de/dip21/btd/17/021/1702163.pdf) (last visited 14 July 2018); German Parliament (Deutscher Bundestag), Legislative proposal for the establishment of Chambers for International Commercial Disputes (Entwurf eines Gesetzes zur Einführung von Kammern für internationale Handelssachen), Drucksache 18/1287 of 30 April 2014 available at: [dipbt.bundestag.de/dip21/btd/18/012/1801287.pdf](http://dipbt.bundestag.de/dip21/btd/18/012/1801287.pdf) (last visited 14 July 2018).

33. Legislative Proposal 2018, Explanatory Statement (Begründung), at 13-14.  
 34. *Ibid.*, Problem and aim (Problem und Ziel), at 1; Explanatory Statement (Begründung), at 15. See also G.-P. Callies and H. Hoffmann, 'Effektive Justizdienstleistungen für den globalen Handel', *Zeitschrift für Rechtspolitik* 1 (2009); H. Hoffmann, *Kammern für internationale Handelssachen* (2011), at 105-9; M. Pika, 'Die Kammer für internationale Handelssachen', *Zeitschrift für Internationales Wirtschaftsrecht* 206 (2016); G. Wagner, *Rechtsstandort Deutschland im Wettbewerb* (2017), at 224-26; H. Hoffmann, '"Von Law – Made in Germany" zu "Commercial Litigation in Germany", Impulse für eine Verbesserung der Justiz im internationalen Handelsrecht', *Zeitschrift für internationales Wirtschaftsrecht* 58, at 61 (2018).  
 35. Legislative Proposal 2018, Explanatory Statement (Begründung), at 8-10.  
 36. See also for Art. 93 GVG W. Zimmermann, in W. Krüger and T. Rauscher (eds.), *Münchener Kommentar zur Zivilprozessordnung* (2017) Art. 93 GVG, at margin no. 1; Art. 94 GVG, at margin no. 2.  
 37. Draft Art. 114c GVG; Legislative Proposal 2018, Explanatory Statement (Begründung), at 15-16; C. Hoppe, 'English als Verfahrenssprache – Möglichkeiten de lege lata und de lege ferenda', *Praxis des Internationalen Privat- und Verfahrensrechts* 373, at 376 (2010).  
 38. *Gerichtsverfassungsgesetz*, Official Journal of the Federal Republic of Germany (Bundesgesetzblatt, hereinafter BGBl.) I, at 1077. Available in English at: [http://www.gesetze-im-internet.de/englisch\\_gvg/](http://www.gesetze-im-internet.de/englisch_gvg/) (last visited 14 July 2018).  
 39. *Zivilprozessordnung* BGBl. I, at 3202; 2006 I, at 431; 2007 I, at 1781; BGBl. I, at 1151. Available in English at: [https://www.gesetze-im-internet.de/englisch\\_zpo/englisch\\_zpo.html](https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html) (last visited 14 July 2018).

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

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

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

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

Since merchants are considered parties experienced in commercial and legal matters, the second sentence of draft Article 114b GVG grants them the freedom to agree on the use of English as court language and thus litigate before the KfiH without the obligation to abide by a specific form.<sup>42</sup> Whether a party is a merchant depends on the *lex fori*, including its conflict-of-laws rules.<sup>43</sup> The German proposal, and its more liberal handling of commercial parties, is driven by the considera-

tion that these are familiar with legal matters and thus fully aware of the implications of an agreement to litigate in English. In addition, the freedom to conclude ex ante agreements, before the dispute has arisen, serves the predictability of the competent forum and, thus, in turn, enhances legal certainty<sup>44</sup> – something that is highly regarded in international commercial relationships.<sup>45</sup>

In contrast, the third sentence of draft Article 114b GVG refers to agreements to litigate in English concluded after the dispute has arisen and declares these permissible irrespective of the parties' identity under the condition that they are express and in writing. Hence, consumers may also bring their disputes before the KfiH as long as they have concluded the respective agreement after the dispute has arisen and have additionally abided by the stricter form requirements. The German proposal for the establishment of the KfiH opens up the upcoming chambers to consumers based on the consideration that when parties enter an ex post agreement, they are more conscious of the implications of such an agreement and thus less in need of legal protection.<sup>46</sup> However, it should be borne in mind that since the KfiH will exclusively handle cases that qualify as commercial under Article 95 GVG,<sup>47</sup> only a few consumer cases will meet the requirements set in this provision and thus hit trial before the specialised chambers. Nevertheless, a literal reading of the German proposal may give the misleading impression that after the dispute has arisen, merchants should also conclude an explicit and in writing agreement. Drawing from Article 38 ZPO, upon which draft Article 114b GVG is based, it should be noted that merchants are free to conclude their agreement to litigate in English without abiding by any form requirement irrespective of the point in time such an agreement was concluded.<sup>48</sup> If specific parties enjoy the freedom to conclude a formless agreement even before the dispute arose, it would make all the more sense to retain this freedom after the dispute arose.

40. Legislative Proposal 2018, Explanatory Statement (Begründung), at 15.  
 41. *Ibid.*, at 16.  
 42. R. Bork, in R. Bork and H. Roth (eds.), *Stein/ Jonas Kommentar zur Zivilprozessordnung* (2014) Art. 38 ZPO, at margin no. 9, 19; R. Patzina, in W. Krüger and T. Rauscher (eds.), *Münchener Kommentar zur Zivilprozessordnung* (2016) Art. 38 ZPO, at margin no. 1, 5; C. Heinrich, in H.-J. Musielak and W. Voit (eds.), *Zivilprozessordnung Kommentar* (2018) Art. 38 ZPO, at margin no. 1.  
 43. P. Mankowski, in T. Rauscher (ed.), *Europäisches Zivilprozess- und Kollisionsrecht* (2016) Art. 25 Brussels Ibis Regulation, at margin no. 76, 84.

44. Legislative Proposal 2018, Explanatory Statement (Begründung), at 15.  
 45. Inter alia R. Fentiman, 'Theory and Practice in International Commercial Litigation', *International Journal of Procedural Law* 235, at 238 (2012).  
 46. Bork, above n. 42, Art. 38 ZPO, at margin no. 37; Patzina, above n. 42, Art. 38 ZPO, at margin no. 7; for the similar provision of Art. 19 Brussels Ibis Regulation, see P. Mankowski and P. Nielsen, in U. Magnus and P. Mankowski (eds.), *Brussels Ibis Regulation* (2016) Art. 19 Brussels Ibis Regulation, at margin no. 12.  
 47. Draft Art. 114b and 114c (1) GVG; Legislative Proposal 2018, Explanatory Statement (Begründung), at 14, 15.  
 48. Legislative Proposal 2018, Explanatory Statement (Begründung), at 15. For Art. 38 ZPO, see also Bork, above n. 42, Art. 38 ZPO, at margin no. 65; Heinrich, above n. 42, Art. 38 ZPO, at margin no. 13, 22.

## 4 Clashing with the Brussels *Ibis* Regulation

### 4.1 Choice-of-Court Agreements under the Brussels *Ibis* Regulation

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

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

49. Art. 25 (1) Brussels *Ibis* Regulation.

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

becomes apparent that Article 25 (1) Brussels *Ibis* Regulation does not merely regulate the formal validity of an international jurisdiction agreement. On the contrary, the parties' consensus is intertwined with the formal validity of the agreement.<sup>51</sup>

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

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

### 4.2 The NCC Rules versus the Brussels *Ibis* Regulation

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

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

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

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

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

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

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

#### 4.2.1 *Implicit Agreements*

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

#### 4.2.2 *Agreements in General Terms and Conditions*

First, the exclusion of inserting an agreement in favour of the NCC in general terms and conditions comes at odds with the established case law of the ECJ.<sup>58</sup> Indeed, as early as 1976, the ECJ ruled that where a jurisdiction clause is included in the general conditions printed on the back of a contract, the writing requirement is fulfilled if the contract signed by both parties expressly refers to those general conditions. Two further requirements should be fulfilled so as to validly incorporate a jurisdiction clause, contained in general terms, into a

contract. The jurisdiction agreement is valid only if a party exercising reasonable care could check the express reference to the general terms and conditions and only if the latter have, in fact, been communicated to the party.<sup>59</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### 4.2.4 Third Parties

Furthermore, the requirement for an explicit jurisdiction clause hinders the involvement of third parties in trial before the NCC. Indeed, according to the Explanatory Memorandum, the provision on an express agreement was not solely driven by the need to protect consumers and small enterprises. It was additionally prompted by the need to secure the procedural rights of third parties who have not expressly agreed to litigate before the NCC in English and according to its rules.<sup>66</sup> The ECJ has been more than once called to interpret the agreement requirement set in Article 25 (1) Brussels *Ibis* Regulation in respect of third parties that neither were a party nor had expressly consented to the jurisdiction agreement. Despite the absence of an express consent, the court extended the effects of jurisdiction agreements on third parties under specific conditions.

- 63. United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980) UN Treaty Series 1489, 3.
- 64. M. de Almeida Cruz, M. Desantes Real and P. Jenard, *Report on the Convention on the accession of the Kingdom of Spain and the Portuguese Republic to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland and the adjustments made to them by the Convention on the accession of the Hellenic Republic* (1990), at Para. 26; P. Jenard and G. Möller, *Report on the Convention on jurisdiction and enforcement of judgments in civil and commercial matters done at Lugano on 16 September 1988* (1990), at Paras. 56-58; Schlosser, Report, above n. 50, at Para. 179; Case 106/95, *Mainschiffahrts-Genossenschaft eG (MSG) v. Les Gravières Rhénanes SARL*, [1997] ECR I-911, at Para. 16. See also Art. 1:105 The Principles on European Contract Law available at: [www.trans-lex.org/400200/\\_/pecl/#head\\_1](http://www.trans-lex.org/400200/_/pecl/#head_1) (last visited 14 July 2018).
- 65. See Case 106/95, *Mainschiffahrts-Genossenschaft eG (MSG) v. Les Gravières Rhénanes SARL*, [1997] ECR I-911, at Para. 18.
- 66. Explanatory Memorandum 2017, at 10.

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

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

- 67. Case 214/89, *Powell Duffryn plc v. Wolfgang Petereit*, [1992] ECR I-1745.
- 68. *Ibid.*, at Paras. 17-19.
- 69. *Ibid.*, at Paras. 26-29.
- 70. See also Case 34/82, *Martin Peters Bauunternehmung GmbH v. Zuid Nederlandse Aannemers Vereniging*, [1983] ECR I-987, at Paras. 13-15.
- 71. Dutch Bar Association (Nederlandse Orde van Advocaten), Internet Consultation Netherlands Commercial Court Proposal (Internetconsultatie Wetsvoorstel Netherlands Commercial Court), 1 February 2017 available at: <https://www.internetconsultatie.nl/ncc/reactie/6cc7700f-31e5-44b1-862a-9d192256867a> (last visited 14 July 2018); Vlaar, above n. 58, at 202. See also De Brauw Blackstone Westbroek N.V., Internet Consultation Netherlands Commercial Court Proposal (Internetconsultatie Wetsvoorstel Netherlands Commercial Court), 31 January 2017 available at: <https://www.internetconsultatie.nl/ncc/reactie/efabc64e-d6c6-4254-b2a9-72dd8026478c> (last visited 14 July 2018).
- 72. Case 71/83, *Partenreederei Ms Tilly Russ, Ernest Russ v. NV Haven- & Vervoerbedrijf Nova, NV Goeminne Hout*, [1984] ECR 2417, at Para. 24; Case 387/98, *Coreck Maritim GmbH v. Handelsveem BV and Others*, [2000] ECR I-9337, at Para. 23; Case 159/97, *Transporti Castelletti Spedizioni Internazionali SpA v. Hugo Trumphy SpA*, [1999] ECR I-1597, at Para. 41.
- 73. Case 352/13, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Akzo Nobel NV, Solvay SA/NV, Kemira Oyj, FMC Foret SA, Evonik Degussa GmbH, Chemoxal SA, Edison SpA*, [2015] ECLI:EU:C:2015:335, at Para. 65; von Hein, above n. 51, Art. 23 Brussels I Regulation.



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

#### 4.2.5 *Submission by Appearance*

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

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

### 4.3 The German Proposal versus the Brussels *Ibis* Regulation

Just as the NCC provisions, the requirements set on agreements in favour of the KfIH by the German pro-

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

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

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

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

74. On the equivalence of submission by appearance to an implicit jurisdiction agreement: Case 48/84, *Hannelore Spitzley v. Sommer Exploitation SA*, [1985] ECR 787, at Paras. 13-15; Case 111/09, *Česká podnikatelská pojišťovna as, Vienna Insurance Group v. Michal Bilas*, [2010] ECLI:EU:C:2010:290, at Para. 33. See also Jenard, Report, above n. 50, Commentary on the sections of Title II, Section 6, Prorogation of jurisdiction, Art. 18.

75. Garcimartin, above n. 51, Art. 26 Brussels *Ibis* Regulation, at margin no. 9.100; A.-L. Calvo Caravaca and J. Carrascosa González, in U. Magnus and P. Mankowski (eds.), *Brussels Ibis Regulation* (2016), Art. 26 Brussels *Ibis* Regulation, at margin no. 1.

76. Calvo Caravaca and Carrascosa González, above n. 75, Art. 26 Brussels *Ibis* Regulation, at margin no. 1, 23.

77. Bork, above n. 42, Art. 38 ZPO, at margin no. 22; Schlosser, above n. 61, Art. 25 Brussels *Ibis* Regulation, at margin no. 7; Mankowski, above n. 43, Art. 25 Brussels *Ibis* Regulation, at margin no. 62, 74-5.

78. Critical also B. Hess as reported in M. Sonntag, 'Justiz & Brexit: Frankfurt Chamber for International Commercial Disputes – Veranstaltung in Frankfurt am Main am 9. August 2018', *Zeitschrift für Europäisches Privatrecht* 966, at 968-69 (2018).

79. Mankowski and Nielsen, above n. 46, Art. 19 Brussels *Ibis* Regulation, at margin no. 22; A. Staudinger, in T. Rauscher (ed.), *Europäisches Zivilprozess- und Kollisionsrecht* (2016) Art. 19 Brussels *Ibis* Regulation, at margin no. 2.

requirements listed in Article 25 (1) Brussels *Ibis* Regulation.<sup>80</sup> On the contrary, draft Article 114b GVG requires an express and in writing agreement.

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

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

## 5 The Consequences of the Clash

### 5.1 A Matter of Characterisation

The previous sections have demonstrated the various clashing points between the provisions regulating the jurisdiction of the international commercial courts in the Netherlands and Germany and the Brussels *Ibis* Regulation. Contrary to the latter, the NCC provisions require parties to conclude an explicit agreement in writing when opting in favour of the NCC. The German proposal, on the other hand, promises commercial parties a greater freedom when agreeing on the jurisdiction of the KfiH. However, the draft provisions requiring the claimant to attach the agreement or the defend-

ant's declaration of consent to litigate in English to the statement of claim put a leash on this freedom and, in effect, cancel it.

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

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

### 5.2 Functional Jurisdiction Agreements

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

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

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

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

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

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

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

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

The structure of the NCC and the KfiH as court divisions points, indeed, towards the conclusion that agree-

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

### 5.3 Lost in Terminology

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

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

85. von Hein, above n. 51, Preliminary remarks to Art. 2 Brussels I Regulation, at margin no. 3; Mankowski, above n. 43, Preliminary remarks to Art. 4 Brussels *Ibis* Regulation, at margin no. 44.

86. Case C-222/15, *Höszig Kft. v. Alstom Power Thermal Services*, [2016] ECLI:EU:C:2016:525, at Para. 48; Rechtbank Rotterdam, ECLI:NL:RBROT:2018:594, at 4.5; von Hein, above n. 51, Art. 23 Brussels I Regulation, at margin no. 75-76; Garcimartin, above n. 51, Art. 25 Brussels *Ibis* Regulation, at margin no. 9.11; Schlosser, above n. 61, Art. 25 Brussels *Ibis* Regulation, at margin no. 4, 14; Magnus, above n. 54, Art. 25 Brussels *Ibis* Regulation, at margin no. 30; Gottwald, above n. 51, Art. 25 Brussels *Ibis* Regulation, at margin no. 66.

87. Exceptions are Art. 8 (3) and 47 (1) Brussels *Ibis* Regulation. Schlosser, Report, above n. 51, at margin no. 81; von Hein, above n. 51, Preliminary remarks to Art. 2 Brussels I Regulation, at margin no. 4; Schlosser, above n. 61, Preliminary remarks to Art. 4-35 Brussels *Ibis* Regulation, at margin no. 2; Mankowski, above n. 43, Preliminary remarks to Art. 4 Brussels *Ibis* Regulation, at margin no. 47; Gottwald, above n. 51, Art. 4 Brussels *Ibis* Regulation, at margin no. 15; R. Geimer, in Zöller (ed.), *Zivilprozessordnung* (2018) Art. 4 Brussels *Ibis* Regulation, at margin no. 57.

88. See also Cases 400/13 & 408/13, *Sophia Marie Nicole Sanders v. David Verhaegen & Barbara Huber v. Manfred Huber*, [2014] ECLI:EU:C:2014:2461, at Para. 32.

89. Explanatory Memorandum 2017, at 5-6.

90. Legislative Proposal 2018, Explanatory Statement (Begründung), at 14: 'dessen Zuständigkeit im Wege der gesetzlich geregelten Geschäftsverteilung geregelt ist'.

91. In this article, the term 'functional jurisdiction' is used in the broader sense and therefore encompasses the internal allocation of cases within a court; see H. Roth, in R. Bork and H. Roth (eds.), *Stein/ Jonas Kommentar zur Zivilprozessordnung* (2014) Art. 1 ZPO, at margin no. 58, 60.

92. Roth, above n. 91, Art. 1 ZPO, at margin no. 58, 60; W. Zeiss and K. Schreiber, *Zivilprozessrecht* (2014), § 11 Die funktionelle Zuständigkeit, at margin no. 64; R. Hüßtege, in K. Reichold, R. Hüßtege and C. Seiler (eds.), *Thomas/Putzo Zivilprozessordnung* (2018), Preliminary remarks to Art. 93-114, at margin no. 1; Rosenberg, Schwab and Gottwald, above n. 82, § 29. Begriff, Arten und Bedeutung der Zuständigkeit, at margin no. 14 and § 33. Die Kammer für Handelssachen, at margin no. 5-6. See also P. Meier, 'Fremdsprachige Verhandlung vor deutschen Gerichten?', *Wertpapier-Mitteilungen* 1827, at 1831-1832 (2018).

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

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

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

For instance, an international jurisdiction agreement may confer jurisdiction on a third state's neutral court, which has no ties to the dispute or the parties. This choice of a neutral 'unrelated' court is common in international commercial disputes, since it ensures that none of the parties will enjoy the advantages of litigating before its home-state courts.<sup>99</sup> As a result, jurisdiction agreements in international disputes may confer juris-

diction on a court that conducts proceedings in its national, but foreign to the parties, language and according to its national, but alien to the parties, rules of civil procedure. When a German company concludes with a Dutch company a choice-of-court agreement in favour of the London Commercial Court, the parties will necessarily litigate in English and according to English civil procedure law. In addition, the parties will pay the fees of the London Commercial Court and will be subjected to the reputedly high lawyers' fees in England. Hence, every choice in favour of a foreign court entails a choice in favour of a foreign language, a foreign set of rules governing proceedings and the associated legal fees.<sup>100</sup> Seen from this perspective, the distinction between procedural agreements and court-language agreements appears a fictitious distinction that overlooks the realities of international commercial dispute resolution by adopting a confusing nomenclature.

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

93. F. Gaul, 'Das Zuständigkeitsverhältnis der Zivilkammer zur Kammer für Handelssachen bei gemischter Klagenhäufung und (handelsrechtlicher) Widerklage', *Juristen Zeitung* 57, at 57-58 (1984); G. Wagner, *Prozeßvertäge* (1998), at 570-72. See also H. Mayer, *Kissel/Mayer Gerichtsverfassungsgesetz* (2018) Art. 94 GVG, at margin no. 2. For the NCC and its resemblance to a self-standing court, see P. Ortolani and B. van Zelst, 'The Netherlands Commercial Court: Enforceability of Choice-of-Court Agreements and Decisions', *Journal of Private International Law* (forthcoming).

94. For an extensive account see H. Fleischer and N. Danninger, 'Die Kammer für Handelssachen: Entwicklungslinien und Zukunftsperspektiven', *Zeitschrift für Wirtschaftsrecht* 205, at 206 (2017); Mayer, above n. 93, Art. 93 GVG, at margin no. 2.

95. Legislative Proposal 2018, Explanatory Statement (Begründung), at 14, 16.

96. *Ibid.*, at 14.

97. Legislative Proposal 2018, Explanatory Statement (Begründung), at 16.

98. Parliamentary Papers I 2018/19 (Kamerstukken I 2018/19), 34 761, D Further Reply to the Statement of Objections (Nadere Memorie van Antwoord), at 6. See also Explanatory Memorandum 2017, at 5-6; Oranje, above n. 23, at 123-24.

99. F. Sandrock, *Die Vereinbarung eines "neutralen" internationalen Gerichtsstands* (1997), at 50-62.

100. H. Koster, 'Netherlands Commercial Court bezien vanuit het perspectief van het ondernemingsrecht', in E. Bauw, H. Koster and S. Krusinga (eds.), *De kansen voor een Netherlands Commercial Court* (2018) 145, at 147. See also E. Rubin, 'Toward a General Theory of Waiver', 28 *UCLA Law Review* 478, at 488-91 (1981); L. Mullenix, 'Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court', *Fordham Law Review* 291, at 293-96 (1988).

101. See also Cases 400/13 & 408/13, *Sophia Marie Nicole Sanders v. David Verhaegen & Barbara Huber v. Manfred Huber*, [2014] ECLI:EU:C:2014:2461, at Para. 32.

102. Case 119/84 *P. Capelloni and F. Aquilini v. J. C. J. Pelkmans*, [1985] EU:C:1985:388, at Para. 21; 420/07, *Meletis Apostolides v. David Charles Orams, Linda Elizabeth Orams*, [2009] ECLI:EU:C:2009:271, at Para. 69; Case 189/08, *Zuid-Chemie BV v. Filippo's Mineralenfabriek NV/SA*, [2009] ECLI:EU:C:2009:475, at Para. 30; Case C-379/17, *Società Immobiliare Al Bosco Srl*, [2018] ECLI:EU:C:2018:806, at Para. 26; Staudinger, above n. 79, Introduction Brussels *Ibis* Regulation, at margin no. 29. See also Case C-92/12 PPU, *Health Service Executive v. S.C., A.C.*, [2012] ECLI:EU:C:2012:255, at Para. 79; Cases 400/13 & 408/13, *Sophia Marie Nicole Sanders v. David Verhaegen & Barbara Huber v. Manfred Huber*, [2014] ECLI:EU:C:2014:2461, at Paras. 31-32.

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

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

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

ing additional and complex layers of national provisions to the existing rules of the Brussels *Ibis* Regulation.<sup>109</sup>

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

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

## 6 Conclusion

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

103. See also Opinion of Advocate General Jääskinen, Cases 400/13 & 408/13, *Sophia Marie Nicole Sanders v. David Verhaegen & Barbara Huber v. Manfred Huber*, [2014] ECLI:EU:C:2014:2171, at Paras. 52, 58.

104. Critical against Art. 38 ZPO G. Lüke, 'Unorthodoxe Gedanken zur Verkürzung der Prozessdauer und Entlastung der Zivilgerichte', in H. Prütting (ed.), *Festschrift für Gottfried Baumgärtel* (1990) 349, at 353; O. Jauerning and B. Hess, *Zivilprozessrecht* (2011), § 11 Angeordnete, vereinbarte und veranlasste Zuständigkeit, at margin no. 2; Bork, above n. 42, Art. 38 ZPO, at margin no. 5.

105. von Hein, above n. 51, Art. 23 Brussels I Regulation, at margin no. 16; Schlosser, above n. 61, Art. 25 Brussels *Ibis* Regulation, at margin no. 7; Magnus, above n. 54, Art. 25 Brussels *Ibis* Regulation, at margin no. 14; Mankowski, above n. 43, Art. 25 Brussels *Ibis* Regulation, at margin no. 62; Gottwald, above n. 51, Art. 25 Brussels *Ibis* Regulation, at margin no. 76-77; Rosenberg, Schwab and Gottwald, above n. 82, § 31. Die internationale Zuständigkeit, at margin no. 44.

106. See above Section 4.1.

107. von Hein, above n. 51, Art. 23 Brussels I Regulation, at margin no. 20. For employment contracts, see Case 25/79, *Sanicentral GmbH v. René Collin*, [1979] ECR 3423, at Para. 5.

108. Recitals 1, 3, 15, 19 and 22 Brussels *Ibis* Regulation. See also Case 533/08, *TNT Express Nederland BV v. AXA Versicherung AG*, [2010] ECLI:EU:C:2010:243, at Para. 49.

109. See also Requejo Isidro, above n. 1, at 3.2.1.1; Opinion of Advocate General Jääskinen, Cases 400/13 & 408/13, *Sophia Marie Nicole Sanders v. David Verhaegen & Barbara Huber v. Manfred Huber*, [2014] ECLI:EU:C:2014:2171, at Para. 69; Cases 400/13 & 408/13, *Sophia Marie Nicole Sanders v. David Verhaegen & Barbara Huber v. Manfred Huber*, [2014] ECLI:EU:C:2014:2461, at Para. 29.

110. See also Schlosser, above n. 61, Art. 25 Brussels *Ibis* Regulation, at margin no. 20a.

111. On the importance of litigation time and costs in commercial disputes, see also Committee on Legal Affairs, Draft Report with recommendations to the Commission on expedited settlement of commercial disputes, (2018/2079[INL]) available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-627.896+02+DOC+PDF+V0//EN&language=EN> (last visited 20 December 2018).

112. See also Fentiman, above n. 45, at 248; Wagner (2017), above n. 34, at 217.

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