2020

The Adjudication Business

Pamela K. Bookman
Fordham University School of Law, pbookman@law.fordham.edu

Article

The Adjudication Business

Pamela K. Bookman[†]

INTRODUCTION

The business of providing adjudication services for international commercial disputes—whether through courts, arbitration, or alternative dispute resolution (ADR) mechanisms—is a growth industry. London and New York have long been go-to forums for international commercial litigation in court.[1] The traditional top choices for arbitral seats include London, Paris, New York,

[†] Associate Professor of Law, Fordham Law School. For helpful conversations, I am grateful to Jane Baron, John Coyle, Courtney Cox, Matthew Erie, Mark Feldman, Susan Finder, Maggie Gardner, Craig Green, Mitu Gulati, Clare Huntington, Rebecca Ingber, Alyssa King, Eva Lein, David Noll, Rachel Rebouche, Danya Reda, Greg Reilly, Marta Requejo Isidro, Giesela Rühl, Aaron Simowitz, Paul Stephan, and participants in the Roundtable on Judicial Administration/Judicial Process at Duke Law School, the Junior International Law Scholars Association Workshop at Brooklyn Law School, and the International Business Law Scholars' Roundtable at Brooklyn Law School. Chelsey Dawson, Jessica Henschel, John Lucas Varney, and Corinne Zucker provided excellent research assistance.

[1] John MacKenzie, *UK: Competition For Commercial Disputes Around The World*, MONDAQ (Mar. 4, 2019), http://www.mondaq.com/uk/x/785390/Arbitration+Dispute+Resolution/Competition+For+Commercial+Disputes+Around+The+World.

and Geneva, homes to "the oldest and most popular arbitral institutions."[2] Reflecting the commonly cited refrain that most international commercial disputes go to arbitration, there has also been growth and innovation in arbitration centers and in arbitration-friendly domestic laws.[3]

A recent phenomenon has disrupted this traditional picture. States around the world are establishing international commercial courts: English-language-friendly domestic courts specializing in international commercial disputes. In the past sixteen years, Dubai (2004), Qatar (2009), Singapore (2015), Abu Dhabi (2015), Kazakhstan (2018), and China (2018) have all opened specialized courts focusing on international commercial disputes.[4] Since the Brexit vote in 2015, this phenomenon has also appeared in Europe: Germany,[5] France,[6] the Netherlands,[7] Belgium,[8] and Switzerland[9] have all either recently opened or considered plans to open new courts or court branches specifically dedicated to international commercial disputes. Other countries are also

---

[2] *The Seat of Arbitration in International Commercial Arbitration*, ACERIS LAW (Aug. 11, 2017), https://www.acerislaw.com/seat-arbitration-international-commercial-arbitration/.

[3] Serge Gravel, Partner, FLV & Associés, Remarks at International Arbitration Roundtable (June 2018) (transcript available at Financier Worldwide, https://www.financierworldwide.com/roundtable-international-arbitration-jun18#.XS4DTC_Mxok).

[4] *See* Matthew Erie, *The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution*, 59 VA. J. INT'L L. 225 (2020) [hereinafter Erie, *The New Legal Hubs*]; Nicolás Álvaro Zambrana-Tévar, *The Court of the Astana International Financial Center in the Wake of Its Persian Gulf Predecessors,* 12 ERASMUS L. REV. 122 (2019). Abu Dhabi's new commercial court handles both domestic and international commercial disputes. *See Abu Dhabi to Set Up New Commercial Court*, TRADEARABIA (Sept. 14, 2019), http://www.tradearabia.com/news/MISC_358611.html.

[5] Burkhard Hess & Timon Boerner, *Chambers for International Commercial Disputes in Germany: The State of Affairs*, 12 ERASMUS L. REV. 33, 33 (2019).

[6] Alexandre Biard, *International Commercial Courts in France: Innovation Without Revolution?*, 12 ERASMUS L. REV. 24, 24 (2019); Emmanuel Gaillard, Yas Banifatemi & Chloe Vialard, *The International Chambers of the Paris Courts and Their Innovative Rules of Procedure*, SHEARMAN & STERLING (Apr. 23, 2018), https://www.shearman.com/perspectives/2018/04/paris-courts-and-their-innovative-rules-of-procedure.

[7] Eddy Bauw, *Commercial Litigation in Europe in Transformation: The Case of the Netherlands Commercial Court*, 12 ERASMUS L. REV. 15, 15 (2019); NETH. COM. CT., https://www.rechtspraak.nl/English/NCC/ (last visited Mar. 4, 2020).

[8] Guillaume Croisant, *The Belgian Government Unveils Its Plan for the Brussels International Business Court (BIBC)*, KLUWER ARB. BLOG (June 25, 2018), http://arbitrationblog.kluwerarbitration.com/2018/06/25/the-belgian-government-unveils-its-plan-for-the-brussels-international-business-court-bibc/ (indicating a planned opening in 2020). In March 2019, the Belgian Parliament rejected the proposal and the BIBC is now at a standstill. *See* Geert Van Calster, *The Brussels International Business Court–Council of State Continues to Resist*, GAVC LAW (Mar. 21, 2019), https://gavclaw.com/2018/11/14/the-brussels-international-business-court-council-of-state-continues-to-resist/; Matthias Verbergt, *Controversiële 'kaviaarrechtbank' van Geens wordt begraven*, DE STANDAARD (March 21, 2019), http://www.standaard.be/cnt/dmf20190321_04272272. Proponents are still hopeful the court will be established. *See* Erik Peetermans & Philippe Lambrecht, *The Brussels International Business Court: Initial Overview and Analysis*, 12 ERASMUS L. REV. 42 (2019).

[9] Natalija Matic, *Switzerland: In the Pipeline: Zurich International Commercial Court*, MONDAQ (Oct. 13, 2018), http://www.mondaq.com/x/745118/international+trade+investment/In+The+Pipeline+Zurich+International+Commerical+Court (discussing consideration of an international commercial court in Switzerland).

contemplating opening new international commercial courts or judicial divisions dedicated to international commercial disputes.[10]

International commercial courts are not international courts. They are domestic courts whose subject matter jurisdiction is limited to, or focuses on, international commercial disputes. These courts add to, and are intended to complement, their home States' international commercial dispute resolution offerings. These States do not embrace litigation *instead* of arbitration; rather, they simultaneously have "litigation-friendly" international commercial courts and "arbitration-friendly" legal regimes that are favorably inclined toward arbitration clauses and deferential in their recognition and enforcement of arbitral awards.[11] These courts present themselves as innovative, cost effective, and responsive to typical criticisms of courts. For example, they often have experienced foreign jurists or other experts as judges, incorporate ADR, and allow parties to opt-out of regular domestic law procedures, resulting in courts that offer something of a hybrid of litigation and arbitration.[12]

Scholars, mostly outside the United States, are beginning to notice these courts. Several articles describe some subset of these new courts and discuss their

---

[10] *See, e.g.,* James M. Claxton et al., *Developing Japan as a Regional Hub for International Dispute Resolution: Dream Come True or Daydream?*, 24 J. OF JAPANESE L. 109 (2019); Marta Requejo Isidro, *International Commercial Courts in the Litigation Market* 5 n.4 (Max Planck Inst. Lux. Procedural L. Research Paper Series, No. 2019 (2), 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3327166 (describing discussions in Spain about opening an international commercial court) [hereinafter Requejo Isidro]; John Balouziyeh, *Judicial Reform in Saudi Arabia: Recent Developments in Arbitration and Commercial Litigation*, KLUWER ARB. BLOG (Dec. 31, 2017), http://arbitrationblog.kluwerarbitration.com/2017/12/31/judicial-reform-saudi-arabia-recent-developments-arbitration-commercial-litigation; Reem Shamseddine, *Saudi Arabia sets up Commercial Courts to Expedite Investment*, REUTERS (Oct. 16, 2017), https://www.reuters.com/article/us-saudi-court/saudi-arabia-sets-up-commercial-courts-to-expedite-investment-idUSKBN1CL2DT; The Honorable Justice John Middleton, The Rise of the International Commercial Court, FED. CT. OF AUSTL. (Sept. 21, 2018), https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-middleton/middleton-j-20180921 (discussing "numerous appeals for an international commercial court to be established in Australia"); Andrew Stephenson, Lindsay Hogan, & Jaclyn L Smith, *Australia: Is an International Commercial Court for Australia a Viable Option?*, MONDAQ (June 27, 2016), http://www.mondaq.com/australia/x/504084/International+Courts+Tribunals/Is+an+international+commercial+court+for+Australia+a+viable+option ("If Australia wants to compete with the likes of Singapore and Hong Kong for a slice of the international commercial disputes resolution market, then it makes sense to establish an international commercial court in Australia.").

[11] *See* Michael Hwang, *Commercial Courts And International Arbitration—Competitors Or Partners?*, 31 ARB. INT'L 193*,* 194 (2015) (defining "arbitration-friendly"). *See also* Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 72 VAND. L. REV. 1119 (2019) (discussing what it means to be arbitration-friendly) [hereinafter Bookman, *The Arbitration-Litigation Paradox*]. The full meaning of "arbitration-friendly" policies can be difficult to discern. *See, e.g.*, George A. Bermann, *What Does It Mean To Be "Pro-Arbitration"?*, 34 ARB. INT'L 341 (2018); William W. Park, *Arbitration and Fine Dining: Two Faces of Efficiency*, *in* THE POWERS AND DUTIES OF AN ARBITRATOR: LIBER AMICORUM PIERRE A. KARRER 251 (Patricia Shaughnessy & Sherlin Tung eds., 2017) (discussing trade-offs among different arbitration-friendly goals); Nobumichi Teramura, Luke R. Nottage & James Morrison, *International Commercial Arbitration in Australia: Judicial Control over Arbitral Awards*, (Sydney Law School Research Paper No. 19/24, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3379494 (discussing Australia's efforts to become more "arbitration-friendly").

[12] For a discussion of a subset of these courts as arbitration-litigation hybrids, see Pamela K. Bookman, *Arbitral Courts*, 61 VA. J. INT'L L. (forthcoming 2021) [hereinafter Bookman, *Arbitral Courts*].

capacity to compete with arbitration[13] or with the London Commercial Court.[14] More recently, entire volumes have been devoted to exploring the inner workings of these courts and speculating about their ability to attract cases.[15]

This Article takes on the received narrative that competition with arbitration to provide the best dispute resolution mechanism has been the primary driving force behind the creation of these courts. It argues that this narrative is mistaken and incomplete.

To the extent that competition is driving the creation of these courts, the competitive forces at work may not be entirely positive or efficient. Moreover, there are explanations for these courts beyond competition: the proliferation of international commercial courts is also a result of particular domestic political economies and other forces. Studying these courts and the forces driving their creation can generate important insights into critical debates about courts, international commercial dispute resolution, and the relationship between courts and arbitration.

This Article offers four main contributions. The first is descriptive: the Article offers a typology of international commercial courts that tracks what appear to be the primary reasons why these courts have come to be.

Second, this Article seeks to correct and shape the current conversation about international commercial courts as an emerging source of positive, efficient competition with arbitration. Long before the rise of international commercial courts, scholars have argued and assumed that competition for forum selection in contracts is an efficient competitive force. That is, such competition is supposed to drive a "race to the top" for tribunals to develop the best, most

---

[13] *See, e.g.*, Dalma Demeter & Kayleigh M. Smith, *The Implications of International Commercial Courts on Arbitration*, 33 J. INT'L ARB. 441, 441 (2016) [hereinafter Demeter & Smith]; Erie, *The New Legal Hubs*, *supra* note 4 (placing international commercial courts in the context of emerging legal hubs in Asia and surrounding areas); Andrew Godwin, *International Commercial Courts: The Singapore Experience*, 18 MELB. J. INT'L L. 219, 222 (2017) [hereinafter Godwin]; Requejo Isidro, *supra* note 10; Firew Tiba, *The Emergence of Hybrid International Commercial Courts and the Future of Cross Border Commercial Dispute Resolution in Asia*, 14 LOY. U. CHI. INT'L L. REV. 31, 32 (2016) [hereinafter Tiba]; Janet Walker, *Specialized International Courts: Keeping Arbitration on Top of Its Game*, 85 ARB. 2 (2019) [hereinafter Walker]; Stephan Wilske, *International Commercial Courts and Arbitration — Alternatives, Substitutes or Trojan Horse?*, 11 CONTEMPORARY ASIA ARB. J. 153 (2018) [hereinafter Wilske]. For an example of a U.S. scholar examining these courts from a U.S. perspective, see S.I. Strong, *International Commercial Courts and the United States: An Outlier by Choice and by Constitutional Design*?, *in* INTERNATIONAL BUSINESS COURTS – A EUROPEAN AND GLOBAL PERSPECTIVE 255 (Xandra Kramer & John Sorabji eds., 2019) [hereinafter Strong].

[14] *See, e.g.*, Xandra Kramer & John Sorabji, *International Business Courts in Europe and Beyond: A Global Competition for Justice?, in* INTERNATIONAL BUSINESS COURTS – A EUROPEAN AND GLOBAL PERSPECTIVE 1 (Xandra Kramer & John Sorabji eds., 2019); Giesela Rühl, *Judicial Cooperation in Civil and Commercial Matters After Brexit: Which Way Forward?*, 67 INT'L & COMP. L.Q. 99 (2018) [hereinafter Rühl, *Judicial Cooperation*]; DIRECTORATE GENERAL FOR INTERNAL POLICIES OF THE UNION, BUILDING COMPETENCE IN COMMERCIAL LAW IN THE MEMBER STATES 43 (Sept. 2018), https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604980/IPOL_STU(2018)604980_EN.pdf.

[15] *See, e.g.*, INTERNATIONAL BUSINESS COURTS – A EUROPEAN AND GLOBAL PERSPECTIVE (Xandra Kramer & John Sorabji eds., 2019); 12 ERASMUS L. REV. 1–135 (2019) (a collection of Articles pertaining to international commercial courts).

efficient procedures to resolve disputes.[16] The nascent literature on the rise of international commercial courts likewise often relies on these assumptions as a jumping-off point, describing international commercial courts as competing with arbitration by combining the best of both worlds (litigation and arbitration).[17]

This account is incomplete. These courts emerge not from some idealistic desire to perfect courts, but from a confluence of different local and international forces. Some courts have appeared because localities want to become new legal hubs for dispute resolution—providing not only new courts, but a forum hospitable to litigation, arbitration, and other forms of ADR (not necessarily focused on generating substantive law).[18] Singapore, for example, recently created an international commercial court to complement its rising prominence in arbitration and as a regional economic hub.[19] Some international commercial courts can emerge as aspiring litigation destinations without a parallel emphasis on arbitration or other kinds of ADR, as appears to be the case in Amsterdam, for example.[20] Other locations, such as Dubai, Qatar, and Kazakhstan, have created special economic zones and view courts with dispute resolution expertise as an integral part of attracting investment and capital to those zones.[21] Finally, China's aim seems keyed to exercising control over Belt and Road disputes,[22] although it may have broader, longer-term goals as well.[23]

It is important to pay attention to the driving forces behind international commercial courts because these goals will likely shape the courts' development. Moreover, over time, these courts' success may be judged domestically by metrics tied to these driving goals. These metrics will lead to decisions about, for example, whether governments will continue to fund the courts. Investment-minded courts will be deemed a success if they help expand investment; aspiring litigation destinations will be judged by the size of their dockets; China may judge its new court by its global influence or by other metrics.

It is possible that achieving these results might coincide with positive perceptions of the courts' quality, fairness, or cost-effectiveness. But it might not. Instead, courts might achieve these results in other ways, such as by catering

---

[16] *See, e.g.*, Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241, 243 (2016) ("Forum selling in contractual settings may be beneficial. When sophisticated parties use forum-selection clauses to choose the forum in their contracts, they have an incentive to choose a forum that provides unbiased, efficient adjudication because doing so maximizes the value of their transaction."); Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. (2006).

[17] *See, e.g.*, Tiba, *supra* note 13, at 32 (describing the SICC as a "hybrid institution [that] promises to combine the best of international commercial arbitration and that of judicial settlement of disputes").

[18] *See* Erie, *The New Legal Hubs*, *supra* note 4, at 49 ("[New legal hubs] compete on the quality of their legal services and procedural efficiency, rather than, necessarily, supplying the law itself.").

[19] *See infra* Section II.B.1.

[20] *See infra* Section II.B.2.

[21] *See infra* Section II.A.

[22] China's Belt and Road Initiative (BRI) includes a "vast collection of development and investment initiatives" launched in 2013 by President Xi Jinping, that "would stretch from East Asia to Europe, significantly expanding China's economic and political influence." Andrew Chatzky & James McBride, *China's Massive Belt and Road Initiative*, COUNCIL ON FOREIGN RELATIONS (Jan. 28, 2020), https://www.cfr.org/backgrounder/chinas-massive-belt-and-road-initiative.

[23] *See infra* Section II.C.

to certain constituencies or by expanding their jurisdiction. As the scholarship on corporate law has shown, probing the "race to the top" analogy reveals a more complicated picture than first appears.[24] While there is much to celebrate about the innovation of international commercial courts, these complicated dynamics also recommend watching them closely to see how they develop. A goal of this Article is to begin a line of scholarship that celebrates these courts' potential and helps avoid their worst outcomes.

International commercial courts also offer insight into a second, related theme in scholarship about the relationship between arbitration and litigation. U.S. courts often portray arbitration and litigation as stark alternatives, with the former as parties' favorite for resolving disputes arising out of international commercial contracts. As I have argued elsewhere, this dichotomy is overblown.[25] The new international commercial courts both bolster this argument and challenge the conventional story in a new way. For example, international commercial courts often borrow procedural devices, like party-driven design and confidentiality, that are typically thought to be characteristics distinguishing arbitration from litigation. These courts therefore explode assumptions about inherent differences between arbitration and litigation and undermine assumptions commonly made by U.S. courts that being pro-arbitration requires being hostile to litigation.[26]

Finally, international commercial courts offer an important perspective on scholarly debates about whether parties really do prefer arbitration, as is widely assumed. The increased supply of international courts suggests that there may be a demand for them, frustrating accounts that arbitration has replaced litigation as the dispute resolution mechanism of choice in international commercial contracts. On the other hand, supply does not prove demand. If it turns out that these courts attract few cases over time, that study, too, could inform understandings of what parties want from dispute resolution and what courts are capable of.

Part I provides a background understanding of the differences between courts, commercial courts, and international commercial courts. Part II canvases the recent growth of international commercial courts around the globe. It sets forth a typology for understanding the emergence of these courts based on the forces driving their creation. Part III discusses the importance of this changing adjudication business landscape for understanding the law market and other forces that may be driving the rise of international commercial courts. Part IV investigates these courts' lessons for scholarship about the relationship between litigation and arbitration and parties' preferences. Part V celebrates the potential

---

[24] *See* William J. Moon, *Delaware's New Competition*, 114 NW. L. REV. 1403 (2020) (discussing the corporate law debates).

[25] *See* Bookman, *The Arbitration-Litigation Paradox*, *supra* note 11.

[26] In a companion piece, I explore the idea of courts that seek to act like arbitral tribunals and the questions of legitimacy and public access that such "arbitral courts" raise. *See* Bookman, *Arbitral Courts*, *supra* note 12. *See also* Hiro Aragaki, *The Metaphysics of Arbitration: A Reply to Hensler and Khatam*, 18 NEV. L. J. 541 (2018) [hereinafter Aragaki, *Metaphysics*] (discussing international commercial courts as hybrids in the context of identifying the "essence" of arbitration).

of international commercial courts but also warns against the dangers of them catering excessively to either State or private interests.

I. COURTS, COMMERCIAL COURTS, AND INTERNATIONAL COMMERCIAL COURTS

To understand the significance of the new international commercial courts, it is important to know what came before them. This Part explains the difference between courts of general jurisdiction, commercial courts, and international commercial courts. It also profiles London's and New York's commercial courts. These examples typify the "old school" prototype of international commercial courts, which were simply *domestic* commercial courts that specialized in hearing business disputes and that were particularly open to foreign parties.

In U.S. law schools, students are usually introduced to two main types of courts: state and federal. State courts are courts of general subject-matter jurisdiction—that is, state courts can hear any kind of dispute (other than those over which federal courts have exclusive jurisdiction). Federal courts, by contrast, are courts of limited subject-matter jurisdiction. Those limits are defined by Article III of the Constitution and statutes such as the diversity and federal question statutes,[27] which grant federal court jurisdiction over disputes involving parties from different states and that involve high amounts in controversy, or disputes that "arise under" federal law. Within those constraints, however, federal courts hear disputes involving a wide variety of subject matters, from torts to civil rights to antitrust. The Federal Rules of Civil Procedure, correspondingly, are "transsubstantive," with rules that supposedly apply equally no matter the substance (or subject matter) of the dispute.[28]

There are a variety of ways, however, in which states can organize their court systems. While the federal courts do so only rarely,[29] state courts often specialize in certain subject matter areas, such as traffic court or family court or probate court. One area of court specialization is business or commercial disputes. An early example of such specialization appeared in 1895, when the Queen's Bench in London created the London Commercial Court.[30] In 1993, New York (along with Illinois) started a U.S. trend and established a Commercial Division to focus on commercial disputes with high amounts in controversy.[31]

---

[27] 28 U.S.C. §§ 1331–32 (2006).
[28] *See, e.g.*, David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 B.Y.U. L. REV. 1191 (2014) (exploring and defending the principle of transsubstantivity); *but see* J. Maria Glover, *The Supreme Court's "Non-Transsubstantive" Class Action*, 165 U. PA. L. REV. 1625 (2017) (arguing that the Supreme Court's class action cases apply differently in different substantive contexts).
[29] For example, the United States Court of Appeals for the Federal Circuit specializes in patent and certain other subject matters.
[30] Wilske, *supra* note 13, at 160.
[31] John F. Coyle, *Business Courts and Interstate Competition*, 53 WM. & MARY L. REV. 1915, 1918 (2012) [hereinafter Coyle, *Business Courts*].

Several other U.S. states and States around the world have created business courts since then.[32]

International commercial courts, the focus of this Article, are in some ways a natural extension of specialized commercial courts. The "old school" approach to having a court that catered to international commercial disputes was to have a high quality domestic court available to locals but also welcoming to foreign parties and attractive to them by virtue of the courts' expertise, efficiency, and broad jurisdiction, among other characteristics. The "old school" international commercial courts—London and New York—have both also been creators of widely consumed substantive law.[33] They have become the premier courts chosen through choice-of-forum clauses, the premier seats of arbitrations, and often the premier source of substantive law chosen through choice-of-law clauses.[34] For over a hundred years, London and New York have also been hospitable not only to international commercial litigation but also to arbitration.

Some background on the London and New York courts is useful for understanding the innovation of the new wave of international commercial courts. For a long time, the London Commercial Court was the prototypical—and indeed only—example of an old school international commercial court. Over time, that chamber became recognized for its judges' business sophistication, independence, and respect for the rule of law, as well as for its development of English law (and the flexible, but predictable, common law system) and its welcoming attitude toward foreign litigants.[35] The London Commercial Court is particularly attractive to foreign parties because of its broad concept of jurisdiction,[36] flexible procedural rules designed to accommodate complex commercial cases,[37] and proclivity toward compelling parties to disclose

---

[32] *Id*. *See also About Us*, SIFOCC, https://www.sifocc.org/about-us/ (last visited March 4, 2020).

[33] *See, e.g.*, Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 17–18, 35–36 (2008) (discussing New York's development of contract law aimed at making it more predictable and therefore more attractive as a choice for international commercial disputes); Geoffrey P. Miller & Theodore Eisenberg, *The Market for Contracts*, 30 CARDOZO L. REV. 2073, 2087 (2009).

[34] *See generally* Miller & Eisenberg, *supra* note 33 (discussing New York); Stefan Vogenauer, *Regulatory Competition Through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence*, 21 EUR. REV. PRIV. L. 13 (2013) (discussing Europe).

[35] *See generally* EVA LEIN ET AL., U.K. MINISTRY OF JUSTICE, 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.

[36] *See* Delphine Nougayrede, *Outsourcing Law in Post-Soviet Russia*, 3 J. EURASIAN L. 383, 395–400 (2015) (discussing Russian oligarchs' use of U.K. courts and law); JUDICIARY OF ENGLAND & WALES, THE COMMERCIAL COURT REPORT 2017–2018 6 (2019), https://www.judiciary.uk/wp-content/uploads/2019/02/6.5310_Commercial-Courts-Annual-Report_v3.pdf ("The jurisdiction of the Commercial Court is wide. It extends to any claim relating to the transaction of trade and commerce (including commercial agreements, import and export, carriage of goods by sea, land and air, banking and financial services, insurance and reinsurance, markets and exchanges, commodities, oil, gas and natural resources, the construction of ships, agency, arbitration and competition matters).") [hereinafter COMMERCIAL COURT REPORT 2017–2018].

[37] *See, e.g.*, COMMERCIAL COURT REPORT 2017–2018, *supra* note 36, at 16 (discussing opportunities for "shorter and flexible trials"); Robin Byron, *Update on Dispute Resolution in England and Wales: Evolution or Revolution*, 75 TUL. L. REV. 1297, 1301 (2001).

documents beyond standard disclosures.[38] The Commercial Court boasts a 60% settlement rate.[39] It also offers expedited and expert procedures for cases that qualify for the "Financial List" by having more than £50 million in dispute and relating to financial markets.[40]

Related to the attractiveness of London's courts is the attractiveness of the English language and English law. English, the "global language of business," is one of the most widely spoken languages in the world.[41] English law, likewise, enjoys a favorable reputation around the globe. It has been the most commonly selected law to govern business contracts within the EU.[42] It is sought after for its familiarity, stability, and predictability, as well as its reputation for fairness and efficiency.[43] The doctrine of precedent offers predictability but also flexibility to adapt to the modern business world.[44] English law is also quite favorable towards enforcing contracts.[45]

These features attract a large quantity of international cases. The U.K.'s Justice Department advertises both U.K. courts and U.K. law as an important export.[46] In 2015, "63% of disputes at the [London] Commercial Court involved foreign nationals,"[47] and "52% of the contracts drafted in English in the Middle East and North Africa chose London as the seat of jurisdiction for disputes."[48]

London's embrace of international commercial litigation coexists with an embrace of arbitration. London hosts one of the most popular commercial

---

[38] Byron, *supra* note 37, at 1301.
[39] COMMERCIAL COURT REPORT 2017–2018, *supra* note 36, at 10.
[40] *The Financial List: Resolving Financial Markets Disputes in London*, NORTON ROSE FULBRIGHT, (Nov. 2015), https://www.nortonrosefulbright.com/en/knowledge/publications/0ee0087d/the-financial-list-resolving-financial-markets-disputes-in-london.
[41] Tsedal Neeley, *Global Business Speaks English*, HARV. BUS. REV. (May 2012), https://hbr.org/2012/05/global-business-speaks-english.
[42] DEP'T FOR EXITING THE EU, HM GOV'T, PROVIDING A CROSS-BORDER CIVIL JUDICIAL COOPERATION FRAMEWORK: A FUTURE PARTNERSHIP PAPER 4 (2017), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/639271/Providing_a_cross-border_civil_judicial_cooperation_framework.pdf.
[43] *See* Vogenauer, *supra* note 34.
[44] *See generally* COURTS & TRIBUNALS JUDICIARY, LEGALUK: THE STRENGTH OF ENGLISH LAW AND THE UK JURISDICTION (2017), https://www.judiciary.uk/wp-content/uploads/2017/08/legaluk-strength-of-english-law-draft-4-FINAL.pdf. *See also* Hwang, *supra* note 11, at 198–200 (discussing benefits of common law).
[45] *See generally* COURTS & TRIBUNALS JUDICIARY, *supra* note 44.
[46] THE LAW SOCIETY OF ENGLAND AND WALES, ENGLAND AND WALES: THE JURISDICTION OF CHOICE 5 (2007), http://www.eversheds-sutherland.com/documents/LawSocietyEnglandAndWalesJurisdictionOfChoice.pdf ("The Ministry of Justice is committed to supporting the legal sector's success on the international stage. I am therefore delighted to introduce this brochure by the Law Society promoting England and Wales as the jurisdiction of choice for the resolution of disputes arising all over the world."); *see also Introduction,* LCIA, https://www.lcia.org/LCIA/introduction.aspx (last visited March 4, 2020).
[47] Wilske, *supra* note 13, at 160 (citing Adam Sanitt, *The Financial List: Resolving Financial Markets Disputes in London*, NORTON ROSE FULBRIGHT (Nov. 2015), http://www.nortonrosefulbright.com/knowledge/publications/134005/the-financial-list-resolving-financial-markets-disputes-in-london).
[48] Requejo Isidro, *supra* note 10, at 8.

arbitration centers, the London Court of International Arbitration (LCIA),[49] and London is one of the most popular choices for seating arbitrations, regardless of which arbitration center administers the arbitration.[50] U.K. law liberally supports arbitration. In 1996, Parliament revised the Arbitration Act, modeling it after the UNCITRAL Modern Rules for Arbitration,[51] which require courts to support arbitration and limit judicial interference.[52] At the same time, U.K. courts are strongly committed to openness, for example, by allowing non-parties to access court documents.[53]

Like London, New York is also a popular choice for designation in both choice-of-law and choice-of-forum clauses. While London dominates the European market, New York law and New York City dominate choice-of-law and choice-of-forum designations in the Americas.[54] Like English law, New York law is widely respected and often selected to govern contracts even when the particular business relationship has little or no connection to New York. Also like English law, its value resonates in the common-law tradition. New York law is also respected for its stability and predictability, as well as its flexibility, and it is thought to be generally favorable to business interests and contract enforcement.[55] In a study of contracts filed with the SEC, New York was designated as the forum in 34% of the studied domestic contracts and 45% of the international ones.[56]

---

[49] QUEEN MARY UNIVERSITY OF LONDON, 2018 INTERNATIONAL ARBITRATION SURVEY: THE EVOLUTION OF INTERNATIONAL ARBITRATION 2 (2018), http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF [hereinafter QMUL 2018 survey].

[50] *See* Loukas A. Mistelis, *Arbitral Seats: Choices and Competition*, KLUWER ARBITRATION BLOG (Nov. 26, 2010), http://arbitrationblog.kluwerarbitration.com/2010/11/26/arbitral-seats-choices-and-competition/.

[51] Byron, *supra* note 37, at 1316.

[52] The previous Arbitration Act had permitted appeals of questions of law from arbitration to the courts. The 1996 law ended that practice. *Id*. at 1316–18.

[53] Cape Intermediate Holdings v. Dring (for and on behalf of Asbestos Victims Support Groups Forum UK) [2019] UKSC 38, [34] (appeal taken from EWCA (Civ)).

[54] LEIN ET AL., *supra* note 35, at 27. Notably, many of the studies of emerging international commercial courts and legal hubs cite London as both the inspiration and primary competition for the new courts. *See, e.g.*, Erie, *The New Legal Hubs*, *supra* note 4 (placing international commercial courts in the context of emerging legal hubs in Asia and surrounding areas); Requejo Isidro, *supra* note 10; Tiba, *supra* note 13, at 37; Godwin, *supra* note 13, at 222; Walker, *supra* note 13; Wilske, *supra* note 13. For an example of a U.S. scholar examining these courts from a U.S. perspective, *see* Strong, *supra* note 13. The few scholars to consider the U.S. role in the growing market for international commercial dispute resolution do not emphasize the importance of New York compared to other states, which have far less developed commercial courts and often focus on domestic rather than international disputes. *See* Strong, *supra* note 13. But New York has the distinction both of having a widely used substantive law and of being a popular litigation destination. *See* Miller & Eisenberg, *supra* note 33; Julian Nyarko, *Stickiness and Incomplete Contracting: Explaining the Lack of Forum Selection Clauses in Commercial Agreements*, 87 U. CHI. L. REV. __ (forthcoming 2020) (manuscript at 15), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3446206 [hereinafter Nyarko, *Stickiness*]; Julian Nyarko, *We'll See You in . . . Court! The Lack of Arbitration Clauses in International Commercial Contracts*, 58 INT'L REV. L. & ECON. 6, 13 (2019) [hereinafter Nyarko, *The Lack of Arbitration Clauses*].

[55] *See generally* Miller & Eisenberg, *supra* note 33; Sarath Sanga, *Choice of Law: An Empirical Analysis*, 11 J. EMPIRICAL LEGAL STUD. 894 (2014).

[56] Nyarko, *The Lack of Arbitration Clauses*, *supra* note 54, at 7.

Most international commercial disputes heard in New York end up in federal court because the parties are diverse or foreign and their disputes have a high amount in controversy. The Southern District of New York—the federal trial level court that sits in Manhattan—is well respected for the competence, neutrality, and legal expertise of its judges.[57]

In 1993, almost one hundred years after the establishment of the London Commercial Court, New York established its own Commercial Division. New York's state courts have long also been "extraordinarily receptive to enforcing contracts that select New York as the provider of law or forum, even in cases where there are few or no other connections between New York and the contract or the parties."[58] In the Manhattan Commercial Division, disputes must be in excess of $500,000.[59] For cases that may have no other connection to New York, New York statutes grant jurisdiction over all cases relating to any contract worth over $1 million where foreigners designate New York in their choice-of-law and choice-of-forum clauses.[60] These statutes were enacted in response to New York Bar Association committee reports recommending "affirmative measures to attract foreign business by providing ready access to a competent forum for dispute resolution" and to compete with other international business centers.[61] New York courts vigorously enforce arbitration clauses, forum-selection clauses, and choice-of-law clauses.[62]

The Commercial Division prides itself on its flexibility and efficiency. For example, under Rule 9, the parties may choose "accelerated procedures" that promise to end proceedings within nine months and require parties to waive a number of procedural rights and defenses, including the right to a jury trial, to recover punitive damages, and to interlocutory appeal.[63]

---

[57] *See* JOHN D. WINTER & RICHARD MAIDMAN, RETELLING THE HISTORY OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (2012), https://www.pbwt.com/content/uploads/2015/07/NYLitigator-Summer2012-History-SDNY-1043294-_2_.pdf.

[58] Miller & Eisenberg, *supra* note 33, at 2087; Vogenauer, *supra* note 34, at 44 ("Today, New York law and New York courts are widely regarded as being particularly sophisticated and mature and as being perceptive to business in general and the financial industry in particular."). Interestingly, Julian Nyarko has documented a "striking lack of choice-of-forum provisions in commercial contracts" filed with the SEC. Nyarko, *Stickiness*, *supra* note 54, at 1.

[59] N.Y. Ct. R. § 202.70(a) (2018).

[60] N.Y. Gen. Oblig. Law § 5-1402 (McKinney 1984) (parties may agree to have disputes arising under a contract resolved in New York, if: (a) the value of the contract is at least $1 million; and (b) the parties agree to submit to personal jurisdiction in New York); *see, e.g.*, IRB-Brasil Resseguros, S.A. v. Inepar Inv.s, S.A., 20 N.Y.3d. 310, 315 (2012); Hemlock Semiconductor Pte. Ltd. v. Jinglong Indus. & Commerce Grp. Co., Ltd., 56 Misc.3d 324, 326–27 (N.Y. Sup. Ct. 2017); Bristol Inv. Fund Ltd. v. ID Confirm, Inc., 2008 N.Y. Misc. LEXIS 7549, *6–7 (N.Y. Sup. Ct. 2008).

[61] Miller & Eisenberg, *supra* note 33, at 2091; Committee on Foreign and Comparative Law, *Proposal for Mandatory Enforcement of Governing-Law Clauses and Related Clauses in Significant Commercial Agreements*, 38 RECORD OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 537, 537 (1983).

[62] *See, e.g.*, Corcoran v. Ardra Ins. Co., 77 N.Y.2d 225, 233 (1990) (citing Cooper v. Ateliers de la Motobecane, S.A., 57 N.Y.2d 408 (1982)) ("[I]t is the policy in New York to encourage resolution of disputes through arbitration, particularly conflicts arising in the context of international commercial transactions."); *see also* Miller & Eisenberg, *supra* note 33, at 2089–90.

[63] N.Y. COMP. CODES. R. & REGS. tit. 22, § 202.70(9) (1965). When parties choose these accelerated procedures, they are deemed to have waived a number of procedural rights, including the right to a jury trial and the right to interlocutory appeal. *Id*. § 202.70(9)(c).

Inspired by the London Commercial Court's "Financial List" for cases over £50 million, New York also recently opened a "Large Complex Case List" for disputes over $50 million, which opens opportunities for special procedures, including the use of special referees for discovery or settlement.[64] The Commercial Division continues to innovate in other ways as well.[65] These efforts have led the Commercial Division to dramatically improve resolution time for cases and dramatically increase the number of cases that settle before trial.[66]

The New York Commercial Division also has various provisions permitting documents to remain confidential.[67] But while "confidentiality orders have become a routine part of commercial litigation," the Commercial Division polices parties' requests for confidentiality for excess or abuse. In a recent decision, the court sanctioned Google for aggressively over-designating documents as confidential.[68]

In addition to promoting itself as a go-to forum for international commercial litigation, New York also strives to "signal to the international business community New York's commitment to the efficient resolution of court proceedings that relate to international arbitration."[69] New York has "engaged in vigorous efforts to attract" adjudication business—both in courts and in arbitration—for much of the last century.[70]

London and New York are thus "old school" examples of international commercial courts. They are courts of limited subject-matter jurisdiction, specializing in commercial disputes including, but not limited to, disputes with international elements. They do not quite deserve the name of "international commercial courts" because they are domestic courts that will hear entirely domestic disputes. But they do make themselves attractive to international commercial disputes, even for controversies with little or no connection to them.

---

[64] Stephen P. Younger & Muhammad U. Faridi, *Top 10 New York Commercial Division Cases and Developments of 2017*, PATTERSON BELKNAP LLP (Jan. 2, 2018), https://www.pbwt.com/ny-commercial-division-blog/top-10-new-york-commercial-division-cases-and-developments-of-2017.

[65] Effective October 1, 2018, for example, two new rule amendments encourage parties to use technology assisted review in discovery and to seek immediate trials on early dispositive issues. Patrick G. Rideout & Giyoung Song, *New York's Commercial Division Continues Its Efforts to Increase Efficiencies*, LEXOLOGY (Sept. 24, 2018), https://www.lexology.com/library/detail.aspx?g=b04dcf9f-94c4-43c8-845d-43cb4675f1a0.

[66] Danya Shocair Reda & Nicholas Frayn, *Global Dimensions of Court Reform* (unpublished manuscript), at 19 (draft on file with Author) [hereinafter Reda & Frayn]. Moreover, "New York has positioned itself as an attractive forum for resolution of international commercial disputes, with flexible rules permitting contracting parties to agree to procedures specific to their needs. That choice works best for parties who take the necessary time in advance to negotiate not only choice of forum, but also the procedural mechanisms of their choice." Chaya Weinberg-Brodt, *International Commercial Litigation in New York*, N.Y. L. J. (Oct. 9, 2018), https://www.law.com/newyorklawjournal/2018/10/09/international-commercial-litigation-in-new-york/?slreturn=20181027165420.

[67] *See* N.Y. C.P.L.R. 3103(a) (McKinney 2013).

[68] *See* Callsome Solutions v. Google, 2018 N.Y. Misc. LEXIS 4852 (N.Y. Sup. Ct. 2018); Thomas J. Hall & Judith A. Archer, *Use and Abuse of Confidentiality Orders*, N.Y. L.J. (Dec. 20, 2018), https://www.law.com/newyorklawjournal/2018/12/20/use-and-abuse-of-confidentiality-orders/?slreturn=20190113131625.

[69] Reda & Frayn, *supra* note 66, at 28 (quoting Advisory Council Report on Rules Changes).

[70] Miller & Eisenberg, *supra* note 33, at 2079–87; Reda & Frayn, *supra* note 66.

Part of that attractiveness is closely tied up in the attractiveness of the substantive law, English and New York law, respectively, that they apply and develop.

II. THE NEW INTERNATIONAL COMMERCIAL COURTS

Over the last fifteen years, a growing number of States around the world have looked to build on the London—and, to some extent, the New York—example and establish a domestic court that caters specifically to international commercial disputes, limiting jurisdiction to cases that qualify as both "commercial" and "international." These courts tend to be English-language-friendly, receptive to common-law procedures and substantive law, and technologically state-of-the-art. Many incorporate desirable characteristics of arbitration, for example, by allowing confidentiality and customized procedures.[71] Unlike London and New York, these new courts distinguish themselves "on the quality of their legal services and procedur[es], rather than, necessarily, supplying the [substantive] law itself."[72]

While several studies examine the growth of international commercial courts as a unified global phenomenon,[73] this Part describes three categories of international commercial courts.[74] The first category includes investment-seeking courts, such as Qatar and Dubai, which were established to attract investment into the country and the region. Second, Singapore and the European courts purport to be striving to become gold-standards and go-to forums in their regions for international commercial dispute resolution. I dub these "litigation destinations." Litigation destinations usually, but need not, exist in a local legal environment that tries to be friendly to litigation as well as arbitration. The third category considers China's new international commercial court, aimed to be a one-stop-shop for all international commercial dispute resolution needs, focused on resolving disputes arising out of its investments in the Belt and Road Initiative.[75] This last type of court has unique potential for global influence.

---

[71] This study is not meant to be exhaustive (nor could it be, as new international commercial courts seem to be appearing all the time). This Article focuses on new courts or court divisions established in the twenty-first century that specifically target international commercial disputes to illustrate how the rise of these courts challenges many common assumptions about international commercial dispute resolution. Other categories of courts exhibit some parallel traits. For example, Ireland currently has a commercial court open to domestic and international disputes; the Cayman Islands, Bermuda, and the British Virgin Islands have recently opened commercial divisions that specialize in disputes involving companies incorporated in those jurisdictions. *See* Moon, *supra* note 24, at 1438.

[72] Erie, *The New Legal Hubs*, *supra* note 4, at 54.

[73] *See* Demeter & Smith, *supra* note 13; Godwin, *supra* note 13; Requejo Isidro, *supra* note 10, Tiba, *supra* note 13; Wilske, *supra* note 13.

[74] "International" here describes the subject matter jurisdiction of these courts—their jurisdiction specializes in and can be limited to transnational commercial disputes. Some are also international insofar as they employ foreign jurists, allow foreign lawyers to practice before them, incorporate foreign law and procedures different from local courts, and operate in a foreign language (usually English). *See* Walker, *supra* note 13, at 4; Georgia Antonopoulou, *Defining International Disputes –Reflections on the Netherlands Commercial Court Proposal*, 2018 NEDERLANDS INTERNATIONAAL PRIVAATRECHT 740 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3380321 (discussing the definition of "international" for the purposes of defining jurisdiction of such courts).

[75] The Belt and Road Initiative aims to improve regional cooperation and connectivity on a trans-continental scale. *Belt and Road Initiative*, THE WORLD BANK (March 29, 2018),

A. *Investment-Minded Courts*

Some international commercial courts have developed in light of a deep local need for foreign investment and a desire to attract international commerce and capital.[76] Localities in Qatar, Dubai and Abu Dhabi in the United Arab Emirates, and Astana (now Nur-Sultan) in Kazakhstan, have established financial centers and free-trade zones, complete with a full menu of international commercial dispute resolution options, including international commercial courts, to reassure foreign investors and the international financial world that their local investments will be protected. These jurisdictions have erected new, state-of-the-art facilities. They build on existing best practices in international commercial dispute resolution, providing a hospitable forum for both litigation and arbitration with well-respected, international judges. They hire British and other foreign experts to design their procedures and institutions and to serve as judges. Especially at first, their innovations primarily came in the form of transplanting English judicial practices and often English judges themselves.

This Section profiles the international commercial courts established in Qatar and Dubai, the oldest investment-minded courts. The newer examples—the Court of the Astana International Financial Center (AIFC) in Kazakhstan,[77] and the Abu Dhabi Global Market Courts (ADGMC)[78]—follow a similar model, establishing English-language, common-law-based courts that employ foreign jurists, are friendly to arbitration, and seek to establish themselves as state-of-the-art dispute resolution centers to attract foreign investment and assure international constituencies of their legitimacy. These courts do not advertise themselves as litigation destinations for all global disputes; rather, they may seek to repatriate disputes involving locals and prevent them from going to London or elsewhere.[79]

---

https://www.worldbank.org/en/topic/regional-integration/brief/belt-and-road-initiative. The goal is to strengthen infrastructure, trade, and investment links between China and 65 other countries. *Id.* Together, they will account for over 30 percent of global GDP, 62 percent of the population, and 75 percent of known energy resources. Efem Nkam Ubi, *How Africa Benefits China*, STRATFOR (July 2, 2019).

[76] The establishment of international commercial courts to attract foreign direct investment likely works better than U.S. state business courts' attempts to create business courts to attract out-of-state companies to relocate or do more business in a particular state. *See* Coyle, *Business Courts*, *supra* note 31, at 1940 (explaining irrelevance of business court availability to business location decisions).

[77] Erie, *The New Legal Hubs*, *supra* note 4; Nicolás Álvaro Zambrana-Tévar, *The Court of the Astana International Financial Center in the Wake of Its Persian Gulf Predecessors* (Dec. 31, 2018), https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3308296 (the Astana financial center and court are modeled after Dubai; the first chief justice of the AIFC court was Lord Woolf, former Lord Chief Justice of England and Wales); *AIFC Court and IAC "eJustice" Launch*, AIFC (Feb. 26, 2019), https://aifc.kz/press-relizy/aifc-court-and-iac-ejustice-launch/; Yerbolat Uatkhanov, *AIFC Court, IAC Consider Five Cases in 2019,* ASTANA TIMES (Jan. 5, 2020), https://astanatimes.com/2020/01/aifc-court-iac-consider-five-cases-in-2019/ ("Our dispute resolution is quick, accessible, cost effective, impartial and, above all, incorruptible.").

[78] Wilske, *supra* note 13, at 165; Walker, *supra* note 13, at 6 ("ADGM Courts are largely based on the English judicial system with a physical and electronic registry that supports their operations and hearings in Abu Dhabi and around the world.").

[79] *See, e.g.*, Frances Gibb, The Times, *UK Judges Head New Court in Kazakhstan*, EMBASSY OF THE REPUBLIC OF KAZAKHSTAN IN THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Interestingly, as these courts gain prominence and acceptance, they can become regional legal hubs and shift their focus from providing stability and predictability to cultivating flexibility and adapting to modern challenges. Aside from the old school international commercial courts, the Qatar and Dubai courts, as "teenagers," are the oldest courts discussed in this Article. Their track record demonstrates that the difference between being an investment-minded court and an aspiring litigation destination can be fluid. But it also shows that international commercial courts can serve multiple masters and be designed to further multiple goals.

1. Qatar

In 2005, Qatar established the Qatar Financial Centre (QFC) to attract international investment to the country.[80] The QFC creates a legislative framework to protect entities established in the QFC from the operation of ordinary Qatar law (with the exception of the criminal law). The laws aim to be business- and user-friendly to encourage foreign direct investment in Qatar. For example, they guarantee QFC entities the ability to repatriate profits and to be owned by foreigners. These reforms replaced the former dual legal framework, which had separate courts for Muslim Qataris and for non-Muslim foreigners.

The QFC also includes the Qatar International Court and Dispute Resolution Centre, also known as the Qatar International Court (QIC).[81] The QIC's jurisdiction is limited to international commercial disputes. The court's official mission is "to provide a world-class international court and dispute resolution Centre." The QIC's promotional materials state that it strives "to be recognized as the world's leading forum for the resolution of international civil and commercial disputes."[82] Nevertheless, scholars describe the original impetus for creating the court as promoting investment and demonstrating stability.[83]

The QIC is open to claims regardless of their connection with Qatar if the parties choose the QIC in their contract.[84] It aims to be a state-of-the-art dispute resolution center that incorporates many of the most desirable features of the London model. The QIC operates in English (although parties can request to have proceedings in Arabic).[85] It follows common law procedures,[86] and

---

(Feb. 1, 2018), http://www.mfa.gov.kz/en/london/content-view/uk-judges-head-new-court-in-kazakhstan ("Woolf accepts that a 'very small number' of cases that would have gone to London might now go to the new court. 'But it does not detract from our commercial court; on the contrary, it promotes it in a part of the world that doesn't have that tradition.'").

[80] Zain Al Abdin Sharar & Mohammed Al Khulaifi, *The Courts in Qatar Financial Centre and Dubai International Financial Centre: A Comparative Analysis*, 46 H.K. L. J. 529, 533 (2016).

[81] *See The Court Overview*, QATAR INTERNATIONAL COURT AND DISPUTE RESOLUTION CENTRE, https://www.qicdrc.gov.qa/court-overview-0 (last visited March 4, 2020).

[82] Wilske, *supra* note 13, at 164.

[83] Sharar & Al Khulaifi, *supra* note 80, at 533.

[84] Requejo Isidro, *supra* note 10, at 9.

[85] Walker, *supra* note 13, at 7.

[86] "It is now accepted that the most understood and accepted jurisdiction in relation to commercial matters is the common law jurisdiction. As a result, any financial centre which seeks international

parties can choose the substantive law applicable to their claims. The judges include some Qatari judges and some retired judges from common and civil law countries.[87] Decisions are typically unappealable and confidential proceedings are available for "good reason."[88]

Notably, Qatar sees the importance of the QIC as not only providing a fair, unbiased, sophisticated courts system operating in English and based in common law, but also a center for multiple kinds of dispute resolution, including arbitration. In 2017, it enacted a new arbitration law[89] based on the UNCITRAL Model Law on International Commercial Arbitration. This change should make Qatar more "arbitration friendly" and a generally more attractive location for dispute resolution.[90]

The QIC itself offers judges as well as arbitrators and arbitration facilities. Parties can select the QIC as an arbitral seat, as the court administers arbitrations as well, and the judges may separately serve as arbitrators.[91] The court aims to be a one-stop shop for all international commercial dispute resolution needs.[92] Unusually, the QIC charges no fees.[93]

There appear to be no available statistics on the number of cases the QIC has heard or the number of contracts designating the QIC as the forum.[94] Existing data suggests that some QIC proceedings took one to two years, suffering from inefficiencies with respect to appointing experts and setting deadlines for expert reports.[95] The recent addition of an eCourt, the QICDRC Case Management System, may address some of these issues.[96]

---

recognition and participation has no choice but to consider a dispute resolution regulatory structure which is based on the common law. A regulatory regime based on the common law by necessity implies that it will be English speaking because the main proponents of the common law are English speakers." Sharar & Al Khulaifi, *supra* note 80, at 539.

[87] Sharar & Al Khulaifi, *supra* note 80, at 534; Walker, *supra* note 13, at 7; Wilske, *supra* note 13, at 163–64; *The Court Overview*, QATAR INT'L CT. AND DISPUTE RESOLUTION CTR., https://www.qicdrc.gov.qa/the-courts/overview (last visited Mar. 4, 2020) (listing judges from the U.K., South Africa, Singapore, Cyprus, and other countries).

[88] *The Qatar Financial Centre Civil and Commercial Court: Regulations and Procedural Rules*, QATAR INT'L CT. AND DISPUTE RESOLUTION CTR. (Dec. 15, 2010), art. 28.3, https://www.qicdrc.gov.qa/sites/default/files/s3/wysiwyg/qfc_civil_and_commercial_court_regulations_date_of_issuance_15_december_2010_0.pdf.

[89] *Law No. 2 of 2017 Promulgating the Civil and Commercial Arbitration Law*, QATAR INT'L CT. AND DISPUTE RESOLUTION CTR (Feb. 16, 2017) https://www.qicdrc.com.qa/sites/default/files/law_no._02_2017_promulgating_the_civil_and_commercial_arbitration_law.pdf.

[90] White & Case, *The Role of the English Courts Post Brexit: Emerging Challengers?*, JD SUPRA (Oct. 31, 2018), https://www.jdsupra.com/legalnews/the-role-of-the-english-courts-post-26537/ [hereinafter *The Role of English Courts Post Brexit*].

[91] Walker, *supra* note 13, at 7.

[92] Wilske, *supra* note 13, at 164–165.

[93] *Id.*

[94] Requejo Isidro, *supra* note 10, at 10.

[95] *Id*.

[96] *Id.*

2. Dubai

Dubai, the most populous emirate in the United Arab Emirates, opened the Dubai International Financial Center (DIFC) in 2004 to be "a hub for institutional finance and . . . a regional express way for capital and investment."[97] It became fully operational in 2006.[98] Like Qatar's financial center, the DIFC establishes a business-friendly legal jurisdiction for international investment that protects foreign companies from the local Shari'a law (enforced in Arabic) that would otherwise govern commerce in Dubai. Establishing this free zone required a UAE constitutional amendment.[99] Dubai hired prominent British law firms to draft the DIFC legislation.[100] These new rules were modeled on the London Commercial Court's, but with some revisions—for example, replacing British evidence rules with the International Bar Association rules of evidence for arbitration.[101]

The DIFC has its own court system as well as an arbitration center. The DIFC Courts have six foreign judges and three Emirati judges.[102] The DIFC proclaims that its laws are based on global best practices in international financial and commercial law.[103] It operates under an English-language, common-law-based legal structure. The parties can choose the substantive law applicable to their claims and the background law is local "DIFC law," which is "the result of legislation and common law decisions."[104] The DIFC has a liberal approach to allowing proceedings to be held confidentially,[105] and its courts are "set up to promote settlement"[106]: over 90% of cases settle before final judgment.[107]

In 2011, the DIFC Court removed the requirement that disputes have physical connections to Dubai, and recognized consent-based jurisdiction if the parties agreed pre- or post-dispute.[108] According to Jayanth Krishnan, this development emboldened the DIFC court judges to broaden their interpretation

---

[97] Sharar & Al Khulaifi, *supra* note 80, at 536. *See also* Erie, *The New Legal Hubs*, *supra* note 4, at 32 (describing Dubai's efforts to "repatriate Middle Eastern money," "secure FDI and encourage international banks to lend in Dubai," including opening the DIFC courts).
[98] Requejo Isidro, *supra* note 10, at 9–10.
[99] Erie, *The New Legal Hubs*, *supra* note 4, at 36.
[100] *Id.* at 37.
[101] *Id*.
[102] Requejo Isidro, *supra* note 10, at 6. The DIFC judges include five English judges, and an Australian, New Zealand, and Hong Kong judge. Walker, *supra* note 13, at 6; *Judges*, DIFC CTS., https://www.difccourts.ae/court-structure/judges/ (last visited March 4, 2020).
[103] *Laws and Regulations Administered by the DIFC Authority*, DUBAI INT'L FIN. CTR., https://www.difc.ae/business/laws-regulations/legal-database/ (last visited March 4, 2020).
[104] Erie, *The New Legal Hubs*, *supra* note 4, at 36.
[105] *See* DIFC Rule 35.4 (permitting proceedings to be private if, for example, "it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality"), available at *Part 35: Miscellaneous Rules Relating to Hearings,* DIFC CTS., https://www.difccourts.ae/court-rules/part-35-miscellaneous-provisions-relating-to-hearings/ (last visited Apr. 26, 2020).
[106] JAYANTH K. KRISHNAN, THE STORY OF THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS: A RETROSPECTIVE 60 (2018).
[107] *Id*.
[108] Krishnan, *supra* note 106, at 40; Requejo Isidro, *supra* note 10, at 6–7.

of the court's jurisdiction, for example, to hear cases involving Islamic banking and to reject motions to dismiss on the basis of forum non conveniens.[109]

The DIFC courts also offer appealing characteristics in terms of joinder and appellate review. On joinder, in DIFC courts, "connected contracts and parties can be joined, and proceedings can be consolidated."[110] The right to appeal cannot be waived and "unusually, the lower court's decision may be appealed by a person who is not a party … but is directly affected by a judgment or order."[111]

The DIFC courts have also been recognized as being "entrepreneurial in terms of enforcement,"[112] since DIFC court judgments are fully enforceable within the DIFC. In another case, the Court established that it would fully recognize and enforce an English judgment as though it were a Dubai judgment. In the same period, some foreign courts began enforcing DIFC judgments as well.[113] To enforce DIFC judgments outside of the DIFC but within the UAE, prevailing parties can follow specified procedures.[114] Outside the UAE, each nation follows its own law for recognition and enforcement of foreign judgments, such as those from the DIFC courts. The UAE is a party to several multilateral and bilateral recognition and enforcement treaties, and DIFC courts themselves have independently established a number of non-binding agreements with partner institutions around the world, such as the London Commercial Court, the Federal Court of Australia, the Southern District of New York, the Supreme Court of Singapore, and the Supreme Court of the Republic of Kazakhstan.[115]

DIFC courts also offer parties the ability to bring a court-rendered money judgment to arbitration at the DIFC-LCIA Arbitration Centre (or any other arbitration center).[116] This unusual process allows a prevailing party to convert its court money judgment into an arbitral award, which can be easier to enforce in a broader number of countries under the New York Convention.

The DIFC has established itself as a hospitable legal environment for investment as well as for dispute resolution. As a marker of success, in 2014, the tribunal heard its first case in a dispute arising out of a contractual agreement that assigned DIFC jurisdiction.[117] In 2016, the DIFC court decided 217 disputes

---

[109] Krishnan, *supra* note 106, at 41.
[110] Walker, *supra* note 13, at 11; *Part 20: Addition and Substitution of Parties*, DIFC CTS., https://www.difccourts.ae/court-rules/part-20-addition-and-substitution-of-parties/ (last visited March 4, 2020).
[111] Walker, *supra* note 13, at 15.
[112] Erie, *The New Legal Hubs*, *supra* note 4, at 35.
[113] *Id.* (discussing Australian court's enforcement of DIFC judgment).
[114] *Id.* at 35.
[115] *Id.* at 36, n.217. Pursuant to such agreements, for example, India updated its civil code in January 2020 to make UAE court judgments, including DIFC and ADGM court judgments, more easily enforceable in India. *Amendment to the Indian Civil Code*, VINSON & ELKINS (Jan. 23, 2020), https://www.velaw.com/insights/amendment-to-the-indian-civil-code/.
[116] Requejo Isidro, *supra* note 10, at 9; Wilske, *supra* note 13, at 163.
[117] Hwang, *supra* note 11, at 197.

involving, in the aggregate, more than $500 million.[118] The Singapore Academy of Law reported that, in 2016, the number of contracts drafted in English in the Middle East and North Africa choosing the DIFC as the seat for disputes increased to 42% (while London's share went from 52% in 2015 to 25% in 2016).[119] At least one leading law firm has recommended that clients include the DIFC court in their forum-selection clauses.[120] The high settlement rate for DIFC cases could be seen as a sign that "the court is doing its job" and creating "certainty and trust."[121] The DIFC courts have found in favor of the government in cases involving the DIFC Authority, but they have also ruled against quasi-government corporations.[122]

DIFC courts are continuing to evolve. In 2017, the DIFC courts and the Dubai Future Foundation launched an initiative to create "Courts of the Future," which is "designed to support companies developing new technologies, sectors and applications—from blockchain to 3D-printing."[123] In this way, this investment-minded court appears to be trying to transform itself into a regional litigation destination.

The DIFC's modern laws include a modern Arbitration Law.[124] According to the DIFC website, "[b]usinesses in Dubai are free to choose between litigation and arbitration, common and civil law, and English and Arabic language—whichever system best suits their specific needs. The driving force has not been competition between courts for cases, but rather competition between countries for investment."[125]

---

[118] Gaillard, Banifatemi, & Vialard, *supra* note 6 (discussing global trend).
[119] Requejo Isidro, *supra* note 10.
[120] *Client Alert: New Dispute Resolution Options in the DIFC Courts*, LATHAM & WATKINS (Oct. 21, 2012), https://www.lw.com/thoughtLeadership/dispute-resolution-options-difc-courts.
[121] Krishnan, *supra* note 106, at 61. According to a local practitioner interviewed in 2017, "Opportunities for investment and growth here [in the litigation business in Dubai] are greater now than ever, particularly in IP and litigation." Alex Taylor, *Dubai: The Gateway To The Middle East For International Firms*, THE LAWYER (Oct. 13, 2017), https://www.thelawyer.com/issues/the-lawyer-october-2017/law-firms-in-middle-east-2017/; *id.* ("And this niche market, according to Al Tamimi managing partner Husam Hourani, is what gives smaller Middle Eastern firms an advantage. 'We don't do English law – we do local law,' he says. 'That's what international firms can't offer. We've focused on areas where we have a competitive edge: litigation, for example, now makes up half our revenue. We've begun building our business around IP, employment, compliance, education, healthcare, sports and consumer protection. These are niche areas which requires a niche team with a niche understanding.'").
[122] Erie, *The New Legal Hubs*, *supra* note 4, at 38.
[123] *Global Consultation Launched in Dubai to Define Courts of the Future*, DUBAI INT'L FIN. CTR. CTS. (Nov. 29, 2017), https://www.difccourts.ae/2017/11/29/global-consultation-launched-in-dubai-to-define-courts-of-the-future/.
[124] Hwang, *supra* note 11 at 195; *see also* Wilske, *supra,* note 13, at 163 ("Interestingly, the DIFC Courts' website has a section that deals specifically with arbitration, emphasizing that 'The DIFC Courts have appointed a number of judges with extensive background in international arbitration, giving parties immense trust in all arbitration related Court proceedings' as well as 'The DIFC Courts can provide parties with support for . . . many . . . arbitration related issues. The DIFC Courts therefore represent an exciting new prospect for parties seeking to arbitrate in the MENA region and around the world.' This seems to indicate that the DIFC wants to satisfy all kind of disputants whether they prefer litigation or arbitration.").
[125] *Global and Local Challenges in Commercial Dispute Resolution*, DUBAI INT'L FIN. CTR. CTS., (Jan. 25, 2018), https://www.difccourts.ae/2018/01/25/global-and-local-challenges-in-commercial-dispute-resolution/.

B. *Aspiring Litigation Destinations*

The States and localities that this Section calls "aspiring litigation destinations" have all proclaimed that they hope to become a global leader in international commercial dispute resolution. They frame international commercial courts as the end in themselves rather than as a means to attract foreign direct investment; although, of course, part of the goal is supposed to be to attract the business of adjudication. To do so, these States have built or established new courts or judicial divisions focused on adjudicating international commercial disputes.

Some of these courts, like those in Singapore and Paris, seek to add to their existing prominence as "arbitration destinations"—that is, desirable arbitral seats. For others, like Amsterdam and Frankfurt, the localities have relatively arbitration-friendly domestic law, but are not otherwise go-to arbitration destinations. The courts described in this Section are designed to accommodate *litigation* of substantive disputes, not just to enforce arbitration clauses and awards. Their stated goal is to be designated in choice-of-forum clauses in international commercial contracts and to provide a desirable venue for the litigation of non-contract-based commercial disputes.

Litigation destinations are often modeled on, or inspired by, the London Commercial Court. They have broad jurisdiction. Many do not require any local connection between the case and the forum State as a basis for jurisdiction. But while London and New York distinguished themselves as providers of both substantive law and a forum for adjudication, these new courts seem less concerned about developing standard-bearing substantive law. On substantive law, their selling point is that they robustly enforce choice-of-law clauses so that parties get the substantive law of their choice.[126]

These litigation destinations are too new for their success at attracting regional or global adjudication business to be evaluated with confidence, but they should have a prominent position on any watch list.

---

[126] *See, e.g.*, JIEYING LIANG, PARTY AUTONOMY IN CONTRACTUAL CHOICE OF LAW IN CHINA 50 (2018); SICC, SICC PROCEDURAL GUIDE (2019), https://www.sicc.gov.sg/docs/default-source/legislation-rules-pd/sicc-procedural-guide-(20190724)-(pdf).pdf; Guangjian Tu, *The Flowing Tide of Parties' Freedom in Private International Law: Party Autonomy in Contractual Choice-of-Law in China*, 15 J. PRIV. INT'L L. 234 (2019); Rachel Chiu Li Hsien, *Clothing the Bare: The Enforcement of Arbitration Clauses in Singapore*, NYU LAW (Mar. 2, 2018), https://blogs.law.nyu.edu/transnational/2018/03/clothing-the-bare-the-enforcement-of-arbitration-clauses-in-singapore (noting the sparse choice-of-law analysis that led to the court applying Singapore law; Tiong Min Yeo, Choice of Law for Contracts: The Hague Principles from a Singaporean and Asian Perspective, 10th Yong Pung How Professorship of Law Lecture ¶¶ 27, 35–39 (May 22, 2019), https://cebcla.smu.edu.sg/sites/cebcla.smu.edu.sg/files/Paper2017.pdf (suggesting that the SICC might recognize parties' choice of non-state law, but that issue is unlikely to come up in practice).

1. Singapore

Singapore seems set on becoming the go-to destination for all international dispute resolution needs, especially in Asia.[127] In 1991, Singapore established the Singapore International Arbitration Centre, which has become one of the top three or four choices for arbitration internationally, according to a survey of international arbitration users.[128] In 2014, Singapore established a mediation center to supplement its ADR offerings.[129]

Then, in 2015, Singapore opened the Singapore International Commercial Court (SICC) as a division of the Singapore High Court.[130] The SICC's stated purpose is "to enhance [Singapore's] status as a leading forum for legal services and commercial dispute resolution"[131] and to become "an Asian dispute resolution hub catering to international disputes with an Asian connection."[132] Its target audience, at least for now, is regional rather than global.

While it had already established state-of-the-art arbitration and mediation centers and developed law highly deferential to arbitration agreements,[133] Singapore saw the SICC as an important complement to its dispute resolution offerings. To this end, the SICC is partially staffed by international judges,[134] and it permits the admission of foreign lawyers, confidential proceedings, and limitations on appellate review.[135] It is also receptive to parties' customization of evidence and procedural rules.[136]

A key feature that sets the SICC apart is its adaptability: its highly customizable procedures are intended to cater to the parties' needs and reflect foreign legal traditions.[137] Parties may opt out of the Singapore Rules of Evidence, for example.[138] In terms of the overall legal structure of the court, both the court and the legislature have been receptive to criticism. For example, the

---

[127] SIDRA ACADEMY, THE SINGAPORE DISPUTE RESOLUTION INSTITUTIONS – WHAT AND WHY (PART 2 OF 4) (2017), https://sidra.smu.edu.sg/singapore-dispute-resolution-institutions-what-and-why-part-2-4.
[128] QMUL 2018 survey, *supra* note 49, at 9 (placing Singapore third); Requejo Isidro, *supra* note 10, at n.35; *see also* INT'L CHAMBER OF COMMERCE, ICC DISPUTE RESOLUTION 2018 STATISTICS 12 (2019), https://nyiac.org/nyiac-core/wp-content/uploads/2019/08/icc_disputeresolution2018statistics.pdf (placing Singapore fifth for ICC arbitrations).
[129] *See* Erie, *The New Legal Hubs*, *supra* note 4, at 32.
[130] *Id.*; Supreme Court of Judicature Act of 1969, rev. ed. 2007, ch. 322 § 18A, https://sso.agc.gov.sg/ACT/SCJA1969 (Sing.) [hereinafter Supreme Court of Judicature Act rev. 2007].
[131] SINGAPORE INTERNATIONAL COMMERCIAL COURT COMMITTEE, REPORT OF THE SINGAPORE INTERNATIONAL COMMERCIAL COURT COMMITTEE § 4(a) (2013), 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 [hereinafter SICC Committee Report].
[132] *Id.* § 9; *see also* Hwang, *supra,* note 11 at 196.
[133] Chiu Li Hsien, *supra* note 126.
[134] The SICC bench is comprised of twenty-two Singapore Supreme Court Judges and twelve International Judges. *Judges*, SICC (June 2018), https://www.sicc.gov.sg/about-the-sicc/judges.
[135] Bookman, *Arbitral Courts*, *supra* note 12.
[136] Supreme Court of Judicature Act rev. 2007, *supra* note 130, § 18K.
[137] Supreme Court of Judicature Act of 1969, rev. ed. 2014, ch. 322 sec. 80, O. 110 r. 23, https://sso.agc.gov.sg/SL/SCJA1969-R5 (Sing.) [hereinafter Rules of Court]; Andrew Godwin, Ian Ramsay & Miranda Webster, *International Commercial Courts: The Singapore Experience*, 18 MELB. J. INT'L L. 219, 239 (2017).
[138] Tiba, *supra* note 13, at 32.

SICC originally had a pre-action certification process designed to give parties an early indication on key issues, such as jurisdiction.[139] After parties complained about that process, the legislature removed it in 2017.[140]

The SICC does not hide its intention to compete with arbitration, to borrow some of its preferable characteristics and to address some of its shortcomings.[141] For example, the SICC's international focus is in part intended to create a "freestanding body of international commercial law" and address the weaknesses of arbitration in creating law.[142] The SICC rules also grant wide discretion to allow joinder of non-parties to the SICC agreement.[143] This permissive joinder rule was adopted to counter the difficulty in arbitration of joining parties that were not signatories to the arbitration agreement.[144] For appeals, the SICC offers an opportunity to appeal to the Singapore High Court of Appeal but also allows parties to agree to limit or exclude that right.[145]

Singapore has received recognition for its excellence in dispute resolution services. As a country, it boasts the shortest dispute resolution time worldwide and is ranked first on the ease of enforcing contracts.[146] Since the SICC was created in 2015, it has rendered 62 judgments.[147] Most of its cases have been referred by the Singapore High Court.[148] The cases have been high stakes: the first decision involved a S$1.1 billion dispute (about US $800

[139] Supreme Court of Judicature (Amendment) Act 2014, § 18E, https://sso.agc.gov.sg/Acts-Supp/42-2014/Published/20141219?DocDate=20141219 (Sing.).
[140] Supreme Court of Judicature (Amendment) Bill, No. 47/2017, § 3, https://sso.agc.gov.sg/Bills-Supp/47-2017/Published/20171106?DocDate=20171106 (Sing.); Leng Sun Chan & Adam Gian, *Singapore International Commercial Court to Have Jurisdiction Over Litigation Related to International Commercial Arbitration*, GLOB. ARBITRATION NEWS (Feb. 12, 2018), https://globalarbitrationnews.com/singapore-international-commercial-court-jurisdiction-litigation-related-international-commercial-arbitration.
[141] Sundaresh Menon, Chief Justice of the Republic of Singapore, Singapore International Chamber of Commerce Distinguished Speaker Series: The Rule of Law and the SICC (Jan. 10, 2018), https://www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/b__58692c78-fc83-48e0-8da9-258928974ffc.pdf; Sundaresh Menon, Chief Justice of the Republic of Singapore, Opening Lecture for the DIFC Courts Lecture Series 2015: International Commercial Courts: Towards a Transnational System of Dispute Resolution (2015), https://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/opening-lecture---difc-lecture-series-2015.pdf.
[142] SICC Committee Report, *supra* note 131, § 13.
[143] Rules of Court, *supra* note 137, ch. 322 sec. 80, O. 110 r. 9; Drossos Stamboulakis & Blake Crook, *Joinder of Non-Consenting Parties: The Singapore International Commercial Court Approach Meets Transnational Recognition and Enforcement*, 2019 ERASMUS L. REV. 98.
[144] Johannes Landbrecht, *The Singapore International Commercial Court (SICC) – an Alternative to International Arbitration?*, 34 ASA BULL. 112, 118 (2016).
[145] Walker, *supra* note 13, at 15.
[146] WORLD BANK GRP., DOING BUSINESS 2020: SINGAPORE 52 (2020) https://www.doingbusiness.org/content/dam/doingBusiness/country/s/singapore/SGP.pdf.
[147] *See Judgments*, SICC (May 13, 2020), https://www.sicc.gov.sg/hearings-judgments/judgments [hereinafter SICC Judgments].
[148] *See id*.; but see SICC, *A Landmark First Case Filed in the Singapore International Commercial Court*, 11 SICC NEWS 1 (2018), https://www.sicc.gov.sg/docs/default-source/modules-document/media-resources/sicc-newsletter-issue-no-11_8239f5c5-8e7f-42bf-81b0-cb581c33a349.pdf (celebrating the first case submitted to SICC by virtue of a SICC forum selection clause).

million).[149] The decisions in these cases have been delivered expeditiously—within three months of the hearing.[150] Some were decided in less than a month.[151] Singapore appears poised and ready to compete for adjudication business at an extremely high level. Its arbitration center and dispute resolution services are already making a name for themselves, and the new SICC may soon join their ranks. In 2018, "[t]he legal industry contributed $2.3 billion to Singapore's GDP . . . , up from $1.5 billion in 2009."[152]

On the other hand, "the neutrality of Singapore's courts has been questioned, particularly in politically sensitive cases."[153] Tests of the SICC's neutrality may come in the future as its cases become more complex and possibly involve government entities.

2. Courts on the Continent: Could They Be Contenders?

Several cities in Europe have either recently opened or are considering opening a new court, chamber, or division of their courts devoted exclusively to international commercial disputes. Commentators see these efforts straightforwardly as an attempt "to challenge the hegemony of English courts in international commercial litigation,"[154] especially given the uncertainty regarding the U.K.'s stature in Europe and worldwide in the aftermath of the Brexit vote.[155] At the beginning, some feared U.K. judgments would no longer be easily enforceable throughout the EU,[156] and many cited that fear as a reason why other European States opened their own international commercial courts.[157] Many, but not all, of the complicated questions about the enforceability of U.K.

---

[149] BCBC Singapore Pte Ltd. and another v. PT Bayan Resources TBK and another, 2016 SGHC(I) 01 [2016], https://www.sicc.gov.sg/docs/default-source/modules-document/judgments/bcbc-singapore-pte-ltd-and-anor-v-pt-bayan-resources-tbk-and-anor_1a989d20-2254-46e4-8ed0-11473dee08bc_e58fcfbb-1e9e-42ba-b279-eae60dbd4ce1.pdf.

[150] *See* SICC Judgments, *supra* note 147.

[151] *See id*.

[152] Tham Yuen-C, *54 Nations to Attend S'pore Convention on Mediation Signing*, STRAITS TIMES (July 30, 2019), https://www.straitstimes.com/singapore/54-nations-to-attend-spore-convention-on-mediation-signing.

[153] Erie, *The New Legal Hubs*, *supra* note 4, at 34 (citing Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391, 403 (2015)).

[154] Giesela Ruehl, *Doors Open for First Hearing of International Chamber at Paris Court of Appeal*, CONFLICT OF LAWS (June 5, 2018), http://conflictoflaws.net/2018/doors-open-for-first-hearing-of-international-chamber-at-paris-court-of-appeal.

[155] *Cf.* QMUL 2018 survey, *supra* note 49 (describing the U.K.'s favorite status before Brexit); Vogenauer, *supra* note 34 (same); *see also* Rühl, *Judicial Cooperation*, *supra* note 14; Wilske, *supra* note 13, at 169 (calling the European international commercial courts "Brexit Wannabe Profiteers"); Pippa Rogerson, *After Brexit: Is International Commercial Litigation in London Doomed?*, NEW L.J. (Dec. 16, 2016), https://www.repository.cam.ac.uk/bitstream/handle/1810/266692/Rogerson-on-BREXIT-for-NLJ.pdf?sequence=1.

[156] *See, e.g.*, Rühl, *Judicial Cooperation*, *supra* note 14.

[157] *See id.*; DIRECTORATE GEN. FOR THE INTERNAL POLICIES OF THE UNION, BUILDING COMPETENCE IN COMMERCIAL LAW IN THE MEMBER STATES 35–38 (2018), https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604980/IPOL_STU(2018)604980_EN.pdf .

judgments post-Brexit have now been resolved.[158] Brexit does not directly affect London's prominence as an arbitration center[159] because recognition of arbitral awards had already been governed by a preexisting and unaffected international regime, the New York Convention. But the uncertainty surrounding what will happen with respect to London's status as an international financial and legal center over the long term may compromise London's attractiveness and the ease of enforcing judgments or arbitral awards within the U.K. itself if defendants' assets leave the U.K.[160] Brexit also has come to represent the contradiction of some of English law's most appealing attributes: its predictability and stability.

This Section will discuss the new international commercial courts established and proposed in Amsterdam, Paris, Frankfurt, and Brussels. These are the most prominent, but not the only examples of efforts to form international commercial courts within Europe. Other German cities have also opened similar international commercial chambers. Reports indicate that Zurich and Geneva are considering creating a specialized international commercial chamber of the existing court that would operate in English.[161] Dublin has a commercial division that follows the "old school" model: It is not specifically dedicated to international disputes, but it could be well-positioned to compete with the U.K. for cross-border dispute resolution in a post-Brexit era given that it is the only English-speaking and common law country in the EU.[162] There may be more in the future.

Amsterdam. The Netherlands has long been a hub of international commerce and is increasingly a litigation destination for certain kinds of transnational disputes, including global class actions.[163] Dutch courts already permitted parties to submit exhibits in English and sometimes permit hearings to

---

[158] *See* Anna Pertoldi & Maura McIntosh, *Enforcement of Judgments Between the UK and the EU Post-Brexit: Where Are We Now?*, DISPUTE RESOLUTION BLOG (Jan. 20, 2020), http://disputeresolutionblog.practicallaw.com/enforcement-of-judgments-between-the-uk-and-the-eu-post-brexit-where-are-we-now. As of the time of this writing, the U.K.'s efforts to accede to the 2007 Lugano Convention were also "apparently proceeding apace." Jonathan Fitchen, *Brexit & Lugano*, CONFLICT OF LAWS (Feb. 5, 2020), https://conflictoflaws.net/2020/brexit-lugano.

[159] *See, e.g.*, Bianca Berardicurti, *Brexit: Could Arbitration Be a Port in the Storm?*, KLUWER ARB. BLOG (May 12, 2019), http://arbitrationblog.kluwerarbitration.com/2019/05/12/brexit-could-arbitration-be-a-port-in-the-storm.

[160] *See* Amie Tsang & Matthew Goldstein, *For Wall Street Banks in London, It's Moving Time*, N.Y. TIMES (Feb. 17, 2019), https://www.nytimes.com/2019/02/17/business/brexit-banks-wall-street-london.html.

[161] Eva Lein, *International Commercial Courts in Switzerland: The Roadmaps for Geneva and Zurich*, *in* INTERNATIONAL BUSINESS COURTS: A EUROPEAN AND GLOBAL PERSPECTIVE 115 (Xandra Kramer & John Sorabji eds., 2019); Matic, *supra* note 9.

[162] THE BAR OF IRELAND, PROMOTING IRELAND AS A LEADING CENTRE GLOBALLY FOR INTERNATIONAL LEGAL SERVICES (2018), https://www.lawlibrary.ie/media/lawlibrary/media/Secure/Promoting-Ireland-as-a-leading-centre-globally-for-international-legal-services.pdf.

[163] *See* Pamela Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767 (2017) (discussing WCAM); Xandra Kramer, *Securities Collective Action and Private International Law Issues in Dutch WCAM Settlements: Global Aspirations and Regional Boundaries*, 27 GLOB. BUS. & DEV. L.J. 235 (2014).

be conducted in English.[164] Court judgments are rendered in Dutch but are accompanied by an English summary.[165]

One unusual feature of Dutch procedure is the conservatory arrest, also known as Dutch freezing or Mareva injunction. These orders prevent assets located in the Netherlands from being removed or otherwise disposed of during the proceedings. Dutch courts award these orders quite readily, which may attract potential plaintiffs.[166]

On January 1, 2019, the Dutch launched the Netherlands Commercial Court, which includes a trial level and a dedicated appellate level court.[167]

Despite the generalist name, the NCC's jurisdiction is limited to international disputes.[168] It does not require the parties to have any ties to the Netherlands if they consent to the NCC's jurisdiction.[169] The courts use Dutch procedure, but all proceedings and judgments are in English.[170] Evidence may be submitted in Dutch, German, French, or English without requiring translation.[171] Thus, the NCC's claim to fame is that it is "an English-language environment within a civil law jurisdiction."[172] Its website has a sleek video advertising that the court offers "the best of both worlds."[173] The website also boasts that Dutch courts are ranked number one worldwide by the World Justice Project and that "NCC judges are impartial, independent and experienced in complex international business matters."[174]

---

[164] Rotterdam courts permit maritime, transportation, and international trade cases to be held in English; the Hague courts allow the same for intellectual property rights cases. Friederike Henke, *Netherlands Commercial Court: English Proceedings in The Netherlands*, CONFLICT OF LAWS (Oct. 25, 2018), http://conflictoflaws.net/2018/netherlands-commercial-court-english-proceedings-in-the-netherlands.

[165] *Id*.

[166] *Freezing Orders in the Netherlands*, NETH. COMMERCIAL COURT, https://netherlands-commercial-court.com/freezing-orders.html ("Any party who appears to have a justified claim may order a pre-judgment attachment, and in practice this is nearly always granted.") (last visited Apr. 26, 2020).

[167] *The Netherlands Commercial Court (of Appeal) Has Been Launched*, LOYENS LOEFF (Jan. 29, 2019), https://www.loyensloeff.com/en/en/news/news-articles/the-netherlands-commercial-court-of-appeal-has-been-launched-n6383/.

[168] NETH. COMMERCIAL COURT, 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) (2018), art. 1.3.1(b), https://www.rechtspraak.nl/SiteCollectionDocuments/ncc-procesreglement-en.pdf [hereinafter NCC Rules].

[169] *See* Jonathan E. Richman, *Dutch Court Approves Collective Settlement of Fortis Shareholders' Claims*, NAT'L L. REV. (July 14, 2018), https://www.natlawreview.com/article/dutch-court-approves-collective-settlement-fortis-shareholders-claims ("Article 107 of the Dutch Code of Civil Procedure allows jurisdiction over codefendants if sufficient connectivity exists between or among the claims—so article 107 is similar to article 8(1) of the Brussels I Regulation.").

[170] *Id.*

[171] Henke, *supra* note 164.

[172] NETH. COMMERCIAL COURT, NCC AND ARBITRATION 2 (2019), https://www.rechtspraak.nl/SiteCollectionDocuments/factsheet-netherlands-commercial-court-and-arbitration.pdf [hereinafter NCC and Arbitration Factsheet].

[173] *Who We Are*, NETH. COMMERCIAL COURT, https://www.rechtspraak.nl/English/NCC/Pages/default.aspx#item_ctl00_ctl53_g_85ea4063_6a8f_487e_b6c8_9898e58e6fe8.

[174] *Key Features*, NETH. COMMERCIAL COURT, https://www.rechtspraak.nl/English/NCC/Pages/key-features-NCC.aspx (last visited Mar. 4, 2020).

The trial and appellate level courts are part of the ordinary Dutch judiciary as chambers of the Amsterdam trial and appellate courts. The judges are selected from the Dutch judiciary for their experience in commercial disputes and their language skills. A panel of three judges and one law clerk typically hears disputes.[175] The appellate division hears appeals in English, but subsequent appeals to the highest court of the Netherlands take place in Dutch. Parties must be represented by lawyers who are members of the Dutch bar, for only they can carry out "acts of process,"[176] and parties may not proceed pro se.[177]

The NCC Rules focus on flexibility. The Rules provide that "[a]t a party's request or of its own initiative, the court gives all such directions as may facilitate the just, fair and speedy disposition of the action."[178] With some exceptions, the parties may agree to depart from the standard rules of evidence.[179] Confidentiality orders are permitted "[f]or compelling reasons,"[180] but the judgments are ordinarily public.[181] The unsuccessful party bears the costs of lawyers' fees and court fees,[182] which are substantially higher than the fees in ordinary Dutch courts.[183] The NCC rules also contemplate broad authority to add third parties or consolidate cases at either the parties' or the court's initiative.[184]

Dutch law is also arbitration-friendly. In 2015, the Dutch arbitration law was updated to improve the efficiency of arbitration procedures and limit the possibility of national courts setting aside arbitral awards.[185] The NCC website has an interesting "Factsheet" devoted to the "NCC and Arbitration."[186] It notes some reasons why parties might prefer to resolve their disputes at the NCC rather than in arbitration.[187] It also boasts the NCC as a good forum both for enforcing arbitral awards and for setting them aside.[188] The NCC's promoters seem wary of the complicated relationship between the NCC and arbitration.

Paris. Paris prides itself on being one of the most arbitration-friendly jurisdictions in the world.[189] It is home to the International Chamber of

[175] NCC Rules, *supra* note 168, arts. 3.5.1, 3.52.
[176] *Id.* art. 3.1.2.
[177] *Id.* art. 3.1.1.
[178] *Id.* art. 3.4.1.
[179] *Id.* art. 8.3.
[180] *Id.* art. 8.4.2.
[181] *Id.* art. 9.4.
[182] *Id.* art. 10.3.
[183] Kramer & Sorabji, *supra* note 15, at 2.
[184] NCC Rules, *supra* note 168, arts. 6.4, 6.5.
[185] Nick Margetson & Nigel Margetson, *Arbitration Procedures and Practice in The Netherlands: Overview*, PRACTICAL LAW (Feb. 1, 2020), https://uk.practicallaw.thomsonreuters.com/4-542-6425?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1.
[186] NCC and Arbitration Factsheet, *supra* note 172.
[187] *Id.*
[188] *Id.*
[189] GILLES CUNIBERTI, RETHINKING INTERNATIONAL COMMERCIAL ARBITRATION 6 (2017) ("French law has now reached the extreme position where arbitration agreements are deemed valid and enforceable in all circumstances, irrespective of the traditional requirements of the French law of contract, or indeed of any other law."); Gaillard, Banifatemi, & Vialard, *supra* note 6.

Commerce (ICC), established in 1923,[190] which hosts the International Court of Arbitration, a leading global arbitral institution.[191]

The development of an international commercial court in 2010 and of a new international chamber of the Court of Appeal in 2018 built upon this arbitration expertise.[192] The 2010 chamber, a new division of the Paris courts, was created "to cater to international litigation and hear disputes between French and foreign companies or between foreign companies."[193] The chamber was marketed as enhancing Paris's "attractiveness as a financial center," and helping to turn Paris into "an indispensable legal marketplace."[194] A 2010 invention, it was obviously not a reaction to Brexit, but it also did not attract many cases.[195]

In February 2018, a special international commercial chamber of the Paris Court of Appeal was created to supplement the trial level chamber.[196] The jurisdiction of both the trial level and appellate chambers is limited to "transnational commercial disputes" relating to international commercial contracts, transportation, unfair competition, anti-competitive commercial practices, and various kinds of financial transactions.[197]

---

[190] Jason Fry & Simon Greenberg, *Review of the International Court of Arbitration of the International Chamber of Commerce*, *in* INTERNATIONAL COMMERCIAL ARBITRATION PRACTICE: 21ST CENTURY PERSPECTIVES § 44.01 (Horacio A. Grigera Naón & Paul E. Mason eds., 2010).

[191] QMUL 2018 survey, *supra* note 49; *ICC International Court of Arbitration*, INT'L CHAMBER OF COMM., https://iccwbo.org/dispute-resolution-services/icc-international-court-arbitration. Paris is also the seat of the Uniform Patent Court. Olivier Mandel, The International Chambers of the Paris Court of Appeal and of the Paris Commercial Court (Paris: a venue for international dispute resolution), http://www.eurolegal.net/useruploads/files/doc/Majorca2017/Presentation%20of%20Olivier%20Mandel%20for%20the%20Eurolegal%20Conference%20(April%2014%202018).pptx.

[192] France has had specialized commercial courts since the sixteenth century, and in many ways they have remained unchanged since that time. *See* Nicole Stolowy, *How France's Commercial Courts Stay Relevant Through the Centuries*, HEC PARIS (June 14, 2017), https://www.hec.edu/en/knowledge/articles/how-frances-commercial-courts-stay-relevant-through-centuries ("[J]udges [in the sixteenth century] were not officials trained in law, but tradesmen elected by other tradesmen to settle commercial disputes. Today, at the Tribunaux de commerce (1st degree commercial court), the elected positions remain voluntary and unpaid.").

[193] Gaillard, Banifatemi, & Vialard, *supra* note 6.

[194] *Our Ambition for Paris' Financial Centre*, PREMIER MINISTRE RÉPUBLIQUE FRANÇAISE (July 6, 2017), https://www.gouvernement.fr/sites/default/files/locale/piece-jointe/2017/07/dossier_de_presse_-_notre_ambition_pour_la_place_de_paris_en-_07.07.2017.pdf.

[195] In theory, parties could use English, Italian, or Spanish in proceedings and could examine witnesses in their native languages, without the use of an interpreter. No proceedings since then have ever actually been made in a language other than French. Biard, *supra* note 6 at 27; Gaillard, Banifatemi, & Vialard, *supra* note 6.

[196] Biard, *supra* note 6, at 24; Philippe Metais & Elodie Valette, *Paris as an International Jurisdiction: Creation of Chambers Specialized in Cross-Border Disputes*, WHITE & CASE (Feb. 12, 2018) https://www.whitecase.com/publications/alert/paris-international-jurisdiction-creation-chambers-specialized-cross-border.

[197] *Protocol on Procedural Rules Applicable to the International Chamber of the Paris Commercial Court*, art. 1, AVOCAT PARIS (Feb. 21, 2018), http://www.avocatparis.org/system/files/editos/protocole_barreau_de_paris_-_tribunal_de_commerce_de_paris_version_anglaise.pdf (hereinafter CITC Protocol); *Protocol on Procedural Rules Applicable to the International Chamber of the Court of Appeals of Paris*, art. 1, AVOCAT PARIS (Jan. 26, 2018), http://www.avocatparis.org/system/files/editos/protocole_barreau_de_paris_-_cour_dappel_de_paris_version_anglaise.pdf (hereinafter CIPAC Protocol).

This division opened in March 2018, staffed by French judges who spoke English and had "English common-law capabilities."[198] Parties, experts, third-party witnesses, and legal counsel (who are not French nationals) may speak in English at hearings.[199] However, when a party uses English in appearances before the courts under this provision, the party must arrange simultaneous translation and bear the costs.[200] Documentary evidence may be submitted in English.[201] Pleadings and filings must be drafted in French.[202] Judgments will be delivered in French and accompanied by an official English translation.[203] Non-French lawyers are also allowed to appear before the International Chamber if accompanied by a member of the Paris Bar. Both the expanded use of English and the admission of foreign lawyers are considered radical departures from the traditionally deeply French institution's previous procedures, although the practical changes are limited.[204]

Overall, the Protocols are touted as providing "highly innovative rules of procedure," where the "parties appearing before those Chambers are given unprecedented flexibility."[205] The disputes will remain public, however, and parties may not opt into using the special division. For a case to proceed in the international chambers, the parties must select the Paris Commercial Court as their forum of choice and then the court may refer the case to the special international commercial division.[206] As of December 2018, "seventeen cases had been filed before the [new appellate chamber], and hearings of two of them had taken place."[207] The International Commercial Chamber of the Paris Court of Appeal issued its first decision in February 2020.[208]

Frankfurt. German scholars have been advocating for English-language proceedings in German courts for almost a decade. Aachen, Bonn, and Cologne have had English-language courts since 2010, although they have not had many cases.[209] Early German proposals were not focused on creating an international commercial division that would compete with London, but rather on competing with *arbitration*, which offered, among other advantages, the

[198] *The Role of English Courts Post Brexit*, *supra* note 90.
[199] CITC Protocol, *supra* note 197, art. 2.4; CICAP Protocol, *supra* note 197, art. 2.4.
[200] CITC Protocol, *supra* note 197, art. 6.3; CICAP Protocol, *supra* note 197, art. 3.3.
[201] CITC Protocol, *supra* note 197, art. 2.3; CICAP Protocol, *supra* note 197, art. 2.2.
[202] CITC Protocol, *supra* note 197, art. 2.2; CICAP Protocol, *supra* note 197, art. 2.1.
[203] CITC Protocol, *supra* note 197, art. 7; CICAP Protocol, *supra* note 197, art. 7.
[204] Biard, *supra* note 6, at 29.
[205] Gaillard, Banifatemi, & Vialard, *supra* note 6.
[206] *Id.*
[207] Biard, *supra* note 6, at 25.
[208] *See* Peter Rosher et al., Reed Smith, Client Alert, *First Decision of the International Commercial Chamber of the Paris Court of Appeal: Clarifications On The Arbitrator's Duty Of Disclosure*, https://www.reedsmith.com/en/perspectives/2020/05/first-decision-of-the-international-commercial-chamber-of-the-paris-court (May 14, 2020).
[209] *See* Daniel Saam, *Book Review—Herman Hoffmann's* Kammern fur international Handessachen: *Can Arbitration Serve as a Model for the Law of Civil Procedure?*, 14 GERMAN L.J. 949 (2013).

availability of proceedings in English.[210] In these efforts, Germans saw U.S. state business courts, especially New York's, as a model.[211]

In January 2018, the Frankfurt High Court opened a specialized chamber for international commercial matters.[212] The Chamber has jurisdiction over international commercial disputes if the parties have agreed to its jurisdiction.[213] The Chamber has three German judges: one experienced professional judge and two business experts who are not professional judges. The business experts are "appointed for a term of five years upon the recommendation of the local Chamber for Industry and Commerce."[214]

In terms of procedures, the Chamber abides by the German Code of Civil Procedure (Zivilprozessordnung). The oral proceedings operate in English, but written documents and judgments must be in German.[215] The Chamber's website declares that proceedings are "usually held in public."[216] The Chamber does not require additional fees and generally imposes costs on the non-prevailing party.[217] The Chamber "encourages settlement at every stage of the proceedings," and begins with a conciliation hearing. Similar chambers exist in Hamburg, Dusseldorf, and Munich.[218]

There are a number of current proposals about how Frankfurt could strengthen its position as a potential legal hub for cross-border disputes in Europe.[219] Many commenters, however, question whether, and when, German international commercial chambers will attract cases.[220] German law is already arbitration-friendly and German authorities advertise Germany as a top arbitral forum, growing in popularity.[221]

---

[210] *See* Ja zu englischsprachigen Gerichtsverhandlungen, DEUTSCHER BUNDESTAG (2011), https://www.bundestag.de/dokumente/textarchiv/2011/36400205_kw45_pa_recht-206810.
[211] Saam, *supra* note 209, at 958.
[212] Hess & Boerner, *supra* note 5, at 33; *Chamber for International Commercial Disputes*, ORDENTLICHE GERICHTSBARKEIT HESSEN, https://ordentliche-gerichtsbarkeit.hessen.de/ordentliche-gerichte/lgb-frankfurt-am-main/lg-frankfurt-am-main/chamber-international (last visited Apr. 26, 2020). Similar proposals had been put forth in Frankfurt in 2012 and 2016, but they gained traction after Brexit. *See* Giesela Rühl*, Auf dem Weg zu Einem Europäischen Handelsgericht?*, 22 JURISTEN ZEITUNG 1073 (2018).
[213] Juergen Mark & Heiko Alexander Haller, *The Chamber for International Commercial Disputes at the District Court Frankfurt/Main*, LEXOLOGY (Oct. 5, 2018), https://www.lexology.com/library/detail.aspx?g=01f8bd1a-21aa-4529-9476-0d8105d3142c.
[214] *Id.*
[215] *Id*.
[216] *Chamber for International Commercial Disputes*, *supra* note 212.
[217] *Id.*
[218] Requejo Isidro, *supra* note 10, at 15.
[219] *See generally* Hess & Boerner, *supra* note 5, at 38 (describing current legislative proposals).
[220] *See, e.g.*, *id.* at 33, 35 (advocating "cautious optimism"); Niklas Luft & Philipp Wagner, *Would You Choose German Courts For Commercial Disputes If Proceedings Were Held Before Specialized Chambers In English?*, WAGNER ARB. (Nov 1, 2018), https://wagner-arbitration.com/en/journal/would-you-choose-german-courts-for-commercial-disputes-if-proceedings-were-held-before-specialized-chambers-in-english/.
[221] LAW – MADE IN GERMANY 27 (3d ed. 2014), https://www.lawmadeingermany.de/Law-Made_in_Germany_EN.pdf.

Thus far, however, the chambers have had limited success. Frankfurt has had at least one case since opening in January 1, 2018.[222] It has been quite successful in recruiting some of the financial industry displaced by Brexit,[223] but the market share of the adjudication business has not come along with that industry—at least not yet.[224]

Brussels. In October 2017, the Belgian Council of Ministers approved a draft bill to establish an international English-speaking commercial court in Brussels, the "Brussels International Business Court" (BIBC), expected to open by January 1, 2020.[225] In March 2019, however, political opposition blocked future development of this initiative.[226]

The proposal, nevertheless, was a fascinating example of a potential international commercial court. The BIBC promised court proceedings that closely mimic arbitration. Instead of Belgian procedures, the rules of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law (UNCITRAL) would apply, with some alterations. Jurisdiction of the court would encompass international commercial disputes, and parties do not need to have a connection with Belgium.[227]

Reports indicated that the court's focus would be on flexibility, and the borrowing from arbitration is not subtle. In addition to the adoption of the UNCITRAL rules, the BIBC's judges would include professional judges as well as international business law specialists, and they did not need to be Belgian. Final judgments would not be subject to appeal. In another echo of arbitration, funding for the BIBC would come from the parties, rather than the State judiciary's budget.[228]

The proposed BIBC strongly resembled a State-sponsored arbitral tribunal. These distinctive features, however, may have prevented the BIBC from seeing the light of day. MPs objected that the BIBC offered "two-tiered justice" and the establishment of a "caviar court" for the "super rich."[229] The judiciary

[222] Hess & Boerner, *supra* note 5, at 35 (noting first case in December 2018).
[223] *See* Tsang & Goldstein, *supra* note 160.
[224] Germany has been advertising its law since 2008. See *Archiv*, LAW – MADE IN GERMANY, https://www.lawmadeingermany.de/archiv.htm (last visited Mar. 4, 2020) (linking documents going back to founding of "Law Made in Germany" in 2008); Oliver Vossius, *Law Made in Germany*, LAW – MADE IN GERMANY (Dec. 2008), https://www.lawmadeingermany.de/pdfs/Law_made_Germany_Vossius_2008_12_.pdf (2008 brochure); *Federal Chamber of Notaries*, LAW – MADE IN GERMANY, https://www.lawmadeingermany.de/Law-Made_in_Germany_EN.pdf (last visited Mar. 4, 2020).
[225] Hess & Boerner, *supra* note 5.
[226] Van Calster, *supra* note 8; Verbergt, *supra* note 8; Xandra Kramer, *The International Business Courts Saga Continued: NCC First Judgment – BIBC Proposal Unplugged*, CONFLICTS OF LAWS .NET (Mar. 27, 2019), https://conflictoflaws.net/2019/the-international-business-courts-saga-continued-ncc-first-judgment-bibc-proposal-unplugged/.
[227] Van Calster, *supra* note 8.
[228] Croisant, *supra* note 8.
[229] Kramer, *supra* note 226.

itself fiercely opposed the BIBC on these same grounds and also questioned the feasibility and costs of the court and whether it would be able to attract cases.[230]

C. *China: Quest for Control?*

In December 2018, China's Supreme People's Court (SPC) established two new Chinese international commercial tribunals, collectively known as the Chinese International Commercial Court (CICC), one in Shenzhen and another in Xi'an.[231] The CICC is intended to "streamline and control" the flow of disputes arising out of China's Belt and Road Initiative (BRI).[232] The purpose of the CICC, according to its website, is "to try international commercial cases fairly and timely in accordance with the law, protect the lawful rights and interests of the Chinese and foreign parties equally, and create a stable, fair, transparent, and convenient rule of law international business environment."[233] One set of scholars explained China's development of international commercial courts as an effort "to share the expanding international business dispute resolution market, better protect its investments and have a greater say in the harmoni[z]ation of substantive international business law."[234] A functioning and legitimate dispute resolution system seems essential to the success of the BRI, to which President Xi is strongly committed.[235] The CICC's jurisdiction, however, is not limited to BRI disputes.[236]

These courts "mark[] the first time [China] is creating legal institutions for the world."[237] This development contrasts with a fascinating history, however, of the world creating legal institutions for itself within China.[238] The

---

[230] Van Calster, *supra* note 8; Verbergt, *supra* note 8.

[231] *A Brief Introduction of China International Commercial Court*, CICC (June 28, 2018), http://cicc.court.gov.cn/html/1/219/193/195/index.html; Matthew S. Erie, *The China International Commercial Court: Prospects for Dispute Resolution for the "Belt and Road Initiative"*, AM. SOC'Y INT'L. L. INSIGHTS (Aug. 31, 2018) https://www.asil.org/insights/volume/22/issue/11/china-international-commercial-court-prospects-dispute-resolution-belt#_ednref4. [hereinafter Erie, ASIL]. This Section focuses on the CICC, but it should be understood in the broader context of Chinese development of free-trade zones and courts for transnational disputes, often in the context of regional competition to shine in this area. Shenzhen, for example, contains a "Hong Kong Modern Services Cooperative District" ("the District") based in a free trade zone that has special courts for transnational disputes, including the Shenzhen Qianhai Cooperative District People's Court with jurisdiction over transnational disputes, Hong Kong jurors, and English-language proceedings.

[232] Nicholas Lingard et al., *China Establishes International Commercial Courts to Handle Belt and Road Initiative Disputes*, OXFORD BUS. L. BLOG (Aug. 17, 2018), https://www.law.ox.ac.uk/business-law-blog/blog/2018/08/china-establishes-international-commercial-courts-handle-belt-and.

[233] *A Brief Introduction of China International Commercial Court*, *supra* note 231.

[234] Wei Cai & Andrew Godwin, *Challenges and Opportunities for the China International Commercial Court*, 68 INT'L & COMP. L.Q. 869, 871 (2019).

[235] *See* Zhengxin Huo and Man Yip, *Comparing the International Commercial Courts of China with the Singapore International Commercial Court*, 68 INT'L & COMP. L.Q. 903 (2019).

[236] Matthew Erie, *Update on the China International Commercial Court*, OPINIO JURIS (May 13, 2019), http://opiniojuris.org/2019/05/13/update-on-the-china-international-commercial-court%EF%BB%BF/. [hereinafter Erie, Opinio Juris].

[237] Erie, ASIL, *supra* note 231.

[238] *See* Catherine Ladds, *China and Treaty-Port Imperialism*, *in* THE ENCYCLOPEDIA OF EMPIRE (John Mackenzie ed., 2016) ("Across the treaty ports, a bewildering array of consular courts meted out extraterritorial justice to treaty-power nationals . . . By 1926 there were 32 British courts alone in China. Thus, colonial governance in China was a complicated mélange of overlapping systems and jurisdictions.").

CICC claims to be a "'one stop shop' for international commercial dispute resolution services, including mediation, arbitration, and litigation that are 'organically integrated.'"[239]

The CICC's jurisdiction is limited to international commercial disputes, defined as involving one or more foreign parties or relevant foreign "objects" or "legal facts."[240] It will not hear investor-State disputes.[241] Notably, the CICC does not have an entirely consent-based system of jurisdiction. There are two main categories: cases where the parties decide they should be brought before the CICC (if the amount in controversy is over RMB 300 million, or approximately $44 million), and cases where the SPC decides.[242] When jurisdiction is based on consent, "only cases with actual connection with China can be submitted to the CICC."[243] In December 2018, the CICC accepted its first set of cases, none of which specifically related to the Belt and Road Initiative.[244] The first hearing, in May 2019, involved a four-hour-long hearing in a case unrelated to the BRI, brought by Thailand's Ruoychai International Group against Red Bull Vitamin Drink, Co. and third party Inter-Biopharm Holding Ltd., disputing the qualifications of Red Bull shareholders.[245]

In some ways, the CICC is designed with an eye toward establishing international expertise and reliability.[246] The CICC has an English-language website and provides a platform for e-filing and other kinds of electronic communications between the parties and with the courts.[247] The judges are Chinese professional judges with expertise in international commercial disputes, conflicts of law, and have English-language proficiency. Three or more judges sit on a panel for any given case. Although it does not employ international jurists

---

[239] Erie, ASIL, *supra* note 231. Chinese courts were already very supportive of arbitration, readily enforcing arbitration agreements and awards.

[240] "The Regulations define 'international commercial disputes' as those whereby:

i. one or both parties are foreign,
ii. the domicile of one or both parties lies outside the PRC,
iii. the object of the dispute lies outside the PRC, or

legal facts producing, changing, or destroying commercial relations in dispute occur outside the PRC." Erie, ASIL, *supra* note 231 (footnotes omitted); *see also* Wei Sun, *International Commercial Court in China: Innovations, Misunderstandings, and Clarifications*, KLUWER ARB. BLOG (July 4, 2018), http://arbitrationblog.kluwerarbitration.com/2018/07/04/international-commercial-court-china-innovations-misunderstandings-clarifications/.

[241] Erie, ASIL, *supra* note 231. It remains to be seen, however, how the CICC will differentiate between investor-state and commercial disputes. *See* Stratos Pahis, *Investment Misconceived: The Investment-Commerce Distinction in International Investment Law*, 45 YALE J. INT'L L. 69 (2020) (discussing the sometimes poorly designed distinction between those two kinds of disputes).

[242] Cai & Godwin, *supra* note 234, at Section IV.B.1.

[243] Article 34 of the Civil Procedure Law.

[244] Susan Finder, *China International Commercial Court Starts Operating*, SUPREME PEOPLE'S CT. MONITOR (Jan. 14, 2019), https://supremepeoplescourtmonitor.com/2019/01/14/china-international-commercial-court-starts-operating/.

[245] Mu Xuequan (ed.), *China's Int'l Commercial Court Tries First Case*, XINHUANET (May 30, 2019), http://www.xinhuanet.com/english/2019-05/30/c_138100724.htm.

[246] *See A Belt-and-Road Court Dreams of Rivalling the West's Tribunals,* THE ECONOMIST (June 6, 2019), https://www.economist.com/china/2019/06/06/a-belt-and-road-court-dreams-of-rivalling-the-wests-tribunals (noting that the CICC's mission statement is "Fairness, Professionalism, Convenience") [hereinafter A Belt-and-Road Court].

[247] *International Commercial Litigation and Diversified Dispute Resolution*, CHINA INT'L COMM. CT., cicc.court.gov.cn/html/1/219/index.html (last updated March 4, 2020).

like the courts in Qatar or Singapore, the CICC has an International Commercial Expert Committee, comprised of Chinese and non-Chinese legal professionals, who may preside over mediation, provide advisory opinions on issues relating to international and foreign commercial law, and offer advice on judicial interpretations and policies.[248]

Unlike the DIFC or the SICC, which were products of constitutional amendments and have certain exemptions from local law, the CICC is a creation of the Supreme People's Court.[249] The CICC, therefore, operates under Chinese law, which follows a modified civil/political law system.[250] As *The Economist* recently described the system, "In the law courts of Communist China, power and political control count for more than fairness."[251] Accordingly, the CICC judges will likely have less discretion and flexibility than judges in other jurisdictions, and parties will have less control over proceedings than parties would have in the SICC, for example.[252]

Much is still unclear about how the CICC will function, but the CICC Procedure Rules offer some information. The proceedings will be in Chinese, but evidence may be submitted in English and need not be translated if the opposing party consents to the English submission.[253] The CICC offers translation services at the parties' expense.[254] The rules provide that the CICC will apply foreign law if chosen by the parties to govern their dispute.[255] To establish jurisdiction, the plaintiff will have to file a written agreement to submit to the court's jurisdiction.[256] The CICC encourages pre-trial mediation.[257]

To improve the enforceability of CICC judgments (among other reasons), China, along with Singapore and the EU, was involved in negotiations over the Hague Convention on the Recognition and Enforcement of Foreign

---

[248] Finder, *supra* note 244; Huang Jin, *An Educated Gentleman Cannot But Be Resolute And Broad-Minded, For He Has Taken Up A Heavy Responsibility And A Long Course*, Speech at the Opening Ceremony and the First Seminar of the International Commercial Expert Committee of the Supreme People's Court of China, (Aug. 26, 2018), http://cicc.court.gov.cn/html/1/219/199/203/1058.html. *See also Judges,* CICC, cicc.court.gov.cn/html/1/219/193/196/index.html.

[249] Erie, ASIL, *supra* note 231. The CICC shares this trait in common with its Dutch, French, and German counterparts. Most U.S. state business courts have also been created as a division of existing local courts. *See* Coyle, *Business Courts*, *supra* note 31.

[250] For a description of the Chinese legal system and the difficulties that Western scholars face in trying to understand it, *see* Don Clarke, *Puzzling Observations in Chinese Law: When is a Riddle Just a Mistake?*, *in* UNDERSTANDING CHINA'S LEGAL SYSTEM 93–121 (Stephen Hsu ed., 2003).

[251] A Belt-and-Road Court, *supra* note 246.

[252] *See* Erie, *The New Legal Hubs*, *supra* note 4.

[253] Procedural Rules for the China International Commercial Court of the Supreme People's Court, art. 9, CHINA INT'L COMM. CT. (updated Dec. 5, 2018), http://cicc.court.gov.cn/html/1/219/208/210/1183.html [hereinafter CICC Rules]; Sun, *supra* note 240 (clarifying that proceedings before the court cannot be in English).

[254] CICC Rules, art. 6.

[255] *Id.*, art. 7.

[256] *Id.*, art. 8.

[257] *Id.*, art. 17.

Judgments.[258] China has signed but not yet ratified the convention.[259] Additionally, China is considering ratifying the Hague Convention on the Choice of Court Agreements (COCA).[260] Without signing these treaties, enforcement uncertainty may hinder the development of the CICC: parties will not be able to reliably predict whether a foreign jurisdiction will recognize a CICC judgment.[261] Moreover, even with these agreements, enforceability may still be less certain than with arbitration awards.

Some experts view the CICC with excitement.[262] Matthew Erie notes that "[t]he CICC is potentially most innovative in providing multiple mechanisms for dispute resolution."[263] But he also recognizes the challenges facing the CICC: "uneven enforcement, Chinese language, and authoritarian government."[264] Susan Finder, a member of the CICC's International Commercial Expert Committee, writes, "As a court focused on international commercial issues staffed by some of China's most knowledgeable judges in that area, the court is likely to have a positive effect on the competence of the Chinese judiciary regarding international trade and investment issues, particularly as the SPC leadership knows that the international legal community is monitoring the court's operation."[265] The CICC has a lot of potential upside for China. According to one of the CICC's advisors, Shan Wenhua, the CICC responds to the "'great risks'" that Chinese businesses face "in belt-and-road countries where legal systems are not of 'very high' quality."[266] He also described the CICC as a way of "'creating a better system,'" explaining that "having to rely on foreign legal systems is 'out of keeping with [their] status as a major power.'"[267]

The Economist's take is more sanguine. Its Chinese bureau opined: "The tribunals could one day matter a lot, should they be used to export a vision of international law that reflects [their] worldview [that independent courts are a fallacy]. At the moment, an obsession with power and order is hobbling the new

---

[258] Lingard et al., *supra* note 232.
[259] *China Establishes International Commercial Courts to Handle Belt and Road Initiative Disputes*, Freshfields Bruckhaus Deringer (2018), https://communications.freshfields.com/SnapshotFiles/30d385d8-07d3-494d-acea-95a37747720b/Subscriber.snapshot.
[260] *Id.*
[261] Zihao Zhou et al., *Survey Results: Rules on China's International Commercial Courts*, 3 CHINA L. CONNECT (Dec. 2018), https://cgc.law.stanford.edu/commentaries/clc-3-201812-26-zhou-harpainter-cao/.
[262] *Id.*
[263] Erie, ASIL, *supra* note 231; Susan Finder, *China International Commercial Court Starts Operating*, SUP. PEOPLE'S CT. MONITOR (July 9, 2018), https://supremepeoplescourtmonitor.com/2018/07/09/comments-on-chinas-international-commercial-courts/ ("The mechanism to link mediation, arbitration and litigation is an important part of the judicial reform measures) (mentioned in this blogpost on diversified dispute resolution). Which mediation and arbitration institutions will link to the CICC are unclear (and the rules for selecting those institutions), but the policy document underpinning the CICC refers to domestic rather than foreign or greater China institutions. The Shenzhen Court of International Arbitration and Hong Kong Mediation Centre have entered into a cooperative arrangement to enable cross-border enforcement of mediation agreements, so presumably, this is a model that can be followed for Hong Kong.").
[264] Erie, *The New Legal Hubs*, *supra* note 4, at 40.
[265] Finder, *supra* note 263.
[266] A Belt-and-Road Court, *supra* note 246.
[267] *Id*.

tribunals. But that could change: China's autocrats may not be as clumsy forever."[268]

While the CICC seems marketed toward being an internationally respected institution, it is unclear whether the court will establish itself as independent or consistent with international standards.[269] To date, for example, all of the arbitration and mediation associations that have been selected to work with the CICC have been Chinese institutions, which has raised concerns that the system will be biased in favor of Chinese parties.[270] There is also some fear that these ADR offerings will become mandatory or that parties will feel forced into them, which is contrary to the consent-based foundations of arbitration and mediation.[271] In the Supreme Court's annual report to the legislature in March, President Zhou Qiang pledged "to uphold the Communist Party's 'absolute leadership' over the work of Chinese courts, . . . [and] called for strict implementation of rules requiring judges to seek Communist leaders' instructions when 'major matters' arise."[272]

III. WHAT DRIVES THE CREATION OF INTERNATIONAL COMMERCIAL COURTS?

Most of the literature analyzing international commercial courts assumes that these institutions have recently emerged as States' efforts to compete with international arbitration or with the London Commercial Court.[273] According to this narrative, the rise of international commercial courts is a positive story of competition driving States to create better mousetraps for dispute resolution. In other words, this competition is predicted to yield a "race to the top" with jurisdictions striving to improve upon litigation and arbitration in international commercial disputes.

Part II of this Article, however, complicates this received account. It reveals that the proliferation of international commercial courts reflects a multiplicity of driving factors. States may be trying to encourage local and regional investment, establish themselves as litigation destinations, cement geopolitical power, or pursue some combination of these and other goals. This perspective complicates the standard account of the adjudication business in a number of ways. At its most basic, the account in Part II reveals both a diversity of courts and a diversity of factors driving their creation.

---

[268] *Id.*
[269] *See* Cai & Godwin, *supra* note 234, at 873–74 (noting challenges to CICC becoming "well-recognized and popular" including questions about Chinese judicial neutrality, particularly when government and government-owned entities are involved in cases).
[270] Zhou et al., *supra* note 261.
[271] *Id.*
[272] A Belt-and-Road Court, *supra* note 246 (noting that "China rejects judicial independence, calling it a false Western ideal").
[273] *See, e.g.*, *supra* notes 13–15 (listing scholarship); Walker, *supra* note 13, at 23 (discussing the "race to excellence between specialized courts and arbitration").

This Part analyzes, critiques, and supplements the standard account that the rise of international commercial courts reflects a global competition to create the best dispute resolution in courts. After laying out the standard account, this Part discusses the factors that may drive these courts to develop sub-optimal law and procedures. It then proposes additional lenses through which to view the rise of international commercial courts, arguing that the competition framework cannot fully explain this phenomenon. While the competition model has intuitive appeal and explanatory force, the rise of these courts should be examined through historical, sociological, domestic political-economic, and geopolitical lenses, which suggest that the pure competition story is incomplete. Understanding the many factors driving the rise of international commercial courts is important to begin to study their potential global impact.

A. *The Standard Account*

The standard account of global competition fits into an extensive body of scholarship that conceives of law—including the provision of dispute resolution services—as a market.[274] For example, scholars argue that States support the establishment of arbitration centers "not just because they are perceived to create a favorable aura for international investment, but because arbitration generates revenue"[275]—by bringing in people who pay for real estate, local legal services, hotels, food, and so on.[276] International commercial arbitration has become a business in itself.[277] Scholars debate, however, whether and how much national *courts* participate in this market and compete with private arbitration.[278] International commercial courts prove that at least some courts do compete on these levels.

Thus, parties "shopping" for a forum to select in their contracts can choose where and how to resolve their disputes, and courts and arbitral tribunals try to "sell" themselves in this market. Scholarship typically considers forum

---

[274] *See, e.g.*, ERIN A. O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET (2009); Donald Earl Childress III, *General Jurisdiction and the Transnational Law Market*, 66 VAND. L. REV. EN BANC 67 (2013); Horst Eidenmuller, *The Transnational Law Market, Regulatory Competition, and Transnational Corporations*, 18 IND. J. GLOBAL LEGAL STUD. 707 (2011); William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979).

[275] Deborah R. Hensler & Damira Khatam, *Re-Inventing Arbitration: How Expanding the Scope of Arbitration is Re-Shaping Its Form and Blurring the Line Between Private and Public Adjudication*, 18 NEV. L.J. 381, 406 (2018).

[276] Anselmo Reyes, *The Business of International Dispute Resolution*, 4 J. INT'L COMP. L. 69 (2017).

[277] *Id.*

[278] Some argue there is no market for law or adjudication. *See* Erin O'Hara O'Connor & Peter B. Rutledge, *Arbitration, the Law Market, and the Law of Lawyering*, 38 INT'L REV. L. & ECON. 87, 89 nn.23–24 (2014) (citing critics). States, after all, are driven by a multitude of factors aside from economic competition. *See* Coyle, *Business Courts*, *supra* note 31. Others argue that arbitration is a "partner of formal adjudication" along with courts, rather than a competitor. Thomas O. Main, *Arbitration, What Is It Good For?*, 18 NEV. L.J. 457, 461 (2018). Still others posit that some large jurisdictions, like the U.K. and New York, compete in this market, while courts in smaller jurisdictions "might in fact be better off reducing their docket as much as possible." Nyarko, *The Lack of Arbitration Clauses*, *supra* note 54, at 7; *cf.* Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679 (2002).

shopping in contracts to be efficient[279] and forum shopping by plaintiffs in non-contractual disputes to be, to put it mildly, inefficient.[280] In the former context, there is thought to be desirable and beneficial interjurisdictional competition.[281] The latter context, scholars argue, leads to "forum shopping" by plaintiffs, "forum selling" by courts,[282] and an overall "race to the bottom."[283]

This narrative is often repeated in accounts of the rise of international commercial courts. Scholars say that the London Commercial Court, for example, became a prime forum choice in international contracts not by adapting to an international standard, but by setting the standards for transnational commercial litigation itself.[284] The rise of international commercial courts around the world, likewise, is attributed to new courts wanting to compete with London or with arbitration to provide better dispute resolution and thus become the new market leader.[285] Scholars tout the positive effects of this competition: international commercial courts will "learn[] the best from other countries, improve[] their own procedures," and, hopefully, eventually "transfer[] best practices to domestic civil litigation."[286]

This account has intuitive appeal. All else being equal, sophisticated international parties with equal bargaining power may prefer a combination of reduced legal risk and an expeditious process.[287] More choices in this area could push all providers to improve on both of these accounts. Courts that fail to do so will not be chosen by parties; and to the extent that their jurisdiction is entirely consent-based, the court then may, in effect, go out of business.

The competition model is in some ways a satisfying description of the courts discussed in Part II. The old-school legal hubs, London and New York,

---

[279] "The theory of optimal contract design, which has been extended to the negotiation of procedural rules between sophisticated parties assumes that parties will agree on the dispute settlement mechanism that maximizes their joint utility." Nyarko, *The Lack of Arbitration Clauses*, *supra* note 54, at 7 (citations omitted); *see also* Scott & Triantis, *supra* note 16.

[280] This kind of "forum shopping" has been called the "longest four-letter word in international litigation." Louise Ellen Teitz, *Where to Sue: Finding the Most Effective Forum in the World*, *in* INTERNATIONAL LITIGATION STRATEGIES AND PRACTICE 49, 49 (Barton Legum ed., 2005). In earlier work, I have dissected the meaning of "forum shopping," arguing that it can have a "broad, value-neutral definition" in addition to the conventional definition of forum shopping as "cheating" by choosing the most advantageous forum. *See* Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. 579, 588–93 (2017) [hereinafter Bookman, *Unsung Virtues*].

[281] *See* Nyarko, *The Lack of Arbitration Clauses*, *supra* note 54, at 7; Gerhard Wagner, *The Dispute Resolution Market*, 62 BUFF. L. REV. 1085, 1089 (2014).

[282] Klerman & Reilly, *supra* note 16.

[283] Wagner, *supra* note 281, at 1090.

[284] *See* Walker, *supra* note 13, at 23 (discussing the "race to excellence between specialized courts"). Others, such as S.I. Strong, attribute the "success of the English Commercial court" "to the benefits of English substantive law, which is generally considered to be sophisticated, well-developed and fair to all parties." Strong, *supra* note 13, at 266 n.4 (drawing similar conclusions about New York).

[285] *See*, *e.g.*, Gary F. Bell, *The New International Commercial Courts—Competing with Arbitration? The Example of the Singapore International Commercial Court*, 11 CONTEMP. ASIA ARB. J. 193 (2018); Strong, *supra* note 13, at 266; Walker, *supra* note 13, at 22 (describing the rise of European international commercial courts as designed "to attract some of the global dispute resolution market previously served by the English Commercial Court").

[286] Hess & Boerner, *supra* note 5, at 40.

[287] Thanks to Paul Stephan for help articulating this point.

are still innovating and trying to attract more adjudication business.[288] In describing their own institutions, supporters of the Singapore and European courts express the courts' desire to compete for adjudication business by providing excellent English-language court options.[289] Even Dubai and Qatar assert that their missions are to offer the best dispute resolution mechanisms in the world. These States' advertising campaigns develop this message.[290]

Moreover, in order to attract cases, these courts probably have to establish some kind of international legitimacy, which likely depends on quality dispute resolution.[291] These "market" forces may drive these courts to establish basic levels of fairness and impartiality, which are widely considered markers of legitimacy.[292] The market also requires some amount of transparency to regulate itself—that is, international commercial courts must be at least somewhat public about process and judges' decisions in order to build a trustworthy reputation in the market. These market incentives may drive a "race to the top."

B. *Cracks in the Standard Account*

While the competition account has intuitive appeal, it tends to glide over the more complicated back stories behind international commercial courts that Part II illuminated. As a definitional matter, if there is competition, it is likely regional more than global—as the Asian, European, and Middle Eastern examples suggest[293]—and it exists between and among all forms of dispute resolution, not just between courts and arbitral tribunals, as demonstrated by the role of mediation in China and Singapore.

But there are four additional reasons why the efficient competition story falters on closer inspection. First, Part II helps reveal that international commercial courts, if they are competing, are not necessarily all competing towards the same end. Second, the competition among international commercial courts can lead to "forum selling"[294] and benefit repeat players to the detriment of others. In similar contexts, scholars have documented that specialization can lead to capture. Third, it is difficult to define what the "top" would be if there were a "race to the top" in the adjudication market. Fourth, the practical realities of the "demand" side—both how parties choose the forum selected in their contracts and how international commercial courts define their jurisdiction—

---

[288] *See supra* notes 40, 66–68 (discussing the financial lists in the London and New York courts and their continued efforts to innovate).
[289] *See* Hwang, *supra* note 11; Peetermans & Lambrecht, *supra* note 8, at 55 ("Clearly, by establishing the BIBC, Belgium is seeking to acquire a share of the global market for resolving international trade disputes.").
[290] *See, e.g.*, Gilles Cuniberti, *The International Market for Contracts: The Most Attractive Contract Laws*, 34 NW. J. INT'L L. & BUS. 455, 457 (2014) (discussing English, Welsh, and German marketing efforts).
[291] *See generally* LEGITIMACY AND INTERNATIONAL COURTS (Nienke Grossman et al. eds., 2018).
[292] *See* Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003).
[293] *See* Cuniberti, *supra* note 290.
[294] *See* Hess & Boerner, *supra* note 5, at 33 (noting that German courts had historically been seen as in the business of providing justice, but have recently gotten into the business of forum selling).

undermine the efficient competition account. In short, just as the corporate law debate about whether competition produced a race to the top turned out to be more complicated than it appeared,[295] there is a more complicated situation with these courts as well.

First, as Part II revealed, there is also no global uniformity on what international commercial courts are *for*. Litigation destinations seem to be competing for the business of adjudication—i.e., for cases—but even they differ on whether they seem to be seeking cases in their courts, or cases more generally in their cities—whether they be in courts, arbitration, or other forms of ADR. These differences matter for the future support of arbitration law. Singapore seems to see arbitration, litigation, and other offerings as potentially growing the overall dispute resolution "pie"; but other nations, like Germany and the Netherlands, seem focused on courts without a parallel emphasis on attracting arbitration. Why do these courts want more cases? Those courts that do not allow foreign lawyers to appear unless accompanied by local counsel may be catering to the preferences of the local bar. The SICC, by contrast, allows foreign counsel to practice and even provides an ethics code for such lawyers.

Investment-minded courts and China, on the other hand, seem focused on different goals. Despite their assertions about aspiring to provide courts for the world, investment-minded courts seem primarily to address a need for stable legal structures to protect local and regional investments. As Amna Sultan Al Owais, Chief Executive and Registrar of DIFC Courts, explained in a 2018 speech, "The driving force has not been competition between courts for cases, but rather competition between countries for investment."[296] She put the issue in blunt economic terms: "[T]hose [countries] ranked highest by the World Bank, as well as an increasing number of emerging economies, have recognized that investing in efficient, well-respected business courts . . . is not a nice-to-have, but rather a need-to-have if they want to compete globally for investment."[297]

The "race to the top" analogy could be compatible with investment seeking.[298] Building good courts will also attract investment, at least in theory. But the incentives are not necessarily aligned. States seeking to attract investment by establishing courts are not necessarily motivated to create

---

[295] *See* Moon, *supra* note 24.

[296] Wilske, *supra* note 13, at 163 (quoting Amna Sultan Al Owais, Chief Exec. and Registrar, DIFC Courts, Global and Local Challenges in Commercial Dispute Resolution, Speech at the Middlesex University Dubai: Fourth International Conference on Emerging Research Paradigms in Business and Social Sciences: Global and Local Challenges in Commercial Dispute Resolution (Jan. 16, 2018), https://www.difccourts.ae/2018/01/25/global-and-local-challenges-in-commercial-dispute-resolution [hereinafter Al Owais speech]).

[297] Al Owais speech, *supra* note 296. Even if specialized courts are not effective tools for attracting investment as an empirical matter, *see* Coyle, *Business Courts*, *supra* note 31, that does not mean that promoting investment is not a consideration within the governments that form these courts.

[298] *See, e.g.*, The Honourable Justice John E. Middleton, The Rise of the International Commercial Court, The 2018 Hong Kong International Commercial Law Conference (Sept. 21, 2018) at ¶¶ 13, 21, https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-middleton/middleton-j-20180921 ("Establishing international commercial courts does not take away from the usefulness of international commercial arbitration, but gives another option of dispute resolution that is available to parties involved in international commerce.").

something new, different and "better," but rather to replicate mechanisms that give assurances of stability and predictability—to the extent the market requires, and possibly no more.[299] The adoption of the common law responds to such incentives.[300] These courts try to offer and support fairly conventional courts as well as arbitration to give investors the dispute resolution options that they have come to expect elsewhere. As Singapore has shown, a nation can "develop an effective and efficient legal system that wins high praise from global business" even if it disregards other aspects of liberal democracy, like separation of powers and freedom of the press.[301] Such a model could lead to courts with more government influence than might be desirable. For example, the DIFC court does not have a track record of ruling against the DIFC Authority.[302]

If providing "high quality" or "efficient" adjudication is just one among several motivating forces behind these courts, then quality may not be the only metric that States use to assess the courts' success and whether they were worth the effort. For an investment-minded court, the metric of success is likely financial: Does the court facilitate and encourage investment in the locality and the region? For an aspiring litigation destination, success will be measured by whether the court attracts litigation. To determine success, one could watch, for example, caseload statistics or the frequency with which the forum is designated in forum-selection clauses. For a court designated to cement geopolitical power, there is yet another metric for success.

These sets of success metrics do not measure the quality of the courts. They do not consider the fairness of procedures, outcomes or jurists, the courts' transparency or efforts to prevent corruption, the speed of case resolution, cost-effectiveness, the quality of the procedural or substantive law generated, or the court's ability to adapt.[303] Having these qualities might contribute to courts' success at attracting either investment or litigation business. But they might instead reflect a courts' expanding jurisdiction or ability to cater to certain constituencies—whether private parties or the State—at the expense of others.

It is also possible, of course, that many of these courts will fail on these metrics. To date, the DIFC court and the SICC already consider themselves a success based on caseload and designation in forum-selection clauses.[304] But their caseloads are paltry in comparison to the London Commercial Court's, if that is an appropriate baseline.[305] The European courts and the CICC are still at

---

[299] *See* Alyssa King, *Global Civil Procedure*, HARV. J. INT'L L. (forthcoming 2021) (draft on file with author).
[300] Even the French initiatives are stated to be oriented toward incorporating procedures known to work in other contexts, rather than reinventing the wheel. *See* Biard, *supra* note 6, at 28 (quoting HCJP).
[301] Gordon Silverstein, *Singapore: The Exception that Proves the Rule*, *in* RULE BY LAW 73, 86 (Tom Ginsburg & Tamir Moustafa eds., 2008).
[302] *See supra* note 125 and accompanying text.
[303] *See* Bookman & Noll, *supra* note 163.
[304] *See supra* Section II.A.2 and Section II.B.1.
[305] *Compare* COMMERCIAL COURT REPORT 2017-2018, *supra* note 36, at 10 (London), *with* DIFC COURTS, ANNUAL REVIEW 2017, at 20-21 (2018), https://issuu.com/difccourts/docs/difc-annualreview2017_jpgs?e=29076707/58783045 (Dubai, 54 cases in 2017), *and Judgments*, SICC,

their very beginning stages—their "success," however defined, remains to be seen.[306] The point is that these courts have different—and multiple—driving forces, which may or may not motivate them to improve upon dispute resolution from an objective viewpoint.

Second, and relatedly, international commercial courts seek to serve a certain market of repeat players. This market dynamic could make them more solicitous of those parties' needs than of other values, should the two conflict. Scholars of specialized courts warn that specialization does not necessarily make courts more efficient.[307] It can make courts more prone to compete with each other (and with arbitration),[308] and thus more prone to judicial capture.[309] In other words, specialized judges and arbitrators may be more likely to cater to particular constituencies that regularly appear before them. Some worry that international arbitrators are particularly susceptible to such capture because arbitrators are supposed to be both "[a]gents of contracting parties, and . . . [a]gents of a larger global community."[310] That is, critics argue that arbitrators are, in some senses, working for the parties who selected them. Judges on international commercial courts may develop similar roles or reputations.

Scholars of specialized courts recommend that lawmakers creating such courts "should consider restricting venue options . . . to reduce court competition"[311] and thus thwart capture. Notably, the emerging international commercial courts appear to take the opposite approach. They open themselves up to litigants from all over the world, without imposing venue-like limitations that require cases to have links to the forum State.[312]

The threat of catering to those contracting parties who choose international commercial courts may seem benign, especially if one assumes that the parties have freely consented to the court's jurisdiction. But the law made for these parties—in these domestic courts—will be generally applicable law. Those legal decisions could be more likely to disregard the interests of non-represented but interested parties, like shareholders, labor, or consumers. Likewise, prioritizing efficient procedures for international commercial courts but not for

---

https://www.sicc.gov.sg/hearings-judgments/judgments (last visited Mar. 6, 2020) (Singapore, 43 judgments since inception).

[306] Perhaps tellingly, in 2020, the number of cases with European parties before the London Commercial Court declined. *See* Portland, Commercial Courts Report 2020, https://portland-communications.com/publications/commercial-courts-report-2020/.

[307] *See* Coyle, *Business Courts*, *supra* note 31, at 1921.

[308] *See* J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631, 636 (2015) [hereinafter Anderson, *Court Competition*].

[309] *See* J. Jonas Anderson, *Court Capture*, 59 B.C. L. REV. 1543, 1550 (2018) (citing LAWRENCE BAUM, SPECIALIZING THE COURTS (2011) (explaining that courts' increasing specialization has led to changes in judicial policy)).

[310] Alec Stone Sweet, *Investor-State Arbitration: Proportionality's New Frontier*, 4 LAW & ETHICS HUM. RTS. 47, 48 (2010).

[311] Anderson, *Court Competition*, *supra* note 308, at 637.

[312] On the other hand, specialization can address other issues, such as the impact of high rates of arbitration on squelching the development of substantive law. Mark Weidemaier suggests that specialization can support a theory that enables arbitrators to create precedent. W. Mark C. Weidemaier, *Toward A Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895, 1943-44 (2010).

other parts of the judiciary could lead to further disparities in quality of judicial offerings. Reflecting this fear, some of the political opposition to the establishment of these courts in democracies has focused on the fear of creating "caviar courts"—exceptional procedures for the 1%.[313]

Another way in which international commercial courts could disregard third party interests is by aggressively expanding jurisdiction or flexing their power over non-consenting third parties. International commercial courts may be tempted to assert such jurisdiction in order to distinguish themselves from arbitration, which lacks jurisdiction over third parties. The SICC, for example, has a broad mandate to join non-consenting third parties.[314]

Third, it is difficult to define the "top" in this market. In the corporate law context, maximization of firm value can allow academics to judge success of a corporate law by objective metrics. But even with that metric, the debate about the normative direction of corporate law is complicated.[315] Here, defining the success of courts, especially compared to each other, is particularly difficult. Using popularity, docket size, or the stakes of the disputes can be a poor measure of *comparison*, even if those may be the metrics on which the courts internally judge their own success. Trying to compare dispute resolution time or efficiency or fairness is likewise problematic because it is difficult to compare each of these issues and weigh them vis-à-vis each other. It is also difficult to identify the proper baseline for comparison.[316] In addition, different parties and different kinds of disputes may lend themselves to different kinds of adjudication. Attempts to define quality adjudication can also be elusive.

In spite of these difficulties, this Article's Part II case studies reveal a market for a respected, independent set of decisionmakers to resolve disputes. London's Commercial Court has long been considered the gold standard on this front, but some of those very same judges are now sitting on the DIFC court, the SICC, and the QIC.

More broadly, those jurisdictions seem to rely heavily on the international composition of their judiciaries as proof that the courts will be independent, fair, and legitimate. Perhaps no one knows exactly how to define excellence in dispute resolution, but there are certain judges whose reputations bring with them assurances of reliability, fairness, and independence. The international commercial courts in Europe, however, with the exception of the Belgian experiment, all employ national judges who are subject matter experts and English speakers, but who might be tempted (at least as much as any national

---

[313] *See supra* note 6; *see also Behandeling Engelstalige rechtspraak bij internationale handelskamers*, EERSTE KAMER DER STATEN-GENERAL (Dec. 4, 2018), https://www.eerstekamer.nl/verslagdeel/20181204/engelstalige_rechtspraak_bij (statement of Mrs. Bikker (Christian Union)) ("My group is concerned with the financing of this court, the court fees and the position of small and medium-sized businesses, in particular the smaller entrepreneur, who is being [left] behind" (translated to English)).

[314] *See supra* note 144 and accompanying text.

[315] Moon, *supra* note 24, at 1412–16 (summarizing the debate).

[316] *See* Walker, *supra* note 13, at 20.

judge) to favor locals, a common criticism of national judges. Those European international commercial courts in this respect hew more closely to traditional court models and perhaps, relying on their democratic legitimacy, do not see the need for—or cannot spend the political capital on—employing foreign judges.

The CICC has forged a middle path by employing well-regarded Chinese judges supplemented with a panel of international experts. Observers nevertheless continue to harbor considerable skepticism about the neutrality and independence of the CICC, and so it remains to be seen if and how this panel will affect the perceived legitimacy of this fledgling court.

Finally, any competition among international commercial courts and arbitration is unlikely to be a fair and efficient competition because of how parties typically include forum selection clauses in their contracts. The standard competition theory assumes that sophisticated parties with equal bargaining power compromise on forum choice based on the quality (efficiency, neutrality, etc.) of the forum. But studies suggest that these conditions do not hold.[317]

As a matter of contract bargaining, one also should not automatically assume equality of bargaining power from the international commercial context. Superior bargaining power—rather than compromise—may be more likely to drive choice-of-forum designations in contracts.[318] That construct further undermines the idea that forum selection in contracts is much different from forum shopping in other contexts.[319] Put another way, international commercial courts seem to be engaging in "forum selling" in ways that seem not that different from the efforts to attract patent and other specialized kinds of litigation that scholars have documented in U.S.[320] and German courts[321] because strong parties are engaging in "forum shopping." This explanation has particular force when applied to the Chinese "Belt and Road" courts, where it seems possible that China or Chinese state-owned entities might insist on CICC forum selection clauses in BRI contracts. The same might be true for government or government-influenced contracts in other countries.

Even if one assumes arm's length negotiations, however, studies on how parties—whether individually or together—select the forum for their contract disputes also suggest that parties are not necessarily looking for the best dispute resolution mechanism. Instead, parties' first priorities both in choice-of-law and choice-of-forum decisions are, first, having a home-court

---

[317] *See, e.g.*, Vogenauer, *supra* note 34 (describing evidence that contracts are not results of compromise between parties with equal bargaining power, and superior bargaining power can dictate choice-of-forum decisions; and that choice-of-forum decisions are guided by preferences for familiarity and home-court bias rather than for efficiency or other objective metrics of quality).

[318] *See* Albert Choi & George Triantis, *The Effect of Bargaining Power on Contract Design*, 98 VA. L. REV. 1665, 1687 (2012); A Belt-and-Road Court, *supra* note 246.

[319] *Cf. supra* notes 279–283 and accompanying text (exploring the general consensus that forum shopping by plaintiffs after disputes arise drives courts into a "race to the bottom" while forum shopping by both parties in contracts drives a "race to the top").

[320] *See* Klerman & Reilly, *supra* note 16.

[321] *See* Stefan Bechtold, Jens Frankenreiter & Daniel Klerman, *Forum Selling Abroad*, 92 S. CAL. L. REV. 487 (2019).

advantage and a familiar forum and, second, the sophistication of the legal system.[322] These priorities reinforce the possibility that the growth of international commercial courts may be an effort to cater to the preferences of the local bar and other local business interests.

This leads to a fundamental question that is often raised by observers of international commercial courts: Is there an actual demand for these courts? It is not entirely clear, for example, whether companies are dissatisfied with current litigation and arbitration offerings, or, more to the point, whether they would prefer a local specialized court alternative. It is likewise unclear that these courts are aimed at serving the needs of international businesses, local lawyers, or other constituencies.[323] Observers often doubt whether any of these new national courts will "manage to convince internationally active companies to settle their disputes on the European continent rather than in London."[324] The proliferation of international commercial courts in light of this skepticism suggests either bold-faced optimism in spite of it, or that attracting cases is not the only reason for establishing these courts. International commercial courts may instead be trying to balkanize the market or appease local interests.

C. *Other Lenses*

The previous Section challenged the competition framework for understanding the rise of international commercial courts on its own terms, questioning whether international commercial courts are all aiming for the same goals, whether they in fact are more concerned with catering to certain constituencies than crafting the best dispute resolution mechanism, whether it is possible to define a "best" mechanism for resolving disputes, and whether the competition analogy works in terms of the practical realities of drafting forum selection clauses. That Section revealed that, while it has some explanatory force, the efficient competition narrative is not the complete story.

Law-and-economics-based competition theory should not have a monopoly on explanatory accounts of international commercial courts. This Section draws again on the descriptive accounts in Part II to suggest additional perspectives—through the lenses of local interests, law and political economy, history, and geopolitics—for studying international commercial courts. Further study through each of these lenses would add to the account in Part II to explain what drives the creation of international commercial courts.

---

[322] LEIN ET AL., *supra* note 35; Erlis Themeli, *Matchmaking International Commercial Courts and Lawyers' Preferences in Europe,* 2019 ERASMUS L. REV. 70 (2019); Vogenauer, *supra* note 34, at 44–45, 77; *see also* John F. Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 WASH. L. REV. 631, 631–35 (2017) (discussing what parties truly seek with choice-of-law clauses, and suggesting that parties care more about choice of forum than choice of law).

[323] *See* Themeli, *supra* note 322, at 70 (arguing that "lawyers are the most important group of choice makers and that their preferences are not sufficiently matched by the new courts," and that "while the new courts are an improvement compared with the existing courts, they do not sufficiently address lawyers' preferences").

[324] Giesela Rühl, *Towards a European Commercial Court,* OXFORD BUS. L. BLOG (Nov. 20, 2018), https://www.law.ox.ac.uk/business-law-blog/blog/2018/11/towards-european-commercial-court.

Local interests. As the discussion in Part II reveals, in each State, there is likely a more complicated domestic political economy driving, or blocking, the creation of international commercial courts. For example, Brexit has been a *catalyst*, as Alexandre Biard put it when describing France, but Brexit propelled machinations already in the making.[325] It is worth asking: who stands to benefit from the establishment of these courts?

International commercial courts may be trying to cater to a local rather than global clientele—and that local constituency may be lawyers rather than businesses.[326] In other contexts, scholars have noted that lawyers have strong incentives to lobby States to supply new legal "products" that will generate revenues for the lawyers.[327] This might be an accurate account of the evolution of the New York Commercial Division and other U.S. business courts.[328] Further research may reveal similar origin stories among some of the courts discussed here, especially in Europe. Interestingly, while the Qatar, Dubai, and Singapore examples generate business for local lawyers, they also employ a fair number of foreign judges and foreign lawyers, who may practice before the courts.[329] The CICC, of course, relies heavily on Chinese lawyers, judges, and experts.

Aspiring litigation destinations may be particularly solicitous of the interests of local lawyers and of building a local legal economy that caters to a global market. Investment-minded courts—and, of course, China—may likewise follow local political economic factors that seek geopolitical influence through the establishment of an international commercial court.

As further evidence of the influence of local considerations, within Europe, an EU-wide European Commercial Court might compete more effectively with London[330] than a proliferation of courts on the Continent. But such a court has not yet materialized and faces substantial legal and political obstacles.[331] Instead, localities are establishing their own national options that permit English-language proceedings and cling to their own procedural cultures in different ways and to different degrees, often privileging local lawyers.[332] This

---

[325] Biard, *supra* note 6, at 24, 25 (2019) ("[T]he drivers of the development of international commercial courts in France are manifold and by no means recent.").
[326] *See* Coyle, *Business Courts*, *supra* note 31, at 1930 (discussing local lawyers' benefits from state business courts).
[327] Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469 (1987).
[328] *See* Coyle, *Business Courts*, *supra* note 31, at 1932 n.61.
[329] *See supra* notes 89, 104, 136, 137 and accompanying text; *see also* Moon, *supra* note 24, at 1437–43 (documenting the rise of offshore business courts in nations considered to be tax havens, like the Cayman Islands and Bermuda).
[330] Giesela Rühl, *Building Competence in Commercial Law in the Member States*, EUR. PARL. THINK TANK (Sept. 14, 2018), http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2018)604980.
[331] *See* Hess & Boerner, *supra* note 5; *see also Expedited Settlement of Commercial Disputes*, EUR. PARL. (Nov. 20, 2019), https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-expedited-settlement-of-commercial-disputes (announcing that the Commission will not establish an EU-wide commercial court).
[332] For example, foreign lawyers may appear at the NCC but only when accompanied by members of the local Bar.

evidence suggests that international commercial courts—especially the aspiring litigation destinations in Europe—are responding to local forces, rather than (or at least in addition to) global competition.

Law and political economy. Questions of law and political economy rely on "the insight that 'the economy' cannot be separated from questions of power, distribution, and democracy."[333] In Belgium and the Netherlands, the legislative debates about whether to create international commercial courts reflect an appreciation that these courts would cater to the largest business interests. These courts often require large amounts in controversy and purport to offer gold-star standards of adjudication, potentially leaving other parts of the judiciary unfunded or otherwise neglected. The potential for capture by repeat players or parties to international commercial contracts with the stronger bargaining power—including potentially state-owned companies—leads to further reasons to question the benefits that these courts may offer when viewed through a law and political economy lens.

Sociology. Sociological institutional theory, sometimes called "institutional isomorphism," posits that driving forces behind legal and institutional innovations and borrowing can take on various forms besides competition, such as outside pressure, a desire for legitimacy, and "the influence of formal education and professional networks in disseminating ideas."[334] Diffusion theory states that diverse laws spread through various mechanisms such as mimicry and learning in addition to competition.[335]

These various theories likely have some salience in the story behind the proliferation of these courts. Investment-minded courts in particular seem driven by a desire for legitimacy as much as, if not more than, competition for cases. As shown in Part II, furthermore, new international commercial courts and scholars alike routinely cite the London Commercial Court as an inspiration and the DIFC court as a trendsetter in this area. Chronologically, the courts have sprung up in relatively quick succession around the world: Dubai (2004), Qatar (2009), France (2010), Singapore (2015), Germany (2018), China (2018), the Netherlands (2019), and most recently, Kazakhstan (2019). While a full exploration of this sociological theory is outside the scope of this Article, Part II contributes to the plausibility of such accounts as explaining the rise of international commercial courts. This account could "compete" with the competition theory, and it complements accounts that incorporate the influence of local interests as well as law and political economy perspectives.

History. A full understanding of the origins of international commercial courts would also benefit greatly from historical accounts of legal institutions in

---

[333] *Inaugural LPE Project Conference – Call for Papers!*, LPE BLOG (July 18, 2019), https://lpeblog.org/2019/07/18/inaugural-lpe-project-conference-call-for-papers/.
[334] *See* Coyle, *Business Courts*, *supra* note 31, at 1966; *see also* Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 150–54 (1983).
[335] *See* Bookman, *Unsung Virtues*, *supra* note 280, at 618 (collecting sources).

these host States, especially historic treaty ports in Asia. The concept of local courts designed for foreigners did not originate with international commercial courts. Treaty ports had courts established *by foreigners* for foreigners. By contrast, international commercial courts are established by locals for foreigners; but, like treaty port courts, they still integrate foreign, often common law, traditions and are interested in making foreign investment more secure.[336] Studying this history would likely yield fascinating results that would also complement the other lenses.

Geopolitics. From today's perspective, the international commercial courts with the most potential for influence are in Asia.[337] For example, emphasizing and developing neutrality and expertise, Singapore seems to be trying to establish itself as a neutral "Switzerland" of dispute resolution for both litigation and arbitration, building on its leadership in other service areas like manufacturing, transportation, shipping, and financial services.[338] For dispute resolution, there may still be questions about Singapore courts' neutrality in cases involving the government, but they have established an excellent reputation for following the rules of law in international commercial adjudication.[339]

China, however, seems to be flexing its muscles most obviously. It will be important to watch whether the CICC emerges as a leader in international commercial dispute innovation or as a cost of doing business with the Belt and Road Initiative. The CICC's jurisdiction is not entirely consent-based and some have raised concerns that incorporating various forms of ADR will make parties feel compelled to submit to mediation or arbitration.[340] Technically, "the CICC is not mandatory for BRI deals; rather it is one option amongst an increasingly competitive field of dispute resolution forums in Asia."[341] But even consent-based jurisdiction may take on a different valence if China exercises its considerable bargaining power in Belt-and-Road-related projects to effectively require parties to designate the CICC for resolution of disputes arising out of those contracts.[342] If the Chinese do pressure counterparties to accept CICC jurisdiction, that may lead to a flow of cases to the court. With those cases, the CICC will be able to gain experience—but the cases will also offer the CICC the

---

[336] *See* ROBERT NIELD, CHINA'S FOREIGN PLACES: THE FOREIGN PRESENCE IN CHINA IN THE TREATY PORT ERA, 1840-1943 (2015).
[337] *See* PARAG KHANNA, THE FUTURE IS ASIAN (2019).
[338] *See* Silverstein, *supra* note 301, at 77.
[339] *See* Erie, *The New Legal Hubs*, *supra* note 4; *see also* Silverstein, *supra* note 301, at 98.
[340] Zhou et al., *supra* note 261.
[341] Erie, Opinio Juris, *supra* note 236.
[342] *See, e.g.*, Hannah Beech, *'We Cannot Afford This': Malaysia Pushes Back Against China's Vision*, N.Y. TIMES (Aug. 20, 2018), https://www.nytimes.com/2018/08/20/world/asia/china-malaysia.html ("From Sri Lanka and Djibouti to Myanmar and Montenegro, many recipients of cash from Chinese's huge infrastructure financing campaign, the Belt and Road Initiative, have discovered that Chinese investment brings with it less-savory accompaniments, including closed bidding processes that result in inflated contracts and influxes of Chinese labor at the expense of local workers.").

opportunity to gain or lose the world's trust.[343] As *The Economist* noted, reporting on the CICC's first hearings:

> [t]oo many belt-and-road contracts are secretive, unequal and reward local power-brokers in opaque ways, reflecting deep cynicism about global norms. Some experts wonder if China secretly envies the ability of American judges in civil suits to demand the seizure of assets on the other side of the world. Though Chinese officials denounce America as a bully with a long reach, some scholars wonder whether China might one day begin issuing more extraterritorial judgments of its own.[344]

More broadly, international commercial courts also present a framework through which to view the evolving geopolitical order. Perhaps these courts represent an effort to oust London and New York from their traditional position of dominance in the international commercial litigation space. But the more nuanced view is that the goal, or at least a satisfactory result, may not be for Singapore or Amsterdam to replace these standard-bearers as a go-to forum globally, but instead to establish regional prominence and to prevent the flight of local disputes to those far-flung jurisdictions. As noted earlier, balkanization may be the goal, or at least an acceptable second-best result.

The opportunity for these potential power-grabs may be emerging in part because of the weakening of London and New York's status as the paragon of legal stability. It may be not only the Brexit vote, but the chaos that followed it, that opens up the field for others to assert themselves in various subsections of the market. A weakened United States on the world stage likewise has ramifications for New York's prominence as an adjudication hub. New York's prominence is also affected by Supreme Court development of "litigation isolationism"—doctrines that keep transnational cases out of U.S. courts—including in ways that keep out arbitration-related litigation.[345]

These developments can affect not only London and New York's ability to attract adjudication business, but also the ability of English and New York law to govern international commercial transactions. To date, international commercial courts seem to be selling themselves for selection in choice-of-forum clauses, but not necessarily for designation in choice-of-law clauses. Even if Singapore and Dubai courts are interpreting cases under contracts that designate English law, that exerts a certain influence over the development of that law.[346] And over time, it seems likely that some of these courts, especially

---

[343] Eriks Selga, *China's New International Commercial Courts: Threat or Opportunity?*, FOREIGN POL'Y RES. INST. (May 29, 2019), https://www.fpri.org/article/2019/05/chinas-new-international-commercial-courts-threat-or-opportunity.
[344] A Belt-and-Road Court, *supra* note 246.
[345] Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV 1081 (2015); Bookman, *The Arbitration-Litigation Paradox*, *supra* note 11.
[346] *See* Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed Out Common Law*, UCLA L. REV. (forthcoming 2020-2021).

in Asia, will exert influence over not only procedural questions, but substantive ones as well.

IV. LITIGATION VS. ARBITRATION

The rise of international commercial courts also sheds light on common assumptions about the relationship between litigation and arbitration. International commercial courts provide an important rebuttal to assumptions that litigation and arbitration are starkly contrasting modes of dispute resolution and they offer potential insights into scholarly debates about the forum preferences of parties to international commercial contracts.

A. *Understanding the Differences between Litigation and Arbitration*

The rise of international commercial courts described in Part II undermines traditional conceptions about the differences between litigation and arbitration and the relationship between them. According to the conventional U.S. understanding, often articulated in Supreme Court decisions, litigation and arbitration are opposite forms of dispute resolution that exist in an antagonistic relationship toward each other. International commercial courts reveal that litigation and arbitration, which historically may have had many distinctive characteristics, appear to be converging in certain ways.[347] This discussion leads to questions about what remains distinctive about litigation and arbitration.

International commercial courts offer at least three lessons on this theme. First, they demonstrate a complementary relationship between courts and arbitration (and other forms of ADR): that together they can support "one-stop shopping" for dispute resolution in a single location. Second, these courts reveal procedural convergence between international commercial litigation and arbitration, undermining accounts that litigation and arbitration are starkly contrasting modes of dispute resolution. Third, these courts show that there are, nevertheless, salient distinctions between litigation and arbitration.

The first point is a contrast between the U.S. federal courts' perspective and these global trends. The U.S. Supreme Court is well known for its "liberal federal policy favoring arbitration agreements"[348] and for its hostility to litigation.[349] But much of the rest of the world, including New York, recognizes that welcoming multiple variations on dispute resolution can increase a locality's attractiveness to business generally and to the adjudication business in particular. Singapore's focus on developing itself as a legal hub for litigation, arbitration, and ADR is a prime example.

These developments suggest that the Supreme Court's attitude toward arbitration and litigation as opposites and antagonists is misplaced. In previous

---

[347] For early scholarship acknowledging this point, see Aragaki, *Metaphysics*, *supra* note 26; Tiba, *supra* note 13. *See also* Bookman, *Arbitral Courts*, *supra* note 12.
[348] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).
[349] Bookman, *The Arbitration-Litigation Paradox*, *supra* note 11.

work, I have explained how courts provide an important support network for arbitration: recognizing and enforcing arbitration agreements and awards, and otherwise supporting ongoing arbitration by, for example, helping direct the collection of evidence or appointing arbitrators where parties cannot agree.[350] And I have argued that to be "arbitration-friendly," U.S. federal courts should embrace a deeper understanding of the role of courts in supporting arbitration when crafting both arbitration law and access-to-court doctrines.

The international trends discussed here suggest there is another dimension to courts' support for arbitration: the usefulness of providing courts, arbitration, and other forms of ADR together as complementary offerings for dispute resolution. These insights are useful for New York and other U.S. jurisdictions to consider when structuring their courts to attract adjudication business.

Second, in international commercial disputes, the conventional distinctions between arbitration and litigation are dissolving. Neither arbitration nor litigation has a monopoly on the procedures once thought to belong to one or the other, like confidentiality, discovery, expert adjudicators, or appellate review.[351] It is already well known that arbitration is increasingly "judicialized," looking more and more like international commercial litigation.[352]

The study here demonstrates that international commercial litigation is also becoming more "arbitrationalized."[353] Many international commercial courts are designed to offer some of the most attractive aspects of arbitration and also to satisfy some of arbitration's shortcomings (like jurisdiction over third parties). They offer English-language proceedings, three-judge panels,[354] and expert judges. Although parties may not select their particular judges by name, they do know that their judge will be selected from a slate of experts listed on the court's website. Moreover, unlike in arbitration, where it can be difficult to find time on a busy arbitrator's calendar, courts offer judges' prompt availability (at least for now).[355]

---

[350] *Id.*, at 1126, 1133, 1182–83.
[351] *See* Aragaki, *Metaphysics*, *supra* note 26.
[352] *See, e.g.*, ALEC STONE SWEET & FLORIAN GRISEL, THE EVOLUTION OF INTERNATIONAL ARBITRATION JUDICIALIZATION, GOVERNANCE, LEGITIMACY (2017). Modern international commercial arbitration can include multi-party arbitration, *see* Abaclat v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011) (permitting class treatment within ICSID dispute), and controversies over evidence, discovery, and challenges to arbitrators. *See* Remy Gerbay, *Is the End Nigh Again? An Empirical Assessment of the 'Judicialization' of International Arbitration*, 25 AM. REV. INT'L ARB. 223 (2014). It can be high stakes and slow. Hiro N. Aragaki, *Constructions of Arbitration's Informalism: Autonomy, Efficiency, and Justice*, 2016 J. DISP. RESOL. 141, 156–57 (2016); Gary Born & Claudio Salas, *The United States Supreme Court and Class Arbitration: A Tragedy of Errors*, 2012 J. DISP. RESOL. 21, 39 (2012). It can also be expensive. In contrast to government-subsidized courts, arbitrators and arbitral tribunals charge considerable fees that are often a percentage of the size of the award.
[353] *See* Bookman, *Arbitral Courts*, *supra* note 12.
[354] *See supra* text accompanying notes 175 (NCC), 247 (CICC).
[355] *See* Walker, *supra* note 13.

These courts also offer options for confidentiality. Court proceedings are typically open to the public and opinions are usually published.[356] That is the default status for new international commercial courts, but they offer varying degrees of confidentiality in both proceedings and opinions.[357]

Many of these courts are unabashedly open to private customization of procedure.[358] Parties can opt out of standard procedures, including the rules of evidence or appellate review.[359] Although creatures of the State, these international commercial courts are also highly receptive to criticism from private parties, as the quick changes to Singapore's procedure demonstrate.

Putting aside the problem of determining whether arbitration is public or private law,[360] the fundamental distinction between litigation and arbitration is often thought of as the difference between public and private adjudication, or between State-mandated procedures and party-designed or party-designated ones, or between confidential proceedings and public ones, or between consent-based jurisdiction and State-power-based ones.[361] These distinctions are becoming more elusive.[362] The design of international commercial courts has the hallmarks of a joint public-private enterprise.

The third point, however, is that some differences, of course, remain.[363] Courts can join third parties and issue injunctive relief, for example, which arbitral tribunals typically cannot do. They can exert jurisdiction over non-consenting parties. Singapore, in particular, seems to offer these capabilities as a way to contrast with arbitration. But it is unclear what the international law

---

[356] *Cf.* Merritt E. McAlister, *"Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 MICH. L. REV. 533 (2020) (documenting circumstances in which U.S. federal court opinions are not published).

[357] *See* Aragaki, *Metaphysics*, *supra* note 26, at 558-559.

[358] The new courts in Brussels and Singapore are particularly good examples of this phenomenon, which is interesting to map onto the domestic court debate about private ordering in procedure. *See, e.g.*, Scott Dodson, *Party Subordinance in Federal Litigation*, 83 GEO. WASH. L. REV. (2014); Robin Effron, *Ousted: The New Dynamics of Privatized Procedure and Judicial Discretion*, 98 B.U. L. REV. 127 (2018); David Hoffman, *Whither Bespoke Procedure?*, 2014 U. ILL. L. REV. 389 (2014).

[359] *See, e.g.*, *supra* notes 140, 147 (SICC); note 103 (DIFC Court follows evidence rules from arbitration, which allow party autonomy over the rules).

[360] *See* Ralf Michaels, *International Arbitration as Private or Public Good* (Duke Law School Publ. L. & Legal Theory Series, Paper No. 2017-57, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3019557 (calling the question of whether arbitration is public or private law "a problematic categorical distinction").

[361] *See id.* (hard to compare because it is "very difficult to create plausible baselines"); Strong, *supra* note 13; Walker, *supra* note 13, at 20 ("Unlike arbitration, parties in litigation are not generally required to pay the compensation and expenses of judges").

[362] *See* Bookman, *Arbitral Courts*, *supra* note 12.

[363] Lord Justice Kerr listed the following benefits of litigation in response to the question "Is litigation so bad after all?": "the possibility of consolidating related disputes by the 'third party' procedure before one tribunal; the certainty of a consistent approach by the application of the same legal principles to different disputes raising similar issues; the control exercisable by the parties over the proper progress and conduct of the proceedings within a prescribed framework by means of a known and enforceable procedure; the availability of a neutral professionally qualified tribunal with the single objective of deciding cases according to law; and the existence of rights of appeal, if necessary, to reverse decisions which are plainly wrong." Lord Justice Kerr, *Arbitration v. Litigation/ The Macao Sardine Case*, 3 ARB. INT'L 79, 79 (1987).

boundaries are on international commercial courts' authority over non-consenting third parties.[364]

One important distinction is courts' ability to declare what the law is and to create binding precedent. Indeed, many judges and commenters have lamented arbitration's popularity because it has hampered courts' ability to develop substantive law.[365] This may be less of a problem in civil law traditions, where the law depends less heavily on judicial opinions and precedent.[366] But commenters in the U.K., the United States, and other common law jurisdictions have recognized this effect of arbitration's growing popularity as a serious issue.[367]

It is unclear what role international commercial courts will play in the development of substantive law. For the most part, the new courts discussed here are offering adjudication services, not lawmaking services.[368] They promise to enforce parties' choice-of-law provisions and offer procedures to make proving foreign law easier. But how this works in practice remains to be seen. A foreign court applying English common law (because it was designated in a choice-of-law clause) would not contribute to the development of the English common law per se, because these interpretations are not precedential.[369].

But foreign court interpretations might contribute to a common law more generally. Some suggest that these courts may contribute to the "continuum of precedential decisions."[370] Justice Middleton of the Federal Court of Australia has argued for "harmonization" of substantive laws, practices, and ethics in international commerce. Arbitration, he contended, cannot do this, and it is not supposed to.[371] Chief Judge Menon of the SICC has said that developing transnational commercial law is a goal of that institution.

That will be a possibility, however, only if the decisions are made public. The courts discussed here seem to value publicity and confidentiality to different degrees. The SICC, for example, permits parties to select confidential

---

[364] *See* Pamela K. Bookman, *Toward the Fifth Restatement of Foreign Relations Law, in* THE RESTATEMENT AND BEYOND: THE PAST, PRESENT, AND FUTURE OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (Paul B. Stephan & Sarah A. Cleveland eds., forthcoming 2020) [hereinafter Bookman, *Fifth Restatement*]; Stamboulakis & Crook, *supra* note 143.

[365] *See, e.g.*, The Right Hon. The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, The Bailii Lecture 2016: Developing Commercial Law Through the Courts: Rebalancing the Relationship Between the Courts and Arbitration, (Mar. 9, 2016), https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf [hereinafter Cwmgiedd Lecture].

[366] Sabrina DeFabritiis, *Lost in Translation: Oral Advocacy in A Land Without Binding Precedent*, 35 SUFFOLK TRANSNAT'L L. REV. 301, 328 (2012).

[367] *See* Bookman, *The Arbitration-Litigation Paradox*, *supra* note 11 (explaining this debate); Cwmgiedd Lecture, *supra* note 365 (lamenting arbitration's interference with English courts' ability to develop common law).

[368] *See* Erie, *The New Legal Hubs*, *supra* note 4.

[369] *See, e.g.*, 8 FEDERAL PROCEDURE, LAWYERS EDITION § 20:632 (2020) ("The highest court of each state is the final arbiter and is unquestionably the ultimate expositor of state law.").

[370] Walker, *supra* note 13 at 18.

[371] Middleton, *supra* note 10, ¶15.

proceedings. The CICC showcased open proceedings in its first hearings.[372] Both the CICC and the NCC plan to make judgments available online.[373] Qatar, the DIFC, and the AGDM all have open court proceedings, and the DIFC posts videos of its proceedings on its website.[374] But proof of the transparency and publicity of these courts will be in the pudding. Confidential proceedings likely will yield confidential decisions. And it is unclear how transparent courts will be about their confidential docket items or their decision-making processes for granting confidentiality requests.

In arbitration, meanwhile, there are heated debates about confidentiality as well.[375] These norms appear to be shifting and it is unclear where the fault lines will come to rest. For those watching for possible convergence between litigation and arbitration, it is interesting to note that other commenters propose allowing arbitration to establish precedent under certain circumstances.[376] This would further elide distinctions between litigation and arbitration.

B. *Party Preferences*

The proliferation of international commercial courts also raises questions about parties' presumed preferences for private dispute resolution, especially arbitration.[377] Some empirical studies of contracts have worked toward debunking the assumption that parties to international commercial contracts mostly choose arbitration.[378] The emergence of new international commercial courts could further undermine that understanding.[379] On the other hand, it could be that the rise of international commercial courts reflects local lawyers' or other constituencies' interests, and may not reflect party preferences—or, at least, not reflect preferences that are strong enough to

---

[372] A Belt-and-Road Court, *supra* note 246; *The China International Commercial Court Hears Its First Cas*e, CICC (May 30, 2019), http://cicc.court.gov.cn/html/1/219/208/210/1237.html.
[373] Walker, *supra* note 13, at 19.
[374] *Id*.
[375] Joshua Karton, *A Conflict of Interests: Seeking a Way Forward on Publication of International Arbitral Awards*, 28 ARB. INT'L 447 (2012) (discussing the controversy).
[376] Weidemaier, *supra* note 312.
[377] *See* MARGARET L. MOSES, PRINCIPLES AND PRACTICES OF INTERNATIONAL ARBITRATION 1 (2d ed., 2012) ("Today, international commercial arbitration has become the norm for dispute resolution in most international business transactions."); Sundaresh Menon, *The Transnational Protection of Private Rights*, *in* PRACTISING VIRTUE: INSIDE INTERNATIONAL ARBITRATION 17-44 (David D. Caron et al. eds, 2015); NIGEL BLACKABY ET AL., REDFERN & HUNTER ON INTERNATIONAL ARBITRATION § 1.129 (6th ed. 2015)("At one time, the comparative advantages and disadvantages of international arbitration versus litigation were much debated…. That debate is now over: opinion has moved strongly in favour of international arbitration for the resolution of international disputes.").
[378] *See, e.g.*, Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 876 (2008); Nyarko, *The Lack of Arbitration Clauses*, *supra* note 54; Christopher Whytock, *Litigation, Arbitration, and the Transnational Shadow of the Law*, 18 DUKE J. INT'L COMP. L. 449, 449 (2008);; Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses*, 25 OHIO ST.J. ON DISP. RESOL. 433 (2010).
[379] *See, e.g.*, Daisy Mallet, Guan Feng & Holly Blackwell, *The Rise of the Courts*, KING & WOOD MALLESONS (Nov. 11, 2018), https://www.kwm.com/en/au/knowledge/insights/the-rise-of-the-courts-20181119 (comparing international commercial courts to arbitration and concluding that arbitration remains more attractive in light of ease of enforcement, confidentiality, and neutrality).

overcome traditional transaction costs or lack of attention that often leads to parties omitting or neglecting forum selection clauses in their contracts.

One may wish to wait for further information on the courts' popularity before drawing conclusions about party preferences. Doing so should require establishing, at the outset, what the markers of success or popularity should be, and over what timeline. As discussed above, however, it is likely that different courts will have different, and sometimes changing, metrics of success.

In assessing party preferences, one must also be vigilant to consider the role of consent to jurisdiction. Many of the courts discussed here, especially those that do not require a connection to the locality as a basis for jurisdiction, like the NCC, seem to rely primarily on consent-based jurisdiction. But jurisdiction tends not to be *limited* to consent-based jurisdiction, and, indeed, one of courts' primary advantages over arbitration is the ability to consolidate cases, join additional parties, and exercise jurisdiction without parties' consent.[380] These courts may test the boundaries of how far such jurisdiction can reach extraterritorially.[381]

For example, thus far, the SICC has mostly relied on referrals from the ordinary Singapore courts.[382] Likewise, the CICC is not limited to consent-based jurisdiction and has had cases referred by the SPC. Moreover, if consent to the CICC's jurisdiction becomes a condition of Chinese investment through the Belt and Road Initiative, the CICC may gain prominence—but not necessarily legitimacy—relatively quickly. As a lawyer with years of Chinese experience told *The Economist*, "'Where you go to resolve a dispute is more or less a question of your bargaining power.'"[383] The CICC's bargaining position may also allow it to retain control over its courts and potentially to circumvent treaty agreements about investment dispute resolution. This dynamic may require adjusting assumptions that forum-selection clauses reflect free choice and party agreement—and, therefore, may require adjusting metrics for judging a particular court's "popularity."

V. EVALUATING INTERNATIONAL COMMERCIAL COURTS

This Part aims to begin conversations about the normative implications of the proliferation of international commercial courts. Because the courts are so new, there are more questions than answers.

On one hand, international commercial courts represent the vanguard of innovation in international commercial dispute resolution. They seem to represent the triumph of choice, competition, and innovation, as well as a

[380] Walker, *supra* note 13, at 11 ("one feature that specialized commercial courts emphasize is their capacity to join and consolidate claims, with or without the unanimous consent of the parties").
[381] *See* Bookman, *Fifth Restatement*, *supra* note 364 (considering whether international commercial courts will test the international law boundaries of adjudicatory jurisdiction).
[382] *See* Hess & Boerner, *supra* note 5 (noting that the SICC has had one case where the forum selection clause designated the SICC).
[383] A Belt-and-Road Court, *supra* note 246.

convergence of norms around best practices in international commercial dispute resolution. Courts and arbitral centers alike recognize the benefits of English-language proceedings, party control over procedure, confidentiality, the availability of opting in or out of appellate review and other procedural rules, three-judge panels, expert adjudicators, and deference to parties' choice of law and forum. Those courts that are part of new legal hubs may become home to a synergistic interaction between litigation, arbitration, and other ADR mechanisms.[384] These developments could be understood to represent the fruits of a positive kind of forum shopping whereby parties, through lobbying efforts, advocacy by lawyers, and ultimately their choices in forum-selection clauses, drive procedural innovation and reform.[385] Ideally, improvements in judicial processes in commercial courts will spread to other parts of the judiciary.[386]

Notably, moreover, most of the States studied here strongly embrace arbitration on its own as well as in combination with litigation (and other forms of ADR); they seem to recognize the complementarity between courts and arbitration. How this will operate in practice remains to be seen. For now, China's CICC recognizes cooperation with only Chinese arbitration centers. If they open their cooperative stance to include foreign or international arbitration centers, that may assuage some fears that China's main priority is to assert further State control over dispute resolution. But China faces an uphill battle at ensuring integrity and freedom from political corruption and influence.[387]

Despite some reasons for optimism, more complicated dynamics drive these developments, with unclear results. Some of these courts may disappear over time from neglect, lack of use, or reduced support from host States. But if they continue and build substantial dockets, there are two sets of possible concerns. First, international commercial courts could represent potentially troubling trends towards a reassertion of State sovereignty in an area that has recently seemed to be dominated by private arbitration. In this context, at least some international commercial courts, most prominently the CICC, may create new environments for flexing disparate bargaining power or exerting State control. In this sense, international commercial courts may reveal a reassertion of State sovereignty and a rejection of both arbitration and globalization. Today, some arbitration scholars fear that the rising trend of economic nationalism threatens States' support for arbitration.[388] The rise of international commercial courts could be a piece of that puzzle, representing State efforts to reject arbitration and replace it with these courts, which might be more sympathetic to

---

[384] *See* Erie, *The New Legal Hubs*, *supra* note 4.
[385] *But see* Christopher R. Drahozal, *Diversity and Uniformity in International Arbitration Law*, 31 EMORY INT'L L. REV. 393, 399 (2017) (advocating diversity in national arbitration laws).
[386] See, e.g., Biard, *supra* note 6; Bookman, *Arbitral Courts*, *supra* note 12 (discussing debates in Dutch legislature contemplating that creation of the NCC would spread reform to other parts of the judiciary).
[387] *See* Middleton, *supra* note 10; A Belt-and-Road Court, *supra* note 246.
[388] *See, e.g.*, Call for Papers, International Arbitration in Times of Economic Nationalism, AM. U. WASH. COLL. L. (Nov. 14, 2019) (on file with Author) [hereinafter Call for Papers]; Björn Arp & Rodrigo Polanco, *TDM Special Issue on "International Arbitration in Times of Economic Nationalism: An Introductory Overview"*, 17 TRANSNAT'L DISPUTE MANAGEMENT 1 (2020), http://www.transnational-dispute-management.com/article.asp?key=2743.

State interests, particularly as they rely on host State support for their existence.[389] Proponents of international commercial courts also have touted them as institutions to develop transnational commercial law, in contrast to arbitration, which has not been able to declare and develop law in these areas. If they do seize on the ability to develop law, international commercial courts should be careful not to favor government parties or government interests, but also not to cater too much to the repeat players before them.

This caution relates to the other set of concerns about international commercial courts, which is that instead of catering to sovereign interests, these courts could become captured by private interests. International commercial courts' resemblance to arbitration may be troubling for the same reasons that scholars worry about arbitration replacing courts in the United States:[390] they could represent a new way of privatizing public courts. In this sense, international commercial courts may become less public or less interested in law declaration in the general public interest; they may focus their legal analysis more on the interests of the parties regularly before them and they may concentrate court resources on a few cases with high amounts in controversy. They may subordinate other judicial roles to resolving disputes according to parties' preferred procedures, competing for adjudication business, and catering to potential plaintiffs. If that happens, public court values and functions will suffer. Likewise, it remains to be seen whether international commercial courts will follow the lead of other specialized courts that have fallen victim to incentives to cater only to certain parties, leaving other interests of justice to the side.[391] One criticism of arbitration is that sometimes it can prize efficiency over fairness;[392] international commercial courts should not.

In sum, as they develop, international commercial courts should be wary of both this Scylla of State abuse of power and the Charybdis of private capture.

---

[389] Erie, *The New Legal Hubs*, *supra* note 4 (discussing legal hubs' reliance on host states); Call for Papers, *supra* note 388 ("In Asia, international arbitration is seen more and more often as a mechanism to protect Chinese companies doing business abroad, while the implementation of modern arbitration standards within mainland China remains sporadic. In fact, in June 2018 China established the first and second International Commercial Courts, to offer companies a court of justice as an alternative to arbitration. Should this be interpreted as a sign that China wants to move away from arbitration, assume a stronger state control over dispute settlement, and curtail the growing use by Chinese companies of international arbitration?").

[390] *See, e.g.*, Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, The Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2809 (2015); Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3074-3075 (2015) (bemoaning that rise of arbitration has "ero[ded] the public realm" "negate[d] substantive law"); Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html (first of three-part series on such arbitration clauses).

[391] *See supra* notes 307–308 and accompanying text.

[392] *See* Hiro Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939 (2014).

CONCLUSION

The recent proliferation of international commercial courts calls into doubt many conventional assumptions about the global market for adjudication, the relationship between arbitration and litigation, and the differences between the two. It belies accounts of courts competing in a "race to the top," of litigation and arbitration being diametrically opposed options for dispute resolution, and of parties to international commercial contracts "always" opting for arbitration. This Article advocates understanding and studying the rise of these courts not just through the law and economics lens of competition among courts and arbitral tribunals for the business of adjudication, but also with other scholarly methodologies. Further study, moreover, will yield insights for a number of additional literatures, including the literature on the role of lawyers as forces for legal and institutional change, the role of culture in procedure, the role of forum shopping in shaping courts as institutions, the role of courts in an evolving geopolitical order, and the role of the United States in the global adjudication business.