Forum Selling and Forum Marketing in International Commercial Disputes

The Case of International Commercial Courts

by

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Forum Selling en Forum Marketing in Internationale Handelsgeschillen: In het Licht van Internationale Handelsrechtbanken

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Birmingham, 30.03.2022

To Jos, Erlis, Emma, Hongwei, and Tita

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CHAPTER 1: INTRODUCTION

1. A New Species of Courts

In March 2018, the cartoon below was published in the Belgian newspaper *De Standaard*.

De Standaard, 'Gerecht niet meer onafhankelijk?', 22 March 2018, available at <http://www.standaard.be/cnt/dmf20180321_03423024>.

It depicts a speedboat named the 'Belgian International Business Court', filled with cheerful judges and a smiling young Lady Justice clad in a red two-piece bathing suit. The speedboat is about to overtake an old, rusty ship named 'Justitie', the Flemish word for justice. Its elderly passengers, a grey haired Lady Justice and the judges, are looking grumpily down at the speedboat that is about to leave them behind.

The cartoon was a follow-up to an earlier announcement by the Belgian government about creating a new court – the Brussels International Business Court (BIBC) – for the purpose of litigating international commercial disputes. It was envisaged that, as a result of Brexit, the BIBC would draw forum-seekers away from London's Commercial Court to Brussels, and would thereby reinforce the city's position as the *de facto* capital of Europe.[1]

[1] Legislative Proposal Establishing the Brussels International Business Court (*Wetsontwerp houdende oprichting van het Brussels International Business Court/ Project de loi instaurant la Brussels International Business Court*), Parliamentary Documents (*Parl. St./Doc. parl.*): Belgian House of Representatives (*Belgische Kamer van Volksvertegenwoordigers/ Chambre de représentants de Belgique*) 54, 3072/001, 15 May 2018, Explanatory

The proposed court sparked the imagination of every proceduralist. It would use English as the court language, and it would apply not the Belgian rules of civil procedure but the UNCITRAL Model Law on International Commercial Arbitration.[2] As well as the standard enrolment fees, parties wishing to bring their disputes before the BIBC would be required to pay an additional fee amounting to 20,000 Euros.[3]

However, the proposal encountered severe criticism in Belgium. The BIBC was characterised as being an arbitral tribunal in the guise of a public court, and therefore its very identity as a court was called into question.[4] The court's higher court fees – compared to those of the ordinary Belgian courts – prompted the characterisations 'VIP' and 'caviar' court.[5] It was feared that the establishment of a specialised court for business-to-business disputes would give commercial parties preferential treatment, and it would create a two-speed justice system, as depicted in the newspaper cartoon. Owing to these and other objections, the proposal was finally withdrawn from parliament, and the envisaged court sank into oblivion.

Unlike the BIBC, however, various international commercial courts, also known as international business courts, have been established in Europe and in Asia. While there are many reasons behind the establishment of international commercial courts in Europe, their creation was fuelled mainly by Brexit and by the aim of attracting litigation away from London. In France, one may find the International Chambers within the Paris Commercial Court and the Paris Court of Appeal inaugurated in 2011 and 2018, respectively.[6] In 2017, Germany launched the 'Justice Initiative Frankfurt am Main' and established a Chamber for International

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Statement (*Memorie van Toelichting/Expose de motifs*), 5 available at <http://www.dekamer.be/FLWB/PDF/54/3072/54K3072001.pdf> accessed January 2022 (hereafter: BIBC Preliminary Draft Law).

[2] UNCITRAL Model Law on International Commercial Arbitration 1985 (With amendments as adopted in 2006) available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf> accessed January 2022 (hereafter: Model Law).

[3] BIBC Preliminary Draft Law, 5. See also Erik Peetermans and Philippe Lambrecht, 'The Brussels International Business Court: Initial Overview and Analysis' (2019) 12 Erasmus Law Review 42.

[4] André Henkes, 'About Cross-border Taxation, other International Economic Issues and the Contribution of the Court of Cassation' (*Over grensoverschrijdende fiscaliteit, andere internationale economische vraagstukken en de bijdrage van het Hof van Cassatie*), Ceremonial Opening Session of the Belgian Supreme Court (*Plechtige openingszitting van het Hof van Cassatie van België*), 3 September 2018, II. Incidental Considerations on the Brussels International Business Court and Crypto-currencies, nr. 35, available at <https://justitie.belgium.be/sites/default/files/downloads/mercuriale2018_nl_site.pdf>; Open Letter from the Magistrates of the Brussels Court of Appeal (*Lettre ouverte des magistrats de la cour d'appel de Bruxelles*), 1 December 2018, available at <http://o0.llb.be/file/5a218368cd7095d1cd315c1b.pdf> all accessed January 2022. See also Geert van Calster, 'The Brussels International Business Court: A Carrot Sunk by Caviar' 107, 111 in Xandra Kramer and John Sorabji (eds), *International Business Courts* (Eleven International Publishing 2019).

[5] Matthias Verbergt, 'Controversiëlle 'Kaviarrechtbank' van Geens wordt begraven', *De Standaard*, 21 March 2019, available at <https://www.standaard.be/cnt/dmf20190321_04272272> accessed January 2022.

[6] Commercial Court Paris, The International Chamber Official Website, available at <https://www.tribunal-de-commerce-de-paris.fr/> accessed January 2022.

Commercial Disputes within the Frankfurt am Main Regional Court.[7] In May 2018, a similar chamber was established within the Hamburg Regional Court,[8] and more recently, in November 2020, Commercial Courts were established within the Stuttgart and Mannheim Regional Courts.[9] In January 2019, the Netherlands Commercial Court opened its doors to prospective litigants.[10] Moving eastwards from Europe, most Asian international commercial courts predate their European counterparts. In 2005, the Emirate of Dubai established the Dubai International Financial Centre Courts within the Dubai International Financial Centre, a special economic zone whose purpose is to attract foreign investment.[11] Other 'investment-minded'[12] international commercial courts established in special economic zones, are the Qatar International Court (2009),[13] the Abu Dhabi Global Market Courts[14] (2015), and the Astana International Financial Centre Court[15] (2018). In 2015, Singapore established the Singapore International Commercial Court,[16] with the aim of reinforcing its position as an Asian dispute resolution hub. Lastly, in 2018 China launched the China International Commercial Courts to resolve disputes arising from the Belt and Road Initiative.[17] Similar initiatives are under discussion in other countries as well as in the European Union.[18]

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[7] Chamber for International Commercial Disputes at the Regional Court Frankfurt am Main Official Website, available at <https://ordentliche-gerichtsbarkeit.hessen.de/ordentliche-gerichte/lgb-frankfurt-am-main/lg-frankfurt-am-main/chamber-international> accessed January 2022.

[8] Regional Court Hamburg Official Website, available at <https://justiz.hamburg.de/landgericht-hamburg/zustaendigkeit/> accessed January 2022.

[9] Commercial Court Stuttgart/ Mannheim Official Website, available at <https://www.commercial-court.de/commercial-court> accessed January 2022.

[10] Netherlands Commercial Court Official Website, available at <https://www.rechtspraak.nl/English/NCC/Pages/default.aspx> accessed January 2022.

[11] Dubai International Financial Centre Courts Official Website, available at <https://www.difccourts.ae/> accessed January 2022.

[12] Pamela Bookman, 'The Adjudication Business' (2020) 45 Yale Journal of International Law 227, 240.

[13] Qatar International Court Official Website, available at <https://www.qicdrc.gov.qa/> accessed January 2022.

[14] Abu Dhabi Global Market Courts Official Website, available at <https://adgmcourts.com/> accessed January 2022.

[15] Astana International Financial Centre Court Official Website, available at <https://court.aifc.kz/> accessed January 2022.

[16] Singapore International Commercial Court Official Website, available at <https://www.sicc.gov.sg/> accessed January 2022.

[17] China International Commercial Court Official Website, available at <http://cicc.court.gov.cn/html/1/219/index.html> accessed January 2022. See also Yuan Yanchao, 'Suzhou International Commercial Court Launched', *China Justice Observer*, 12 May 2021, available at <https://www.chinajusticeobserver.com/a/suzhou-international-commercial-court-launched> accessed January 2022.

[18] Giesehla Rühl, *Building Competence in Commercial Law in the Member States*, Study for the European Parliament, Directorate General for Internal Policies of the Union, Policy Department for Citizens' Rights and Constitutional Affairs, September 2018, available at <https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604980/IPOL_STU(2018)604980_EN.pdf> accessed January 2022; Eva Lein, 'International Commercial Courts in Switzerland: The Roadmaps for Geneva and Zurich' 115 in Kramer and Sorabji (n 4).

These new 'species' of courts are national courts that focus on private disputes. As their titles suggest, international commercial courts deal with commercial disputes having an international element. Notwithstanding variations, international commercial courts all have in common the claim to be different from ordinary courts. Being largely modelled on the London Commercial Court and international commercial arbitration, they have new and innovative features geared to the particular needs of international commercial disputes. For instance, most international commercial courts use English as the language of court proceedings, while some have foreign nationality judges sitting on their bench.

A host of reasons lie behind the establishment of international commercial courts. These courts are considered conducive to creating a good business climate, to attracting investment, and to generating business for the local bar. Although the establishment of international commercial courts was strongly rooted in these economic considerations, it was also linked expressly to access to justice. It is expected that international commercial courts will improve access to justice for businesses by offering greater judicial specialisation, tailor-made proceedings, and an affordable alternative to international commercial arbitration.[19]

It did not take long after their establishment before international commercial courts were being discussed in the academic literature. Publications focused mainly on single courts, and laid down their innovative features, in terms of court administration and procedural rules.[20] A few

[19] Parliamentary Papers II 2016/17 (*Kamerstukken II*), 34 761, no. 3, Amendments to the Code of Civil Procedure and the Civil Court Fees Act with regard to the introduction of English-language case law at the international commercial chambers of the Amsterdam District Court and the Amsterdam Court of Appeal (*Wijziging van het Wetboek van Burgerlijke Rechtsvordering en de Wet griffierechten burgerlijke zaken in verband met het mogelijk maken van Engelstalige rechtspraak bij de internationale handelskamers van de rechtbank Amsterdam en het gerechtshof Amsterdam*), Explanatory Statement (*Memorie van Toelichting*), 2 (hereafter: NCC Law 2017); Sundaresh Menon, 'International Commercial Courts: Towards a Transnational System of Dispute Resolution' Opening Lecture for the DIFC Courts Lecture Series 2015, para. 49.

[20] See the articles in Erasmus Law Review (2019) 12; Kramer and Sorabji (n 4); Stavros Brekoulakis and Georgios Dimitropoulos (eds), *International Commercial Courts: The Future of Transnational Litigation* (Cambridge University Press 2022). For the Dubai International Financial Centre Courts, see Jayanth Krishnan and Priya Purohit, 'A Common Law Court in an Uncommon Environment: The DIFC Judiciary and Global Commercial Dispute Resolution' (2014) 25 The American Review of International Arbitration 497; Harold Koster and Mark Beer, 'The Dubai International Financial Centre (DIFC) Courts: A Specialised Commercial Court in the Middle East' 195 in Eddy Bauw, Harold Koster and Sonja Kruisinga (eds), *De Kansen voor een Netherlands Commercial Court* (Boom juridisch 2018); Jayanth Krishnan, *The Story of the Dubai International Financial Center Courts: A Retrospective*, DIFC Academy of Law 2018, 43, available at <https://issuu.com/difccourts/docs/difc_courts_10_years> accessed January 2022. For the Singapore International Commercial Court, see also Man Yip, 'The Resolution of Disputes Before the SICC' (2016) 65 International and Comparative Law Quarterly 439, 461; Adeline Chong and Man Yip, 'Singapore as a Centre for International Commercial Litigation: Party Autonomy to the Fore' (2019) 15 Journal of Private International Law 97. For the China International Commercial Court, see also Wei Cai and Andrew Godwin, 'Challenges and Opportunities for the China International Commercial Court' (2019) 68 International and Comparative Law Quarterly 869; Sheng Zhang, 'China's International Commercial Court: Background, Obstacles and the Road Ahead' (2020) 11 Journal of International Dispute Settlement 150.

compared different courts.[21] International commercial courts are being discussed by some as 'the hotbed of procedural innovation'[22] and 'the future of transnational litigation'[23]. Over time, some of the euphoria of early scholarship gave way to more sceptical accounts of the courts' current operations. According to these, although the courts' innovations may lead to shifts in international commercial dispute resolution, the question of whether there is sufficient demand for these new institutions lingers.[24] A glance at the caseloads of various international commercial courts indeed reveals that, especially during their early years of functioning, only a few cases flowed to them.[25] Although the literature acknowledges that international commercial courts are the product of a civil justice systems competition, and identifies that, unlike most ordinary courts, international commercial courts aim at attracting cases,[26] little is known about how this intention actually shapes the courts' rules, case law, and practices. Literature mainly focuses on how international commercial courts compete with international commercial arbitration by borrowing some of its rules and practices.[27] It has been largely overlooked as to how international commercial courts are deliberately attempting to attract cases; in other words, how exactly they are forum selling.

2. The Research Topic and the Research Question

The present research examines international commercial courts from a novel perspective: that of forum selling. The research explores the idea of forum selling in the context of international commercial courts, and examines how these courts carve out their own piece of international commercial dispute resolution. Taking into consideration that in some countries the setting up

[21] Zain Al Abdin Sharar and Mohammed Al Khulaifi, 'The Courts in Qatar Financial Centre and Dubai International Financial Centre: A Comparative Analysis' (2016) 46 Hong Kong Law Journal 529; Zhengxin Huo and Man Yip, 'Comparing the International Commercial Courts of China with the Singapore International Commercial Court' (2019) 68 International and Comparative Law Quarterly 903.

[22] Xandra Kramer and John Sorabji, 'International Business Courts in Europe and Beyond – A Global Competition for Justice?' (2019) 12 Erasmus Law Review 1, 5-6; Alexandre Biard, 'International Commercial Courts: Innovation Without Revolution?' (2019) 12 Erasmus Law Review 24.

[23] Man Yip, 'The Singapore International Commercial Court: The Future of Litigation?' (2019) 12 Erasmus Law Review 81; Stavros Brekoulakis and Giorgios Dimitropoulos (n 20).

[24] Pamela Bookman and Matthew Erie, 'Experimenting With International Commercial Dispute Resolution', Symposium on Global Labs of International Commercial Dispute Resolution (2021) 115 American Journal of International Law 5.

[25] Pamela Bookman, 'The London Commercial Court in Global Context' in Portland, *Commercial Courts Report 2021,* available at <https://portland-communications.com/publications/commercial-courts-report-2021/> accessed January 2022.

[26] Erlis Themeli, *The Great Race of Courts, Civil Justice System Competition in the European Union* (Eleven International Publishing 2018); Kramer and Sorabji (n 22) 1; Bookman (12) 227; Geert Van Calster, 'Brexit and the Competition of Dispute Resolution Fora in Europe: The Role of International Commercial Courts' in Brekoulakis and Dimitropoulos (n 20).

[27] Pamela Bookman, 'Arbitral Courts' (2021) 61 Virginia Journal of International Law 161; Thomas Schultz and Clément Bachmann, 'International Commercial Courts: Possible Problematic Social Externalities of a Dispute Resolution Product with Good Market Potential' 52 in Brekoulakis and Dimitropoulos (n 20).

of international commercial courts was motivated by considerations of access to justice, the research also explores the implications of forum selling with regard to access to justice.

The research provides an answer to the main research question:

How are international commercial courts engaging in forum selling and what are the implications of forum selling with regard to civil procedure and access to justice?

To provide an answer to this central research question, different parts of the research aim to answer the following sub questions:

1. *Why are international commercial courts engaging in forum selling?*
2. *How are international commercial courts engaging in forum selling?*
3. *What are the implications of forum selling with regard to civil procedure and access to justice?*

3. International Commercial Courts as Forum Selling Courts

Academic literature on international commercial courts mainly focuses on their innovative features, and on how these may sway parties' choice of court in their favour. This is in line with the literature on court competition in general, which predominantly deals with how parties and lawyers choose from among courts or private dispute resolution methods: namely, how parties and lawyers are forum shopping.[28] The one-sided focus on forum shopping could be attributed to a common view according to which public courts and judges lack an interest in attracting cases. It is, in particular, claimed that a country that successfully attracts litigation will only incur additional expenses rather than generate significant income. This is so because national courts are subsidised by the state, and impose low court fees that do not cover the actual cost of providing judicial services.[29] In addition, most court systems suffer from an overload of incoming cases, and are therefore reluctant to add disputes to their caseload.[30] Similarly, most judges enjoy life tenure and a fixed salary that is independent of the number of

[28] White & Case and Queen Mary University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration*, available at <http://www.arbitration.qmul.ac.uk/research/2018/>; Gerhard Wagner, *Rechtsstandort Deutschland im Wettbewerb. Impulse für Justiz und Schiedsgerichtsbarkeit* (Beck 2017); Themeli (n 26); Singapore Management University, School of Law, Singapore International Dispute Resolution Academy (SIDRA), *SIDRA International Dispute Resolution Survey: 2020 Final Report*, Exhibit 4.1., available at <https://sidra.smu.edu.sg/sidra-international-dispute-resolution-survey-final-report-2020> all accessed January 2022.

[29] Stefan Vogenauer, 'Regulatory Competition Through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence' (2013) 21 European Review of Private Law 13, 27-28. See also European Commission for the Efficiency of Justice (CEPEJ), European Judicial Systems CEPEJ Evaluation Report, Part 1 Tables, Graphs and Analyses, 2020 Evaluation Cycle (2018 Data), Figure 2.22 available at <https://rm.coe.int/evaluation-report-part-1-english/16809fc058> accessed January 2022.

[30] Vogenauer (n 29) 27-28.

cases they hear. Owing to this lack of economic incentives, public courts and judges are commonly viewed as lacking an interest in attracting litigation, and as simply being spectators with regard to the ongoing forum shopping.[31]

However, contemporary academic literature refines the crude theory that public courts and judges are disinterested in attracting cases. It has illustrated that some public courts and judges deliberately attempt to increase their caseloads, in a practice referred to as forum selling. In 2005, in the book 'Courting Failure', Lynn LoPucki studied how forum shopping by large public companies induced competition to attract cases among bankruptcy courts in the United States.[32] In 2015, Jonas Anderson explored the competition between courts in patent cases in the United States. According to Anderson, nearly half of the patent cases in 2013 were filed in the District of Delaware or the Eastern District of Texas.[33] In 2016, Daniel Klerman and Greg Reilly studied five 'magic jurisdictions': namely, patent litigation in the Eastern District of Texas; class actions and mass torts in Madison County, Illinois; bankruptcy cases in the District of Delaware; ICANN domain name arbitration; as well as common law judging in early modern England. The authors explored how these jurisdictions make themselves attractive to litigants, and were the first to coin the term 'forum selling'.[34] In 2019, Stefan Bechtold, Jens Frankenreiter, and Daniel Klerman provided empirical evidence that forum selling has exceeded the common law world and occurs also in Germany. The authors focused mainly on patent and press law disputes, and illustrated how the Regional Courts of Düsseldorf, Mannheim, Munich, and Hamburg dominate in these fields of litigation.[35] According to all the aforementioned authors, what explains why cases cluster in specific courts is forum selling. Courts and judges make themselves more attractive to litigants by adopting various techniques, such as increasing the predictability of their judgments, speeding up trials, or adopting pro-

[31] Described as '*corks bobbing on the waves of litigation*' in Richard Posner, 'What do Judges and Justices Maximize? (The Same Thing Everybody Else Does)' (1993) Law & Economics Working Paper (University of Chicago Press) 1, 4. Christopher R. Drahozal, 'Judicial Incentives and the Appeals Process' (1989) 51 Southern Methodist University Law Review 469, 476; Richard Epstein, 'The Independence of Judges: The Uses and Limitations of Public Choice Theory' (1990) Brigham Young University Law Review 827, 837-838; Jonathan Macey, 'Judicial Preferences, Public Choice, and the Rules of Procedure' (1994) 23 The Journal of Legal Studies 627, 631-632.

[32] Lynn LoPucki, *Courting Failure: How Competition for Big Cases is Corrupting the Bankruptcy Courts* (University of Michigan Press 2005).

[33] Jonas Anderson, 'Court Competition for Patent Cases' (2015) 163 University of Pennsylvania Law Review 631.

[34] Daniel Klerman and Greg Reilly, 'Forum Selling' (2016) 89 Southern California Law Review 241.

[35] Stefan Bechtold, Jens Frankenreiter and Daniel Klerman, 'Forum Selling Abroad' (2019) 92 Southern California Law Review 487.

claimant approaches.[36] Forum selling courts are therefore not just spectators, but respond actively to forum shopping and vie for the forum shoppers.

According to the literature, economic and reputational incentives are the main reasons courts and judges engage in forum selling. The prospects of increased revenues from court fees and benefits for the local economy incite courts to attract litigation.[37] Judges engage in forum selling because they like the intellectual challenge as well as the heightened reputation that comes from handling complex cases in specialised fields of law.[38] In addition, it is claimed that court specialisation facilitates forum selling. The small number of judges serving at specialised courts or chambers makes coordination among them easy, and increases the odds that these judges will deal with the interesting and intellectually challenging cases.[39] More significantly, court specialisation turns caseload into an existential issue. A small number of incoming cases may call into question the necessity of specialised courts and therefore their existence.[40] Hence, a host of economic and non-economic incentives as well as the structural characteristics of specialised courts explain why they engage in forum selling.

The economic reasons behind the establishment of international commercial courts and their institutional and procedural features hint at the hypothesis that these courts are one more instance of forum selling courts. Although the reasons behind the establishment of international commercial courts are as diverse as the countries hosting them, these courts are considered significant for national economies. They contribute to attracting investment[41] and creating business for the legal services sector.[42] As indicated, some international commercial courts impose court fees that are higher than those of the ordinary courts, and may therefore generate increased court revenues.[43] In the case of some international commercial courts in Asia, the

[36] LoPucki (n 32); Anderson (n 33) 668-677; Klerman and Reilly (n 34) 250-270, 289, 294-295, 297-299; Bechtold, Frankenreiter and Klerman (n 35) 502-513, 523-534.
[37] Klerman and Reilly (n 34) 271-275; Bechtold, Frankenreiter and Klerman (n 35) 518-519.
[38] LoPucki (n 32) 20; Anderson (n 33) 636-637, 661-662; Klerman and Reilly (n 34) 271-272; Bechtold, Frankenreiter and Klerman (n 35) 514, 516, 535-536.
[39] Anderson (n 33) 685; Bechtold, Frankenreiter and Klerman (n 35) 514, 553.
[40] Anderson (n 33) 685-686.
[41] World Bank Group, *Doing Business 2020, Comparing Business Regulation in 190 Economies*, 91, 96, 98 109 126 available at <https://openknowledge.worldbank.org/bitstream/handle/10986/32436/9781464814402.pdf> accessed January 2022. See also Kramer and Sorabji (n 22) 1.
[42] Indranee Rajah, Speech by Senior Minister of State for Law at the Litigation Conference 2015, 16 March 2015, paras. 15, 25, available at <https://app.mlaw.gov.sg/news/speeches/speech-by-senior-minister-of-state-for-law--indranee-rajah--at-t>; Council for the Judiciary (*Raad voor de Rechtspraak*), Plan for the Establishment of the Netherlands Commercial Court (*Plan tot oprichting van de Netherlands Commercial Court*), November 2015, 8, available at <https://www.rechtspraak.nl/SiteCollectionDocuments/plan-netherlands-commercial-court.pdf> all accessed January 2022.
[43] See Parliamentary Papers II 2017/2018 (Kamerstukken II), 34761, B, Amendments to the Code of Civil Procedure and the Civil Court Fees Act With Regard to the Introduction of English-language Case Law at the

appointed foreign nationality judges lack tenure, and their remuneration is calculated based on an hourly fee for the time spent on each case assigned.[44] In addition, the fact that international commercial courts reach out to an international constituency may amplify the reputational benefits for the judges sitting at these courts as well as for the countries hosting the courts. The economic reasons behind the establishment of international commercial courts and their unique features give rise to forum selling incentives, and indicate that international commercial courts may be engaged in forum selling.

The literature on forum selling focuses on an intrastate competition between domestic courts, such as the competition between different state courts in the United States or Germany.[45] Bechtold, Frankenreiter and Klerman have additionally examined how German courts compete with other national courts on the European level. However, they conclude that German courts are not very appealing to foreign litigants and therefore find very little forum selling evidence.[46] The authors also note that outside antitrust and patent law, European forum selling plays a lesser role.[47] There is a missing piece to this important body of scholarship. The literature has largely overlooked how courts compete on the international, global level and in the broader field of international commercial disputes. The present research examines forum selling in international commercial dispute resolution where international commercial courts compete with domestic courts and foreign courts, as well as with private dispute resolution methods. Forum selling in international commercial dispute resolution involves multiple actors and diverse interests. Furthermore, while courts and judges are the main forum sellers on a domestic level, national legislatures have a more prominent role to play in forum selling on an international level.[48] International commercial courts were introduced on the basis of constitutional amendments or national laws devised specifically for the establishment of these courts.[49] A distinct set of rules regulates procedure before these courts, and sets them apart

International Commercial Chambers of the Amsterdam District Court and the Amsterdam Court of Appeal (*Wijziging van het Wetboek van Burgerlijke Rechtsvordering en de Wet Griffierechten Burgerlijke Zaken in Verband Met Het Mogelijk Maken van Engelstalige Rechtspraak bij de International Handelskamers van de Rechtbank Amsterdam en het Gerechtshof Amsterdam*), Statement of Reply (*Memorie van Antwoord*) 31 Mei 2018, 5.

[44] Unrecorded discussion with stakeholder. See also Alyssa King and Pamela Bookman, 'Travelling Judges' American Journal of International Law 33 (forthcoming).

[45] Bechtold, Frankenreiter and Klerman (n 35) 545-550.

[46] Ibid. 544-548.

[47] Ibid. 550.

[48] Anderson (n 33) 634-635; Klerman and Reilly (n 34) 301-302; Bechtold, Frankenreiter and Klerman (n 35) 550-551.

[49] Dubai Law No. (12) of 2004 in respect of the Judicial Authority at Dubai International Financial Centre; Qatar Financial Centre Law, Law No. (7) of 2005; Art. 94 Constitution of the Republic of Singapore; Supreme Court of Judicature Act (Chapter 322, 2014 Revised Edition), Rules of Court, Order 110, available at

from the other courts within a country. In addition, national rules that facilitate international commercial dispute resolution, such as rules permitting and regulating third party funding, may make some international commercial courts more attractive than others.[50] Therefore, the study of forum selling in the context of international commercial courts provides an especially fertile ground in terms of understanding how forum selling plays out at the international level and to explore the role of national legislatures, the courts, and the judges.

What also differentiates forum selling in the case of international commercial courts is its contractual nature. The aforementioned literature focuses on non-contractual disputes and is unanimous in its denunciation of forum selling in non-contractual settings because it leads to pro-claimant approaches.[51] Where the claimant has the initiative as to where to file the claim, forum selling courts favour claimants as being the actual 'case placers'.[52] In contrast, in contractual settings, the literature contends that forum selling may improve the overall efficiency of justice, improve the quality and predictability of case law, and accelerate trials.[53] This is in line with the literature on an economic analysis of private dispute resolution methods, according to which favouring one side or the other may damage the reputation of a private decision maker, and consequently decrease the demand for its services.[54] By focusing on international commercial courts that deal mainly with contractual disputes, and that derive their jurisdiction from the parties' choice of court, the present research puts to the test the claim that forum selling in a contractual setting is a one-way trip to the top.

The literature on international commercial courts has mainly centred its attention on their emergence in international commercial dispute resolution. The present research examines the forum selling of international commercial courts, and therefore the courts' practices with regard

<https://sso.agc.gov.sg/SL/SCJA1969-R5?ProvIds=PO110-#PO110-P4_1-pr1->; Constitutional Statute of the Republic of Kazakhstan on the Astana International Financial Centre, Constitutional Statute No. № 438-V ZRK of 7 December 2015; NCC Law 2017; Law No. (4) of 2013 Concerning Abu Dhabi Global Market; Federal Council (*Bundesrat*), Drucksache 219/21, Draft Proposal submitted by the Federal States of North Rine-Westphalia and Hamburg (*Gesetzesantrag der Länder Nordrhein-Westfalen und Hamburg*), Legislative Proposal for Strengthening the Courts in Commercial Disputes (*Entwurf eines Gesetzes zur Stärkung der Gerichte in Wirtschaftsstreitigkeiten*), 17 March 2021, available at <https://www.bundesrat.de/SharedDocs/beratungsvorgaenge/2021/0201-0300/0219-21.html> (hereafter: German Chambers Legislative Proposal 2021); BIBC Preliminary Draft Law all accessed January 2022.

[50] See Ministry of Law Singapore, Third-Party Funding to be Permitted for More Categories of Legal Proceedings in Singapore, 21 June 2021, available at <https://www.mlaw.gov.sg/news/press-releases/2021-06-21-third-party-funding-framework-permitted-for-more-categories-of-legal-preceedings-in-singapore> accessed January 2022.

[51] Anderson (n 33) 679; Klerman and Reilly (n 34) 245; Bechtold, Frankenreiter and Klerman (n 35) 512-513, 526-531.

[52] LoPucki (n 32) 17.

[53] Klerman and Reilly (n 34) 243.

[54] Richard Posner, 'Judicial Behavior and Performance: An Economic Approach' (2005) 32 Florida State University Law Review 1259, 1260-1261.

to establishing a place in international commercial dispute resolution. It illustrates that what truly distinguishes international commercial courts from the ordinary courts is not their distinctive features *per se* but the way these features may be utilised in an attempt to forum sell. However, as well as exploring how international commercial courts fit the literary 'whys', and 'hows' of forum selling, the research also recasts the existing theories on forum selling in the context of international commercial courts.

What this research does not do is examine whether international commercial courts have succeeded in competing effectively with other popular dispute resolution fora, such as the London Commercial Court or international commercial arbitration. This is so not only because such an assessment would at this point be premature, but also because the focus of the research is on the processes rather than on the fluctuating outcomes of a competition in international commercial dispute resolution.

4. Normative Framework

As previously mentioned, the literature on forum selling claims that civil procedure holds the key to forum selling. Courts and judges make themselves more attractive to litigants by adopting distinct procedural rules and case management practices. When exploring the negative implications of forum selling, the literature examines how these rules and practices may offer claimants an unfair procedural advantage, and as a result, undermine the procedural rights of the defendant. Therefore, in the existing literature, access to justice is the implicit normative standard used to evaluate forum selling. Access to justice becomes especially relevant in the context of international commercial courts, as their establishment was justified on the basis of access to justice considerations. This research assesses the forum selling activities of international commercial courts against the parties' right to a fair trial and access to justice.

However, defining access to justice and thereby developing a normative framework appears challenging at first, owing to the potentially diverging standards regarding access to justice in the different countries where international commercial courts have been established. Nevertheless, diverse sources could be useful in providing certain minimum procedural safeguards that stretch across jurisdictions. In particular, national constitutions and international human rights treaties protect access to justice. The most prominent treaties in this

regard are the Universal Declaration on Human Rights,[55] the European Convention of Human Rights (ECHR),[56] the International Covenant on Civil and Political Rights,[57] the American Convention on Human Rights,[58] the African Charter on Human and People's Rights,[59] and the Charter of Fundamental Rights of the European Union[60]. Access to justice is a broad notion that encompasses various features. Despite differences in wording in the relevant instruments, common access to justice features are the right to access a court, the right to be represented by legal counsel, the right to a public hearing, the right to be heard, and the right to an independent and impartial tribunal. Therefore, access to justice is a two-pronged notion that includes the right to access a court as well as a procedure that safeguards natural justice and the right to a fair trial.[61] The judgments of the European Court on Human Rights on Article 6 (1) ECHR and

[55] Article 10: '*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.*', available at <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed January 2022.

[56] Article 6 (1): '*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*', available at <https://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed January 2022.

[57] Article 14 (1): '*All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*', available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> accessed January 2022.

[58] Article 8 (1): 'Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.', available at <http://www.oas.org/en/iachr/mandate/Basics/3.AMERICAN%20CONVENTION.pdf> accessed January 2022.

[59] Article 7 (1): '*Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defense, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.*', available at <https://www.african-court.org/wpafc/wp-content/uploads/2020/04/AFRICAN-BANJUL-CHARTER-ON-HUMAN-AND-PEOPLES-RIGHTS.pdf> accessed January 2022.

[60] Article 47: '*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice*', available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT> accessed January 2022.

[61] Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 Buffalo Law Review 181, 182.

the Court of Justice of the European Union on Article 47 EU Charter have defined the requirements of the right to a fair trial more fully, and could therefore serve as a normative standard.[62] Furthermore, the broader significance of access to justice for democracy has turned it into an essential element of the rule of law.[63]

International commercial courts are public courts, and must therefore ensure access to justice. However, some courts base their jurisdiction mainly on choice of court agreements, and have adopted a host of provisions that allow parties to shape proceedings on the basis of their agreement.[64] This consensual character of international commercial courts, both in terms of jurisdiction and procedure, brings them closer to being private dispute resolution methods such as international commercial arbitration. Owing to this similarity, it is interesting to examine how access to justice is redefined in the context of international commercial arbitration, and whether this redefinition could be applied in the case of international commercial courts.

Parties to an arbitration agreement waive their right to submit potential disputes to the ordinary courts, and thereby waive their right to a fair trial according to national provisions and international treaties.[65] Nevertheless, arbitration proceedings are required to adhere to the fundamental rules of due process.[66] In this regard, the case law of the European Court on Human Rights on Article 6 (1) ECHR may once again offer inspiration.[67] However, as arbitration is expanding beyond commercial disputes, access to justice has entered unexpected

[62] See European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights, Right to a Fair Trial (Civil Limb) (31 December 2020), available at <https://www.echr.coe.int/documents/guide_art_6_eng.pdf>; European Union Agency for Fundamental Rights, EU Charter of Fundamental Rights, Article 47, available at <https://fra.europa.eu/en/eu-charter/article/47-right-effective-remedy-and-fair-trial#TabCaseLaw> all accessed January 2022.

[63] United Nations and the Rule of Law, Access to Justice, available at <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/>; European Commission, *The 2020 EU Justice Scoreboard*, 1, available at <https://ec.europa.eu/info/sites/default/files/justice_scoreboard_2020_en.pdf> accessed January 2022. See also United Kingdom Supreme Court. *R (On the application of Unison)* v. *Lord Chancellor* [2017] UKSC 51, paras. 65-66.

[64] See Chapters 4 and 5.

[65] European Court of Human Rights *Transportes Fluviais do Sado S.A.* v *Portugal* (Application no. 35943/02), 16 December 2003; *Eiffage S.A.* v *Switzerland* (Application no. 1742/05), 15 September 2009; *Suda* v *the Czech Republic* (Application no 1643/06), 28 October 2010, para. 48; *Tabbane* v *Switzerland* (Application no. 41069/12), 1 March 2016, para. 27; *Mutu and Pechstein* v *Switzerland* (Applications nos. 40575/10 and 67474/10), 2 October 2018, para. 96; *Ali Riza* v *Turkey* (Applications nos. 30226/10 and 4 others), 28 January 2020, para. 174.

[66] Art. 12, 18, 24 (2) and (3), 34 (2) (a) (ii) and (b) (ii), 36 (1) (a) (ii) and 36 (1) (b) (ii) Model Law; Article V (1) (b) and V (2) (b) United Nations Conference on International Commercial Arbitration, 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards available at <https://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf> accessed January 2022. See also ICC Arbitration Rules 2021 Articles 11, 22(4) and 32(2); LCIA Arbitration Rules 2020 Articles 5.3 and 14.1; and SIAC Arbitration Rules 2016 Articles 14.1, 19.1, 19.6 and 32.4

[67] Blackaby Nigel, Constantine Partasides et al., *Redfern and Hunter on International Arbitration* (Sixth Edition, Kluwer Law International; Oxford University Press 2015) paras. 10.58-10.59.

places, and is being increasingly invoked in the context of arbitration.[68] I will not examine access to justice in consumer, employment, or sports arbitration, as all these types of arbitration involve procedurally weaker parties, and are therefore very different from the type of commercial disputes that are the focus of the present research.

In the context of international commercial arbitration, access to justice takes a form different form that in public court proceedings. For instance, although private and confidential proceedings might violate the right to a fair trial in a public court setting,[69] private and confidential proceedings in arbitration are frequently the norm, and account as one of arbitration's most valuable features.[70] This difference is mainly because international commercial arbitration rests on the parties' agreement, and is therefore of a contractual and private nature.[71] As such, arbitral proceedings must be in accord with the parties' agreement. Although access to justice may be at odds with arbitration's contractual nature, arbitration proceedings must nevertheless abide by certain procedural safeguards. Arbitrators are to disclose any circumstances that may call into question their independence and impartiality, parties must be treated equally and be given the right to fully present their case, and arbitral awards need to be reasoned.[72] As a result, access to justice in arbitration is not understood as an obligation to ensure the parties' ability to access an arbitral tribunal or an arbitration institution, but refers mainly to the conduct of the proceedings.

International commercial courts allow parties to choose in their favour and shape proceedings by way of their agreement. Still, although the parties' agreement confers jurisdiction upon the courts and shapes proceedings, international commercial courts ultimately derive their legitimacy from the state.[73] This means that, unlike in international commercial arbitration, some features intrinsic to access to justice in court adjudication may not be overridden by the

[68] Leonardo de Oliveira and Sara Hourani (eds), *Access to Justice in Arbitration: Concept, Context and Practice* (Kluwer Law International 2020).
[69] European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights (n 62) 81-87.
[70] White & Case and Queen Mary University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration*, Chart 3; Singapore Management University, School of Law, Singapore International Dispute Resolution Academy (SIDRA), *SIDRA International Dispute Resolution Survey: 2020 Final Report*, Exhibit 6.1.1.
[71] For the different theories on the nature of arbitration, see Julian D.M. Lew, Loukas A. Mistelis and Stefan M. Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 72; Jan Paulsson, *The Idea of Arbitration* (Oxford University Press 2013) 30-50.
[72] Above (n 66).
[73] Bookman (n 27) 203.

parties' agreement.[74] A solution to the contrary would not only jeopardise the parties' right to a fair trial but also threaten the beneficial role of courts in the society at large, which exceeds the privity of contracts.[75] For instance, public court proceedings do not only safeguard the parties' right to a fair trial but also serve a broader public function. The access of the public to courts enables public scrutiny of the judiciary and spurs debate about legal rules. It '*keeps the judge himself, while trying, under trial*' and converts justice *'into a theatre, where the sports of the imagination give place to the more interesting exhibitions of real life*'.[76]

International commercial courts justify their rules and practices, some of which are geared towards attracting cases, not only on the basis of the parties' agreement but also on the basis of specialisation. It is claimed that the growth of international trade and foreign investment has led to a boom in international commercial disputes, which in turn requires procedures attuned to the particularities of such disputes.[77] Specialisation is indeed considered as the means to increase judicial expertise and to improve the overall efficiency of the justice system.[78] However, specialised courts for commercial and high-value claims have also invited the criticism relating to preferential treatment and procedural inequality. International commercial courts offer well-resourced businesses, able to afford the higher court fees, the ability to jump the queue and access courts that are more specialised, faster, and therefore better. Hence, it may be that international commercial courts give rise to an unequal access to justice.[79] Various stakeholders involved in the setting up of international commercial courts argue that by charging higher court fees and placing the financial burden of public justice on the 'haves', the extracted profits could be poured into the justice system as a whole, and thereby also benefit

[74] Henry S. Noyes, 'If You (Re)build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image' (2007) 30 Harvard Journal of Law and Public Policy 579, 633-635.
[75] Deborah Hensler, 'Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System' (2003) 108 Pennsylvania State Law Review 165; Hazel Genn, 'What is Civil Justice For? Reform, ADR and Access to Justice' (2012) 24 Yale Journal of Law and the Humanities 397; Judith Resnik, 'Reinventing Courts as Democratic Institutions' (2014) Daedalus, The Journal of the American Academy of Arts and Sciences 9; Alexandra Lahav, *In Praise of Litigation* (Oxford University Press 2017).
[76] Jeremy Bentham, 'Bentham's Draught For The Organization of Judicial Establishments, Compared with That of the National Assembly, with a Commentary on the Same' in John Bowring (ed), *The Works of Jeremy Bentham*, Volume 4 (Edinburgh, Scot. William Tait, 1843) 316.
[77] Rajah (n 42) para. 10; Menon (n 19) para. 5; NCC Law 2017, Explanatory Statement, 2; German Chambers Legislative Proposal 2021, Explanatory Statement, 11.
[78] Rochelle Dreyfuss, 'Forums of the Future: The Roles of Specialized Courts in Resolving Business Disputes' (1995) 61 Brooklyn Law Review 1; 'Specialized Adjudication' (1990) Brigham Young University Law Review 377; Lawrence Baum, *Specializing the Courts* (University of Chicago Press 2011) 32-34; Ori Aronson, 'Out of Many: Military Commissions, Religious Tribunals, and the Democratic Virtues of Court Specialization' (2011) 51 Virginia Journal of International Law 268-270.
[79] Verbergt (n 5). See also German Chambers Legislative Proposal 2021, Special Part, on Draft Article 119 (4) German Constitutions Act.

the 'have nots'.[80] Although such an arrangement may offset any inequalities, a question remains: Are there certain goods that cannot be reduced to monetary terms?[81] In the present research, I explore how the forum selling techniques of international commercial courts alter the way courts function, and may therefore contribute to the commodification of public justice. In this respect, I do not offer definitive answers but seek to contribute to a broader, reasoned debate on the value of courts as public institutions.

The research rests on the premise that although international commercial courts find themselves in diverse legal orders, a common form of procedural justice shapes a transnational public policy, and therefore binds all courts. Although international commercial courts rest predominantly on the parties' choice, there are some features of access to justice that the parties' agreement may not set aside, such as the right to be heard, the right to a public hearing, and the right to an independent and impartial tribunal. However, the benefits of access to justice are not examined only with regard to the parties involved in a dispute before an international commercial court. I also consider the public benefits of access to justice and the public responsibilities of courts. The forum selling techniques employed by international commercial courts are gauged against access to justice that is further refined, and discussed case by case in each chapter. On the basis of this evaluation, this research assesses the implications of forum selling with regard to public justice, and whether forum selling in contractual settings leads to a race to the top or a race to the bottom.

5. Research Methodology

The present research is a case study on forum selling in the specific context of international commercial courts. It explores why these courts are engaged in forum selling and how exactly they are doing so. In addition, the research examines the implications of forum selling as regards civil procedure and access to justice.[82] On the basis of this analysis, the research ultimately re-examines the existing theories on forum selling. By theories, I mean the explanations provided in the literature as to why and how courts engage in forum selling, such as the theory that court specialisation facilitates forum selling, as well as the arguments in

[80] Parliamentary Papers I 2017/2018 (*Kamerstukken I*), 34761, B, Amendments to the Code of Civil Procedure and the Civil Court Fees Act With Regard to the Introduction of English-language Case Law at the International Commercial Chambers of the Amsterdam District Court and the Amsterdam Court of Appeal (*Wijziging van het Wetboek van Burgerlijke Rechtsvordering en de Wet Griffierechten Burgerlijke Zaken in Verband Met Het Mogelijk Maken van Engelstalige Rechtspraak bij de International Handelskamers van de Rechtbank Amsterdam en het Gerechtshof Amsterdam*), Statement of Reply (*Memorie van Antwoord*) 31 Mei 2018, 5.

[81] See also Michael J. Sandel, *What Money Can't Buy, The Moral Limits of Markets* (Penguin 2013).

[82] Sanne Taekema, 'Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice' [2018] Law and Method 1.

favour of or against forum selling, such as the theory that in contractual disputes forum selling leads to a race to the top.[83] The research builds on these theories, and refines them in the specific context of international commercial courts.

5.1. Selection of Courts

The present research focuses on the German Chambers for International Commercial Disputes, the Netherlands Commercial Court, the proposal for the establishment of the Brussels International Business Court, the Dubai International Financial Centre Courts, the Singapore International Commercial Court, and the China International Commercial Courts. These courts have been recently established, exhibit multiple innovative features, and are accessible in terms of language. The other international commercial courts – the Paris International Chambers, the Qatar International Court, the Abu Dhabi Global Market Courts, and the Astana International Financial Centre Court – are only briefly discussed. Unlike the existing literature that predominantly focuses on specific courts, in specific regions, and is therefore more insular, the research examines in detail both the European and the Asian international commercial courts. Juxtaposing the courts in Europe with the ones in Asia allows us not only to juxtapose different courts and their distinctive features in different parts of the world but also to set different narratives against each other. While the creation of international commercial courts in Europe was justified on the basis of access to justice considerations, and was therefore framed in terms of human rights, Asian international commercial courts are telling their own story. Their establishment rests primarily on the more practical, and market-oriented considerations of increasing legal certainty for business activities and of decreasing transaction costs.

Each chapter takes different courts into consideration, depending on which court provides evidence of forum selling and therefore supports the clearest analysis. The introduction of each chapter further justifies the focus on specific international commercial courts.

Municipal courts, such as the London Commercial Court or the New York Commercial Division, are excluded from the scope of this research. These courts deal with both domestic and international commercial disputes, and are governed by the general rules of civil procedure. In contrast, the international commercial courts studied here were specifically established with the aim of focusing on international commercial disputes, and their proceedings are governed by separate, purpose-built rules. For the purpose of the present research, therefore, these and

[83] See also Lisa Webley, 'Stumbling Blocks in Empirical Legal Research, Case Study Research' [2016] Law and Method 1.

other municipal courts are not classified as international commercial courts.[84] Nevertheless, the research acknowledges the influence of the London Commercial Court on the institutional design and the procedural rules of various international commercial courts. Wherever relevant, the research reminds us of when and how the London Commercial Court has served as the blueprint for the new courts.

Although the proposal for the establishment of the BIBC was withdrawn from parliament, parts of this research focus on that court. The criticism the legislative proposal received informs this research with counterarguments that did not or have not yet been voiced in the rest of the international commercial courts. This research explores the critical points of the legislative proposal, and thereby illustrates the caveats of similar rules found in other international commercial courts that have gone unnoticed.

5.2. Methods

Based on the literature on forum selling, the present research first identifies the reasons for forum selling in the domestic context. For instance, the literature attributes forum selling to economic and reputational motives as well as to court specialisation. This research examines whether the motives and the circumstances relating to forum selling in the domestic context could similarly explain forum selling in the context of international commercial courts. In order to trace forum selling incentives, the research explores the reasons behind the establishment of international commercial courts and their innovative features. It studies the policy documents that preceded the establishment of international commercial courts, and the courts' communication material as well as the relevant legislation. The research then turns to the relevant academic literature on international commercial courts. This literature focuses mainly on the reasons behind the establishment of international commercial courts, and their innovative features in terms of court administration and civil procedure.

Subsequently, the research examines how international commercial courts engage in forum selling. In order to identify forum selling techniques, a variety of sources are studied. These sources include the marketing material used by international commercial courts, such as the courts' websites, newsletters, social media accounts or conference presentations, as well as their rules and case law, and singles out the practices, rules and interpretations that could facilitate forum selling. As well as comparing different international commercial courts and their rules, the courts' rules are also compared to international instruments that regulate

[84] Similarly, Bookman (n 12) 233, 238.

international commercial dispute resolution, such as the Brussels Ibis Regulation and the Hague Choice of Court Convention. The comparison allows us to better understand the alignment or misalignment of national rules on international commercial courts with the most notable international instruments in the field.

The last part of the research examines the implications of forum selling in relation to civil procedure and access to justice. It explores how forum selling reshapes civil procedure by encouraging international commercial courts to prioritise specific procedural doctrines over others. On the basis of the normative framework of access to justice, as defined above, the research also examines the implications of forum selling as regards the parties' procedural rights and civil justice as a whole. In this last part, the research returns to the literary theories on forum selling, and recasts them in the specific context of international commercial courts and international commercial dispute resolution.

In order to gain a better understanding of the ways in which participants view forum marketing and forum selling, interviews are used to complement the insights gathered from the written sources. More specifically, the interviews provide a context for the findings yielded from the study of the courts' communication material, their rules, case law and the literature. The purpose of the interviews is also to gain more insights into the different controversies surrounding the courts, such as their potential to improve dispute resolution and to compete with other dispute resolution methods.

The interviews with judges were conducted at the Netherlands Commercial Court and the Singapore International Commercial Court as well as with lawyers that have used these courts. Among the interviewees were also court registrars and other court personnel. I conducted a total of seven teen interviews between May 2019 and September 2020.

The interviews focus on two international commercial courts: the Netherlands Commercial Court and the Singapore International Commercial Court. Having conducted my research at the Erasmus School of Law in Rotterdam, I had a 'front row seat' to the process of the development of the Netherlands Commercial Court and the surrounding debate. Furthermore, unlike other international commercial courts in Europe, the Netherlands Commercial Court has many innovative features. For instance, it applies a different set of rules called the 'Netherlands Commercial Court Rules'; it uses English as the court language throughout the procedure, including the pronouncement of the judgment; and it actively promotes itself on its website and social media. In the same vein, the Singapore International Commercial Court is inventive and

has many distinctive features. In addition, it is located in an ambitious and outspoken country that openly states and pursues its aim of rising to become an Asian dispute resolution hub.

The interviewees were identified from case law and the courts' websites or from communication material such as newsletters. I contacted the interviewees directly by emailing them or messaging them on LinkedIn. I approached some of the interviewees personally during two trials I observed at the Netherlands Commercial Court and the Singapore International Commercial Court. I was introduced to other interviewees by existing contacts or interviewees that had already participated in this research. Eleven interviews were conducted in person in the Netherlands and Singapore. Owing to the outbreak of the Covid-19 pandemic, the remaining interviews were conducted online, via Zoom or Skype. Apart from two interviews in which the interviewees did not feel comfortable being recorded, all interviews were recorded and transcribed. Notes were taken for all interviews. I noticed that some interviewees were uncomfortable about being recorded, and were therefore very cautious when answering questions. At the end of every interview, after switching off the recorder, I invited the interviewees to raise any issues they thought were significant and worth discussing. I assured them that any statements they made during our 'off the record' discussion would not be quoted in the research. Their replies in fact reoriented the subsequent interviews, and prompted delving into specific topics that until then had not been included. I very much appreciate the interviewees' participation and their insightful replies.

The interviews were semi-structured, and ran on average for forty-five minutes. A list of general questions and topics was used, but only as a reference point to start and stimulate the discussion on the selected international commercial courts. As forum selling and forum marketing came up only later in the research process, initially I focused more on the operations of the courts at the time of the interview. When interviewing judges, I was interested in the challenges facing the courts, and in the relationship of the courts to other dispute resolution methods and to international commercial arbitration. When interviewing practitioners, I was interested mainly in why they chose to bring their cases before an international commercial court rather than litigating at a regular court or arbitrating. I was also interested in the participants' views on the courts' institutional and procedural features.

Not all participants were as vocal as I expected. For example, some judges were cautious and guarded. This is understandable if we take into consideration that as is explained in more detail in chapter 3, international commercial courts are reputation sensitive courts. The topic of forum

selling and forum marketing is an 'uncomfortable' one that may harm the reputation of these nascent courts by portraying them as 'case grabbing', 'attention seeking' courts, which may give rise to concerns about impartiality and independence.

Similarly, some of the questions did not receive extended replies from practitioners. In particular, the interviewees did not engage with questions pertaining to the procedural rules of the courts or points for further improvement. Since most international commercial courts are embedded within national justice systems, and apply national rules of civil procedure, albeit with some modifications, it could be that the practitioners do not share the prevalent account in the literature that international commercial courts are novel or exotic. For instance, to the question of whether they see any points for improvement in the rules or functioning of the international commercial courts, some interviewees scoffed, saying '*it's just a court*' or adding that '*a coat hanger should be added at the back of the court room*'. In light of these types of replies and as the issue of forum selling had surfaced, I adjusted the interview questions accordingly.

Lastly, it should be noted that it was difficult to access the judges at the Singapore International Commercial Court. It is my impression that specific judges speak for the court in public, while others are less involved. The court appears to have a circle of designated speakers beyond which I failed to break.

In addition to the interviews, I also had informal conversations with judges, practitioners, and academics involved in the setting up and the operations of an international commercial court other than the Netherlands Commercial Court or the Singapore International Commercial Court. These discussions took place mainly in Luxembourg and Singapore during two research visits to the Max Planck Institute for International, European and Regulatory Procedural Law from January 2019 to April 2019; to the Singapore Management University, School of Law from February 2020 to March 2020; in Shanghai, while presenting at the conference 'International Civil and Commercial Dispute Resolution and Judicial Cooperation in Asia Pacific' organised by the China-Australia Private International Law Forum in July 2019; in London, while chairing the panel on international commercial courts at the R3 & INSOL Europe's International Restructuring Conference in June 2019; in Dubai, while attending the conference 'Court Excellence and Innovation: Today and Tomorrow 2018'; in Rotterdam,

while organising the conference 'Innovating International Business Courts' in July 2018;[85] and online on Zoom and Skype.

6. Research Outline

The rest of the research is structured as follows.

Chapter 2 chronicles the rise of international commercial courts around the world. It explores the reasons behind the creation of the courts; and illustrates that economic considerations and jurisdictional competition largely lie behind the proliferation of international commercial courts. The chapter explores why international commercial courts engage in forum selling, and provides an explanatory framework for the forum selling techniques of international commercial courts examined in the subsequent chapters.

Chapter 3 starts by exploring how international commercial courts engage in forum selling, and identifies the first forum selling technique: namely, forum marketing. The chapter argues that international commercial courts strive to raise awareness of their recent establishment and actively promote their institutional and procedural merits. Chapter 3 shows exactly how the courts market themselves, and explores the implications of forum marketing with regard to civil procedure and access to justice.

Chapter 4 turns to the second forum selling technique used by international commercial courts: namely, case-attracting jurisdiction rules. It argues that the jurisdiction rules and the relevant case law of international commercial courts facilitate the courts in establishing jurisdiction and casting a wide jurisdiction net. The chapter explores how forum selling reshapes jurisdiction rules and what its implications are with regard to the parties' procedural rights and access to justice.

Chapter 5 identifies the arbitration features of international commercial courts as their third and last forum selling technique. It argues that the courts compete with international commercial arbitration by emulating some of its most valued features, and therefore signal the growing 'arbitralisation' of public justice. Chapter 5 underlines when and how international commercial courts hit the limits of 'arbitralisation' by incorporating arbitration features that may jeopardise the parties' procedural rights and call into question the courts' very identity as being public.

[85] Georgia Antonopoulou and Erlis Themeli, 'Seminar Report: Innovating International Business Courts, 10 July 2018, Erasmus University Rotterdam' (2019) 27 European Review of Private Law 1207.

Chapter 6 pulls the previous chapters together. It returns to the central research question, and reflects on the main findings on why international commercial courts engage in forum selling, on how they do so, and on the implications of forum selling as regards civil procedure and access to justice. The chapter also offers a few suggestions for future inquiry and research.

CHAPTER 2: THE REASONS BEHIND FORUM SELLING

1. Introduction

Over the past decade, international commercial courts have been proliferating around the world.[1] A host of reasons lie behind their establishment. These courts are presented as the means to attract foreign investment, to generate litigation business, and to improve access to justice for commercial litigants by increasing judicial expertise and offering court proceedings tailored to the particular needs of international commercial disputes. Notwithstanding variations, prevalent among the reasons are economic considerations and a competition among civil justice systems. International commercial courts are part of broader policies aimed at attracting foreign investment and creating business for the legal services sector. The significance of international commercial courts for the pursuit of broader policy objectives explains why, unlike ordinary courts, international commercial courts have an interest in attracting cases and in forum selling.

Chapter 2 is structured as follows. Part 1 offers an overview of the various international commercial courts exploring the reasons behind their establishment and touching upon the courts' innovative features. It starts with the London Commercial Court (LCC), which has served as the blueprint for multiple international commercial courts. It then turns to the international commercial courts established in special economic zones with the aim of attracting investment, and, in particular, the Dubai International Financial Centre (DIFC) Courts, the Qatar International Court (QIC), the Abu Dhabi Global Market (ADGM) Courts, and the Astana International Financial Centre (AIFC) Court. The Singapore International Commercial Court (SICC) and its significance in positioning Singapore as Asia's dispute resolution hub is then examined. Subsequently, this part focuses on the establishment of international commercial courts in Europe, and explains their creation in light of Brexit and as part of a broader competition among civil justice systems in the European Union. In particular, the chapter traces the creation of the Paris International Chambers, the German international

[1] For an overview, Giesela Rühl, 'Auf dem Weg zu einem europäischen Handelsgericht?' (2018) Juristen Zeitung 1073; Marta Requejo Isidro, 'International Commercial Courts in the Litigation Market' (2019) 9 International Journal of Procedural Law 4; Sonja Kruisinga, 'Commercial Courts in the Netherlands, Belgium, France and Germany – Salient Features and Challenges' (2019) Praxis des Internationalen Privat- und Verfahrensrechts 277; the articles in (2019) 12 Erasmus Law Review; John Sorabji and Xandra Kramer, 'Introduction – The International Business of Courts' in Xandra Kramer and John Sorabji (eds), *International Business Courts* (Eleven International Publishing 2019); Pamela Bookman, 'The Adjudication Business' (2020) 45 Yale Journal of International Law 227; Stavros Brekoulakis and Georgios Dimitropoulos (eds), *International Commercial Courts: The Future of Transnational Litigation* (Cambridge University Press 2022).

commercial courts, and the Netherlands Commercial Court (NCC). In addition, the chapter introduces us to the recent China International Commercial Courts and their role in China's 'One Belt, One Road Initiative'. Lastly, Part 1 recounts the fall of one court, the Brussels International Business Court (BIBC). Part 2 translates into forum selling motives, the economic reasons behind the establishment of international commercial courts and some of their features. It explores why these courts have an interest in attracting cases, and offers an explanatory framework for the courts' forum selling techniques described in the subsequent chapters. Part 3 concludes that the goal of international commercial courts to attract cases sets them apart from the ordinary courts, and prompts them to engage in forum selling.

2. Establishing International Commercial Courts Around the Globe

2.1. One Court to Rule Them All: The London Commercial Court

One court has served as the prototype of all international commercial courts: the LCC. Although the LCC is a municipal court, dealing with both domestic and international disputes, studies indicate that it hears a considerable number of cases involving foreign litigants and cross-border elements. According to the widely cited studies of the British Institute of International and Comparative Law[2] and the Portland's Annual Commercial Courts Reports,[3] more than half of the cases before the LCC involve non-UK litigants.[4] Therefore, the LCC is a *de facto* international commercial court.

The LCC's influence is widely apparent in the newly established international commercial courts around the world, lending its rules to many of them. Article 1 of the Rules of the DIFC Courts,[5] for example, which states the rules' overriding objective, is a copy of the overriding objective of the English Civil Procedure Rules (CPR).[6] To instil expertise in their benches, the

[2] Eva Lein, Robert McQorquodale, Lawrence McNamara, Hayk Kupelyants and José del Rio, British Institute of International and Comparative Law, *Factors Influencing International Litigants Decisions to Bring Commercial Claims to the London Based Courts*, Ministry of Justice Analytical Series (2015), 10 available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/396343/factors-influencing-international-litigants-with-commercial-claims.pdf> accessed January 2022.

[3] Portland Litigation Consulting, *Who Uses the Commercial Court?*, *Commercial Courts Report 2019*, available at <https://portland-communications.com/publications/commercial-courts-report-2019/>; *Commercial Courts Report 2021*, available at <https://portland-communications.com/publications/commercial-courts-report-2021/> accessed January 2022.

[4] According to the Judiciary of England and Wales, Business and Property Courts, *The Commercial Court Report 2018-2019 (including the Admiralty Court Report)*, 10: 'The proportion of the Court's business which is international remains stable at around 75%', available at <https://www.judiciary.uk/wp-content/uploads/2020/02/6.6318_Commercial-Courts-Annual-Report_WEB1.pdf> accessed January 2022.

[5] Dubai International Financial Centre (DIFC) Courts, Court Rules: Part 1 Citation, Commencement, Application And The Overriding Objective, Rule 1.6 The Overriding Objective, available at <https://www.difccourts.ae/rules-decisions/rules/part-1> accessed January 2022.

[6] Ministry of Justice, Civil Procedure Rules: Part 1 – Overriding Objective, available at <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part01> accessed January 2022.

DIFC Courts,[7] the QIC,[8] the ADGM Courts,[9] the AIFC Court,[10] the SICC[11], and the CICC Expert Committee[12] have recruited senior judges from England and Wales and in particular the LCC.

Although modelled on the LCC, the newcomers aim to compete with and perhaps ultimately surpass it. Especially in Europe, where international commercial courts were established to draw litigants back to national state courts, and were fuelled by the prospects of Brexit, the policy documents clearly state their goal of prizing litigation away from the LCC.[13] In response to this mounting competition, the LCC did not remain idle.

In October 2018, the 'Business and Property Courts' came into force.[14] This is an umbrella term that brings together the already existing specialist courts and lists, such as the Commercial Court, the Business List, the Admiralty Court, the Commercial Circuit Court, the Technology and Construction Court, the Financial List, the Insolvency List, the Companies List, the

[7] DIFC Courts Official Website, Judges, available at <https://www.difccourts.ae/about/court-structure/judges> accessed January 2022.

[8] Qatar International Court and Dispute Resolution Centre Official Website, Court Overview, available at <https://www.qicdrc.com.qa/court-overview> accessed January 2022. See also Andrew Dahdal, 'International Commercial Courts: the Qatari Experience' 235, 245 in Kramer and Sorabji (n 1), speaking of '*the common law bias of judicial appointments*'.

[9] Abu Dhabi Global Markets Courts Official Website, Judges, available at <https://www.adgm.com/adgm-courts/judges> accessed January 2022.

[10] Astana International Financial Centre Court Official Website, Who We Are, Justices available at <https://court.aifc.kz/who-we-are/justices/> accessed January 2022.

[11] Singapore International Commercial Court Official Website, Judges, available at <https://www.sicc.gov.sg/about-the-sicc/judges> accessed January 2022.

[12] The Supreme People's Court, 'The Decision on the Establishment of International Commercial Expert Committee of the Supreme People's Court', available at <http://cicc.court.gov.cn/html/1/219/235/243/index.html> accessed January 2022.

[13] Council for the Judiciary (*Raad voor de Rechtspraak*), *Plan for the Establishment of the Netherlands Commercial Court* (*Plan tot oprichting van de Netherlands Commercial Court*), November 2015, 4, 8, available at <www.rechtspraak.nl/SiteCollectionDocuments/plan-netherlands-commercial-court.pdf> (hereinafter: Dutch Council for the Judiciary, NCC Plan 2015); Legal High Committee for Financial Markets of Paris, *Recommendations for the Creation of Special Tribunals for International Business Disputes*, 3 May 2017, paras. 6-7, 16, available at <https://publications.banque-france.fr/sites/default/files/rapport_07_a.pdf> (hereafter: Legal High Committee for Financial Markets of Paris, Recommendations 2017); Federal Council (*Bundesrat*), Drucksache 219/21, Draft Proposal submitted by the Federal States of North Rine-Westphalia and Hamburg (*Gesetzesantrag der Länder Nordrhein-Westfalen und Hamburg*), Legislative Proposal for Strengthening the Courts in Commercial Disputes (*Entwurf eines Gesetzes zur Stärkung der Gerichte in Wirtschaftsstreitigkeiten*), 17 March 2021, Explanatory Statement (Begründung), 13 (hereafter: German Chambers Legislative Proposal 2021); Legislative Proposal Establishing the Brussels International Business Court (*Wetsontwerp houdende oprichting van het Brussels International Business Court/ Project de loi instaurant la Brussels International Business Court*), Parliamentary Documents (*Parl. St./Doc. parl.*): Chamber of Representatives (*Belgische Kamer van Volksvertegenwoordigers/ Chambre de représentants de Belgique*), Explanatory Statement (*Memorie van Toelichting/Expose de motifs*) *(doc 54 3072/001)*, 15 May 2018, 5, available at <http://www.dekamer.be/FLWB/PDF/54/3072/54K3072001.pdf> (hereafter: BIBC Preliminary Draft Law 2018) all accessed January 2022.

[14] The Civil Procedure (Amendment No. 3) Rules 2018 (SI 2018/975), available at <http://www.legislation.gov.uk/uksi/2018/975/introduction/made> accessed January 2022.

Competition List, the Intellectual Property List, the Property, the Trusts and Probate List, and the Revenue List. The introduction of the 'Business and Property Courts' is aimed at dispensing with outmoded court names – such as the previous Mercantile Court and now Commercial Circuit Court, which were often incomprehensible to foreigners – and establishing an all-encompassing, user-friendly term.[15] In the words of the Lord Chancellor David Lidington, the courts now '*do exactly what it says on the tin*'.[16]

In addition to reintroducing the courts to foreign litigants, the launch of the 'Business and Property Courts' also had some substance in it. It decentralized the specialist courts situated in the Rolls Building in London and allowed domestic litigants to bring their disputes before seven High Court District Registries across England and Wales, thereby alleviating the London courts' caseloads and easing access to legal redress for domestic parties.[17] Other innovations include the introduction of the Financial List. However, one could object that these measures lack tangible innovations.[18] As in the case of other international commercial courts, their allegedly innovative features are merely a rebranding and repackaging of existing courts or rules mostly aimed at sending an inviting signal to foreign parties. I turn to these and to other marketing efforts of the international commercial courts in chapter 3.

2.2. Investment-Minded Courts in the Middle East and Kazakhstan

In 2004, the Emirate of Dubai set up the DIFC, a special economic zone established to offer benefits to businesses and to attract foreign investment.[19] Although the legal system of the United Arab Emirates is based on civil law and Sharia law, the DIFC offers a common law legal framework based on the principles of English law. In 2005, the DIFC Courts were established with the aim of offering foreign investors the reassurance of a trustworthy and efficient dispute resolution system within the zone.[20] This rationale driving the creation of the

[15] Sir Geoffrey Vos and Sir Brian Leveson, *The Business and Property Courts of England & Wales: An Explanatory Statement*, The Judiciary of England and Wales, 18 May 2017, available at <https://www.judiciary.uk/wp-content/uploads/2017/03/bpc-explanatory-statement-final-20170518-v2.pdf> accessed January 2022.

[16] David Lidington (Lord Chancellor), Speech, 'Launch of the Business and Property Courts of England and Wales', 4 July 2017, available at <https://www.gov.uk/government/speeches/launch-of-the-business-and-property-courts-of-england-and-wales> accessed January 2022.

[17] Ibid.; Sir Geoffrey Vos, Speech, Seminar Innovating International Business Courts: A European Outlook, Rotterdam, The Netherlands, 10 July 2018 (2019) 12 Erasmus Law Review 10, para. 4.

[18] Masood Ahmed, 'A Critical Review of the Business and Property Courts of England and Wales' 21, 36, 39 in Kramer and Sorabji (n 1).

[19] DIFC, Starting a Business, available at <https://www.difc.ae/business/starting-business/> accessed January 2022.

[20] Jayanth Krishnan and Priya Purohit, 'A Common Law Court in an Uncommon Environment: The DIFC Judiciary and Global Commercial Dispute Resolution' (2014) 25 The American Review of International Arbitration 499-500; Zain Al Abdin Sharar and Mohammed Al Khulaifi, 'The Courts in Qatar Financial Centre and Dubai International Financial Centre: A Comparative Analysis' (2016) 46 Hong Kong Law Journal 529, 539;

courts found its expression in their jurisdictional reach. Initially, the DIFC Courts had exclusive jurisdiction over all disputes occurring within the DIFC or related to companies registered in it.[21]

However, 2011 marked the beginning of a 'second era' for the DIFC Courts.[22] Dubai Law No. 16 expanded the jurisdiction of the Court of First Instance to any civil or commercial matter as long as the parties expressly agreed on the court's jurisdiction.[23] This opt-in jurisdiction internationalised the DIFC Courts by adding international disputes to their previously domestic caseload,[24] and rightfully lent them the title of the first international commercial court. Despite Arabic being the official language of the United Arab Emirates, the DIFC Courts use English as the language of court proceedings.[25] Except for Emirati judges, foreign nationality judges, referred to as international judges, and mostly drawn from common law jurisdictions, are appointed to the DIFC Courts' bench.[26]

The DIFC Courts are not the only investor-driven courts established within an economic zone.[27] In 2009, the Civil and Commercial Court of the Qatar Financial Centre (QFC) started hearing cases.[28] In 2012, the court changed its name to the Qatar International Court and Dispute Resolution Centre (QIC).[29] As well as creating an inviting business environment and attracting foreign investors, the QIC marks the country's efforts to create a legal infrastructure

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Harold Koster and Mark Beer, 'The Dubai International Financial Centre (DIFC) Courts: A Specialised Commercial Court in the Middle East' 195, 201 in Eddy Bauw, Harold Koster and Sonja Kruisinga (eds), *De Kansen voor een Netherlands Commercial Court* (Boom juridisch 2018)

[21] Art. 5 (A) Law No. (16) of 2011 Amending Certain Provisions of Law No. (12) of 2004 concerning Dubai International Financial Centre Courts, available at <https://www.difc.ae/files/8414/5510/4278/Dubai_Law_No.16_of_2011_English.pdf> accessed January 2022.

[22] Jayanth Krishnan, *The Story of the Dubai International Financial Centre Courts: A Retrospective* (DIFC Academy of Law 2018) 43, available at <https://issuu.com/difccourts/docs/difc_courts_10_years> accessed January 2022.

[23] Art. 5 (A) (2) Law No. (16) of 2011 Amending Certain Provisions of Law No. (12) of 2004 concerning Dubai International Financial Centre Courts.

[24] Michael Hwang, 'Commercial Courts and International Arbitration – Competitors or Partners?' (2015) 31 Arbitration International 193, 202; Sundaresh Menon, 'International Commercial Courts: Towards a Transnational System of Dispute Resolution', Opening Lecture for the DIFC Courts Lecture Series 2015.

[25] Alejandro Carballo, 'The Law of the Dubai International Financial Centre: Common Law Oasis or Mirage Within the UAE?' (2007) 21 Arab Law Quarterly 91; Koster and Beer (n 20) 195-197; also Barnabas Reynolds, Thomas Donegan and Oliver Lynch, 'The Value of English Common Law For New "Special Zones": A Case Study of Two Contrasting Examples' (2022) Trusts and Trustees 1.

[26] DIFC Courts Official Website, About Us, Court Structure, Judges, available at <Judges | DIFC Courts> accessed January 2022.

[27] Bookman (n 1) 240-246.

[28] Article 8 (3) of the QFC Law – Law No. 7 of 2005 –, as amended by Law No. 2 of 2009 within the Qatar Financial Centre (QFC), available at <http://www.complinet.com/qfcra/display/display.html?rbid=1557&element_id=2> accessed January 2022.

[29] QICDRC Official Website, About Us, available at <About Us | QICDRC> accessed January 2022.

and expand its legal services sector.[30] The court has jurisdiction over disputes involving QFC entities, and currently lacks an opt-in jurisdiction.[31] Companies registered with the QFC may operate anywhere in the state of Qatar, and are therefore not limited to operating within the zone. This is an important difference between other special economic zones and the QFC, which potentially expands the QIC's jurisdiction over disputes that exceed the zone's geographical confines. The QIC usually conducts trials in English,[32] and has both local and international judges.[33] In October 2021, the court's jurisdiction was expanded to include disputes pertaining to the Qatar Free Zones.[34]

In 2015, building on the experience of the DIFC, the Emirate of Abu Dhabi opened the ADGM financial free zone and the ADGM Courts.[35] Like the rest of the international commercial courts established in special economic zones, the ADGM Courts use English as the court language and have international judges on their bench. What distinguishes the ADGM Courts from other courts of its kind, is that not only the ADGM regulations are modelled on English law. Some English statutes have been directly adopted, and, according to Article 1 of the Application Regulations, the ADGM imports the whole body of common law case law.[36] Last on the list of investment-minded courts is the AIFC Court, which has operated since 2018.[37] The AIFC Court uses English as the court language, applies laws modelled heavily on English laws, and during its initial years of functioning it was staffed exclusively by judges from

[30] See Dahdal (n 8).
[31] See Art. 8 (3) (c) of the QFC Law and Art. 9 The Qatar Financial Centre Civil and Commercial Court Regulations and Procedural Rules, available at <Regulations of the Court | QICDRC> accessed January 2022; Al Abdin Sharar and Al Khulaifi (n 20) 540. According to Dahdal (n 8) '*The ability of the Court to adjudicate matters between two parties unconnected to the QFC […] is not yet possible*'. Contra Gerald Lebovits and Delphine Miller, 'Litigating in the Qatar International Court' (2015) 28 New York State Bar Association International Law Practicum 54, 56; Marta Requejo Isidro, 'International Commercial Courts in the Litigation Market' (2019) 9 International Journal of Procedural Law 4, 14; Nicolas Zambrana-Tevar, 'The Court of the Astana International Financial Center in the Wake of its Predecessors' (2019) 12 Erasmus Law Review 121, 126.
[32] Art. 3 (2) The Qatar Financial Centre Civil and Commercial Court Regulations and Procedural Rules.
[33] QICDRC Official Website, Courts, available at <The Court | QICDRC> accessed January 2022.
[34] QICDRC, 'Expanded Jurisdiction of Qatar International Court to Include the Qatar Free Zones Comes into Effect QICDRC' (20 October 2021), available at <Expanded Jurisdiction of Qatar International Court to Include the Qatar Free Zones Comes into Effect | QICDRC> accessed January 2022.
[35] Art. 13 Law No. (4) of 2013 Concerning Abu Dhabi Global Market, available at <https://www.adgm.com/-/media/project/adgm/legal-framework/documents/abu-dhabi-legislation/abu_dhabi_law_no_4_of_2013.pdf>. See also ADGM Courts Official Website, available at <https://adgmcourts.com/ADGM/Home/> all accessed January 2022.
[36] The Application of English Law Regulations 2015. See also Reynolds, Donegan and Lynch (n 25).
[37] Art. 13 Constitutional Statute of the Republic of Kazakhstan on the Astana International Financial Centre, Constitutional Statute No. 438–V ZRK of 7 December 2015, available at <https://court.aifc.kz/files/legals/7/file/unofficial-english-translation-of-the-contitutional-statute-on-the-aifc-as-amended.pdf>. See also AIFC Court Official Website, available at <https://court.aifc.kz/> all accessed January 2022.

England and Wales.[38] All the aforementioned courts operate alongside intra-zone arbitration or mediation institutions, and are therefore a part of diversified dispute resolution systems.[39]

The use of English as the court language, the application of English law-inspired rules and the appointment of international judges demonstrate that the DIFC Courts, the QIC, the ADGM Courts, and the AIFC Court are part of broader policies pursued by the host states to internationalise their domestic legal orders, diversify the local economies, and attract foreign investment.[40] As Lord Woolf, former Chief Justice of the AIFC Court and first president of the Qatar Civil and Commercial Court, explained, the courts are designed to build confidence in investors and appeal to capital markets.[41]

2.3. The Asian Dispute Resolution Hub: The Singapore International Commercial Court

In 2015, Singapore created the SICC, a court specialised in international commercial disputes. The main incentive was the aim of further enhancing Singapore's status as a leading forum for commercial dispute resolution in Asia.[42]

Among the countries that have established or are contemplating the establishment of an international commercial court, Singapore has a well-developed arbitration sector. Within only a few years, Singapore and the Singapore International Arbitration Centre[43] rose to becoming the third most preferred arbitration seat and arbitration institute worldwide.[44] Being the new kid on the arbitration block, Singapore provides a unique context that informs the rationale driving the establishment of the SICC, with arguments unmatched in the rest of the international commercial courts. More specifically, the SICC's arbitration features aim to build

[38] AIFC Court Official Website, available at <Main (aifc.kz)> accessed January 2021.
[39] However, recently the DIFC-LCIA Arbitration Centre was abolished. See Noor Kadhim, 'Upheaval of Dispute Resolution Centres in the Gulf: Recent Developments in Qatar and Dubai', Kluwer Arbitration Blog, 23 October 2021, available at <Upheaval of Dispute Resolution Centres in the Gulf: Recent Developments in Qatar and Dubai - Kluwer Arbitration Blog> accessed January 2022.
[40] Zambrana-Tevar (n 31) 121-122; Georgios Dimitropoulos, "International Commercial Courts in the 'Modern Era of Nature': Adjudicatory Unilateralism in Special Economic Zones" (2021) Journal of International Economic Law 1, 3.
[41] Lord Woold, *A Vision of the AIFC Court* (AIFC Court 2019), 8.
[42] *Report of the Singapore International Commercial Court Committee*, November 2013, para. 4 (a), available at <https://www.sicc.gov.sg/docs/default-source/about-sicc/annex-a-sicc-committee-report.pdf> (hereafter: SICC Committee Report 2013); SICC Official Website, Establishment of the SICC, available at <https://www.sicc.gov.sg/about-the-sicc/establishment-of-the-sicc> all accessed January 2022.
[43] Singapore International Arbitration Centre (SIAC) Official Website, available at <http://www.siac.org.sg/> accessed January 2022.
[44] White & Case and School of International Arbitration, Queen Mary University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration*, Charts 6 and 12, available at <https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-19.pdf> accessed January 2022.

on and draw from the country's reputation and expertise in international commercial arbitration. Indeed, key features of the SICC such as its international bench,[45] the possibility of excluding the right to appeal,[46] and of opting in to alternative evidentiary rules – such as the IBA Rules on the Taking of Evidence in International Arbitration[47] – resemble or mimic arbitration.[48] In addition, provisions specifically devised for offshore disputes – namely, disputes that have no substantial connection to Singapore[49] – allow parties to conduct proceedings confidentially and in private, and to be represented by foreign lawyers before the court.[50] In her speech in 2016, the former Senior Minister of State for Law, Indranee Rajah, stressed that representation by foreign lawyers aimed to incentivise parties to bring their disputes before the SICC. In the same manner that the number of international commercial arbitration cases boomed once Singapore amended its laws and allowed foreign lawyers to appear in arbitration proceedings, representation by foreign lawyers before the SICC would give the court and its caseload a significant boost.[51]

Shortly before launching the SICC, Singapore established the Singapore International Mediation Centre[52] and the Singapore International Mediation Institute.[53] More recently, in August 2019, the country spearheaded the conclusion of the 'Singapore Convention on Mediation'.[54] Hence, the SICC rounds off the country's multi-pronged strategy to become a

[45] SICC Official Website, About the SICC, Judges, available at <https://www.sicc.gov.sg/about-the-sicc/judges> accessed January 2022.
[46] Singapore International Commercial Court Practice Directions, Part XXII, available at <Singapore International Commercial Court Practice Directions (judiciary.gov.sg)> accessed January 2022.
[47] IBA Rules on the Taking of Evidence in International Arbitration, 29 May 2010, International Bar Association, available at <https://www.international-arbitration-attorney.com/wp-content/uploads/2018/09/IBA-Rules-Document-Production-Arbitration.pdf> accessed January 2022.
[48] For the parties' right to opt out of national rules of civil procedure, see Supreme Court of Judicature Act section 18K; Rules of Court (Chapter 322, 2014 Revised Edition), Order 110, rule 23 (hereafter: SICC Rules); Singapore International Commercial Court User Guides Note 4, para 25, available at <https://www.sicc.gov.sg/docs/default-source/legislation-rules-pd/sicc-user-guides-31jan19.pdf> accessed January 2022.
[49] SICC Rules, Order 110, rule 1 (2) (f); SICC Practice Directions, *Part V*, *Offshore cases*, para. 29. See also *Teras Offshore Pte Ltd* v *Teras Cargo Transport (America) LLC*, [2016] 4 SLR 75, para. 8.
[50] For confidential and private proceedings, see SICC Rules, Order 110, rule 30 (2) (a). For representation by foreign lawyers, see Supreme Court of Judicature Act section 18M; Legal Profession Act section 36P (1); Legal Profession (Foreign Representation in Singapore International Commercial Court) Rules 2014, rule 4 (1); Singapore International Commercial Court Practice Directions, Part IV - Representation, para. 26.
[51] Indranee Rajah, *Speech by Senior Minister of State for Law at the Litigation Conference 2015*, 16 March 2015, paras. 30-34, available at <https://app.mlaw.gov.sg/news/speeches/speech-by-senior-minister-of-state-for-law--indranee-rajah--at-t> accessed January 2022.
[52] Singapore International Mediation Centre (SIMC) Official Website, available at <http://simc.com.sg/> accessed January 2022.
[53] Singapore International Mediation Institute (SIMI) Official Website, available at <https://www.simi.org.sg/> accessed January 2022.
[54] United Nations Convention on International Settlement Agreements Resulting from Mediation ('Singapore Convention on Mediation'), 20 December 2018, available at <https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements> accessed January 2022.

sought-after Asian legal hub and completes the offer of a full suite of dispute resolution services.[55]

Furthermore, regional developments such as China's 'Belt and Road Initiative', a development strategy entailing investments and infrastructure projects involving various continents,[56] the establishment of the Asian Infrastructure and Investment Bank[57] as well as the Association of Southeast Asian Nations Economic Community[58] promise a rise in cross-border trade and investment, and, as a result, a spike in international commercial disputes. Taking into consideration Hong Kong's present troubles and precarious relationship with mainland China,[59] Singapore could become the perfect gateway for the 'Belt and Road Initiative'.[60] After all, Singapore allegedly enjoys an 'Asian advantage'. As opposed to rival legal hubs, it can fully capture Asian attitudes and therefore better serve Asian parties.[61]

Nevertheless, various stakeholders rush to emphasise that the SICC not only fulfils Singapore's aspirations to become a regional legal hub but it also responds to a real demand. According to stakeholders, the SICC rectifies the shortcomings of arbitration, such as its increasing costs, the lack of appellate proceedings, the lack of a transparent body of jurisprudence, and

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[55] Singapore Parliamentary Debates, Official Report, 5 March 2014, Volume 91, available at <https://sprs.parl.gov.sg/search/sprs3topic?reportid=motion-208>; 16 May 2014, Volume 92, available at <https://sprs.parl.gov.sg/search/sprs3topic?reportid=president-address-350>; 10 March 2015, Volume 93, available at <https://sprs.parl.gov.sg/search/sprs3topic?reportid=budget-460>; 15 January 2016, Volume 94, available at <https://sprs.parl.gov.sg/search/sprs3topic?reportid=president-address-251>; 14 April 2016, Volume 94, available at <https://sprs.parl.gov.sg/search/sprs3topic?reportid=bill-207>; 3 March 2017, Volume 94, available at <https://sprs.parl.gov.sg/search/sprs3topic?reportid=budget-931> all accessed January 2022. See also Rajah (n. 51) para. 14; Hwang (n 24) 196.

[56] Belt and Road Portal, available at <https://eng.yidaiyilu.gov.cn/> accessed January 2022.

[57] Asian Infrastructure and Investment Bank official (AIIB) Official Website, available at <https://www.aiib.org/en/index.html> accessed January 2022.

[58] Association of Southeast Asian Nations Economic Community (ASEAN) Official Website, available at <https://asean.org/> accessed January 2022.

[59] Gary L. Benton, 'The Whispered Conversation: Hong Kong v. Singapore', *Kluwer Arbitration Blog,* 2 January 2019, available at <http://arbitrationblog.kluwerarbitration.com/2019/01/02/whispered-conversation-hong-kong-v-singapore/>; Alyssa King, 'Pearl River Delta Blues: Extradition and Hong Kong's Position as Arbitral Seat', *Kluwer Arbitration Blog*, 16 June 2019, available at <http://arbitrationblog.kluwerarbitration.com/2019/06/16/pearl-river-delta-blues-extradition-and-hong-kongs-position-as-arbitral-seat/>; Jeanne Huang and Winston Ma, 'Arbitration and Protest in Hong Kong', *Conflict of Laws.net*, 9 October 2019, available at <http://conflictoflaws.net/2019/arbitration-and-protest-in-hong-kong/> all accessed January 2022.

[60] SICC Committee Report 2013, paras. 5-14; Rajah (n 51) paras. 9-13; Sundaresh Menon, 'Shaping the Future of Dispute Resolution and Improving Access to Justice', Global Pound Conference Series 2016 – Singapore, 17 March 2016, available at <Global Pound Conference Series 2016, Shaping the Future of Dispute Resolution Improving Access to Justice.pdf (smu.edu.sg)>; Sundaresh Menon, 'Response by Chief Justice Sundaresh Menon Opening of the Legal Year 2020', 6 January 2020, para. 22, available at <LSC | Speeches>; Sundaresh Menon, 'International Commercial Courts in the Post-Pandemic Era', Singapore International Commercial Court Symposium 2021, 10 March 2021, paras. 7-8 available at <https://file.go.gov.sg/opening-address-cj-sicc-symposium.pdf> all accessed January 2022.

[61] Rajah (n 51) para. 17.

especially what has been prominently criticised as arbitration's increasing 'judicialisation', a term used to signify arbitration's increasing court-like formality.[62]

However, Singapore's strong arbitration legacy requires it to balance conflicting interests. Early on, the former Senior Minister of State for Law underlined that the SICC aimed to attract disputes that would otherwise not end up in Singapore. The court's objective was to attract offshore work and thereby '*not take away from the existing pie, but rather add to the pie, or get access to another pie*'.[63] In contrast to Europe – where international commercial courts openly stated their aim was to attract disputes frequently resolved in arbitration – in Singapore, phrases such as '*the SICC a companion rather than a competitor to arbitration*'[64] are common. Such a difference in rhetoric is not merely a question of semantics; it stresses the latent stakes and Singapore's effort to reassure arbitration's vested market share.

2.4. Brexit and International Commercial Courts in Europe

Placing the establishment of European international commercial courts on the timeline and identifying the reasons behind their creation is challenging because some international commercial courts in Europe are not exactly new. They go back to older initiatives aimed at increasing the attractiveness of European courts to international commercial litigants, and are an expression of a broader regulatory competition between European Union Member States.

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[62] Sundaresh Menon, 'The Rule of Law and the SICC', Singapore International Chamber of Commerce Distinguished Speakers Series, 10 January 2018, para. 26, available at <https://www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/b_58692c78-fc83-48e0-8da9-258928974ffc.pdf>. See also SICC Committee Report 2013, paras. 12, 16; SICC Official Website, Establishment of the SICC; K. C. Vijayan, 'Singapore International Commercial Court, $1.1b Dispute is First Case Heard', *The Straits Times*, 21 November 2015, available at <https://www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/-singapore-international-commercial-court-1-1b-dollar-dispute-is-first-case-heard-the-straits-times_6c8b6ed8-1053-4700-b242-a19da8b482b2-1.pdf>; Lucy Reed, 'International Dispute Resolution Courts: Retreat or Advance?' – 10th John E.C. Brierley Memorial Lecture (2017-2018) 4 McGill Journal of Dispute Resolution 129; Kannan Ramesh, 'International Commercial Courts: Unicorns on a Journey of a Thousand Miles', Conference on the Rise of International Commercial Courts, Doha, Qatar, 13 May 2018, paras. 3-7, 19, available at <https://www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/international-commercial-courts-unicorns_23108490-e290-422f-9da8-1e0d1e59ace5.pdf> all accessed January 2022; Anselmo Reyes and Kevin Tan, 'Recognition and Enforcement of International Commercial Court Judgments' 32 in Lei Chen and André Janssen (eds), *Dispute Resolution in China, Europe and World, Ius Gentium: Comparative Perspectives on Law and Justice* 79 (Springer 2020). For the 'judicialisation' of arbitration, see Thomas J. Stipanowich, "Arbitration: The 'New Litigation'" (2010) University of Illinois Law Review 1; Leon Trakman and Hugh Montgomery, "The 'Judicialization' of International Commercial Arbitration: Pitfall or Virtue?" (2017) 30 Leiden Journal of International Law 405.

[63] Rajah (n 51) paras. 15, 25.

[64] SICC Official Website, Establishment of the SICC. See also See also Menon (n 24) para. 10; Menon (n 62) para. 26; Ramesh (n 62) para. 18.

2.4.1. The Paris International Chambers

I start with the International Chamber of the Paris Commercial Court, which dates back to 2010 and is the merger of two older chambers: the European Union Law Chamber and the International Chamber. In February 2018, its procedural rules were revised in order to rekindle its attractiveness for commercial litigants.[65] At the same time, the French Minister of Justice inaugurated the International Chamber within the Paris Court of Appeals. It offers parties the option to lodge an appeal against decisions of the International Chamber of the Paris Commercial Court, and thus complements this court in second instance.[66]

The revision of the procedural rules of the first instance International Chamber and the inauguration of the second instance International Chamber were the result of a report by the Legal High Committee for Financial Markets of Paris on the implications of Brexit as regards judicial cooperation in civil and commercial matters.[67] Although acknowledging that the jurisdictional appeal of London is not exclusively due to the benefits of the European Union rules on civil litigation, the report nevertheless assumed that Brexit and the resulting uncertainty might reshuffle the litigation market.[68] The committee therefore made a series of recommendations to increase the attractiveness of Paris as a litigation destination. It suggested the use of English before French courts and English-style litigation practices including the discovery of documents and the cross examination of witnesses. Lastly, the committee proposed the establishment of specialised courts for cross-border civil and commercial disputes.[69]

In a subsequent report, the committee suggested the rapid set-up of specialised tribunals within the existing judicial and procedural framework. Since France already had an International

[65] Protocol on Procedural Rules Applicable to the International Chamber of the Paris Commercial Court, Preamble, available at <https://www.avocatparis.org/system/files/editos/protocole_barreau_de_paris_-_tribunal_de_commerce_de_paris_version_anglaise.pdf> accessed January 2022 (hereafter: Protocol – International Chamber of the Paris Commercial Court).

[66] Protocol Relating to the Procedure Before the International Chamber of the Paris Court of Appeal, available at <Traduction en anglais du protocole CCIP-CA - V4 (justice.fr)> accessed January 2022 (hereafter: Protocol – International Chamber of the Paris Court of Appeal).

[67] Legal High Committee for Financial Markets of Paris, *Report on the Implications of Brexit on Judicial Cooperation in Civil and Commercial Matters*, 30 January 2017, available at <https://publications.banque-france.fr/sites/default/files/rapport_05_a.pdf> accessed January 2022 (hereafter: Legal High Committee for Financial Markets of Paris, Report on Brexit).

[68] *Ibid*. para. 5.3.2.; Legal High Committee for Financial Markets of Paris, *Recommendations for the Creation of Special Tribunals for International Business Disputes*, 3 May 2017, para. 6, available at <https://publications.banque-france.fr/sites/default/files/rapport_07_a.pdf> accessed January 2022 (hereafter: Legal High Committee for Financial Markets of Paris, Recommendations 2017).

[69] Legal High Committee for Financial Markets of Paris, Report on Brexit, para. 5.3.4.

Chamber, there was a need to raise its visibility.[70] In light of this, the revision of the procedural rules of the International Chamber of the Paris Commercial Court and the establishment of the International Chamber of the Paris Court of Appeals did not solely aim at offering commercial litigants a renewed procedural framework with appellate proceedings. They were mostly a reminder that – like other European Union Member States that had established or are about to establish an international commercial court – France has an international commercial court of its own, and should therefore be understood as a publicity stunt.[71]

2.4.2. The German International Commercial Courts

France is not the only Member State repackaging and rebranding its courts. In January 2018, Germany established a Chamber for International Commercial Disputes within the Frankfurt am Main Regional Court.[72] The chamber was launched as part of a broader initiative called the 'Frankfurt Justice Initiative', and ties with older ones such as the 'Law Made in Germany',[73] with the goal of increasing the attractiveness of the German justice system as a whole.[74] The main innovative feature of the Frankfurt chamber is the use of English in court, which brings to mind similar initiatives in the courts of Cologne, Aachen, and Bonn.[75] However, in light of Brexit, Germany's efforts to become the next litigation destination in Europe regained momentum and were resumed – only this time in Frankfurt am Main. It is, in particular, expected that in the aftermath of Brexit, financial activities may relocate from London to

[70] Legal High Committee for Financial Markets of Paris, Recommendations 2017, Proposals 21, 23, 31.

[71] For the marketing efforts concerning the former International Chamber, see Civil Law Initiative (*Fondation pour le droit continental*), Newsletter (*Lettre d' information*), December 2010, available at <www.fondation-droitcontinental.org/fr/wp-content/uploads/2013/12/decembre-2010.pdf>. See also Gilles Cuniberti, 'Paris, the Jurisdiction of Choice?', *Conflict of Laws.net*, 2 February 2011, available at <http://conflictoflaws.net/2011/paris-commercial-court-creates-international-division/> all accessed January 2022; Emmanuel Jeuland, 'The International Division of the Paris Commercial Court' (2016) Tijdschrift voor Civiele Rechtspleging 143; Emmanuel Jeuland, 'The International Chambers of Paris: A Gaul Village' 65, 72 in Kramer and Sorabji (n 1).

[72] Frankfurt am Main Regional Court Official Website, available at <https://ordentliche-gerichtsbarkeit.hessen.de/ordentliche-gerichte/lgb-frankfurt-am-main/lg-frankfurt-am-main/chamber-international> accessed January 2022. See also Burkhard Hess and Timon Boerner, 'Chambers for International Commercial Disputes in Germany: The State of Affairs' (2019) 12 Erasmus Law Review 33, 34-38.

[73] Ministry of Justice and Consumer Protection (*Bundesministerium der Justiz und für Verbraucherschutz*), Law – Made in Germany, 3rd Edition 2014, available at <https://www.lawmadeingermany.de/Law-Made_in_Germany_EN.pdf> accessed January 2022.

[74] Hermann Hoffmann, "Von Law – Made in Germany" zu "Commercial Litigation in Germany", Impulse für eine Verbesserung der Justiz im internationalen Handelsrecht' (2018) Zeitschrift für internationales Wirtschaftsrecht 58.

[75] Christopher Bisping, 'Conquering the Legal World: The Use of English in Foreign Courts' (2012) 20 European Review of Private Law 541, 542; Christoph Kern, 'English as a Court Language in Continental Courts' (2012) Erasmus Law Review 187, 198. The Chambers heard only two cases, see Bundesrechtsanwaltskammer, *Stellungnahme Nr. 23/2014 Juni 2014 zum Entwurf eines Gesetzes zur Einführung von Kammern für internationale Handelssachen (KfiHG)* (2014) 3, available at <https://www.brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2014/juni-1/stellungnahme-der-brak-2014-23.pdf> accessed January 2022.

Frankfurt, as Frankfurt already possesses a developed financial and banking sector. In this case, a relocation of Europe's judicial hub from London to Frankfurt would most likely follow.[76]

A few months later, in April 2018, a proposal for the establishment of German Chambers for International Commercial Disputes was resubmitted to the German parliament.[77] As opposed to the 'Frankfurt Justice Initiative', which allows for the use of English in court on the basis of a lenient interpretation of the German civil procedure rules, and is therefore mostly an organisational measure,[78] the legislative proposal amends the German Code of Civil Procedure and the German Courts Constitution Act, and thereby provides the legal basis for the whole conduct of proceedings, including pronouncement of the judgment, to be in the English language.[79] It is the third time the proposal is awaiting its parliamentary approval, following two previously unsuccessful attempts.[80] Although failure of the earlier proposals is due to the expiration of the respective legislative periods, it nevertheless reveals a certain degree of scepticism regarding the establishment of international commercial chambers in Germany.[81] So far, the main point of criticism has centred on the use of English as the court language, which, as previously mentioned, is the chambers' primary innovative feature.[82]

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[76] Wilhelm Wolf in 'Es könnte der Beginn eines ganz neuen Kapitels sein, Seit Januar 2018 gibt es eine englischsprachige Kammer für Handelssachen am LG Frankfurt' (2018) 2 Deutscher AmwaltSpiegel 2018, 17; Micheal Sonnentag, 'Justiz & Brexit: Frankfurt Chamber for International Commercial Disputes – Veranstaltung in Frankfurt am Main am 9. August 2018' (2018) Zeitschrift für Europäisches Privatrecht 966; Hess and Boerner (n 72) 34.

[77] German Parliament (*Deutscher Bundestag*), Legislative Proposal for the Establishment of Chambers for International Commercial Disputes (*Entwurf eines Gesetzes zur Einführung von Kammern für internationale Handelssachen*), Drucksache 19/1717, 18 April 2018, Draft Art. 114c (1) German Courts Organization Act, available at <http://dipbt.bundestag.de/dip21/btd/19/017/1901717.pdf> (hereafter: German Chambers Legislative Proposal 2018).

[78] Burkhard Hess, 'The Justice Initiative Frankfurt am Main 2017', *Conflict of Laws.net*, 31 March 2017, available at <conflictoflaws.net/2017/the-justice-initiative-frankfurt-am-main-2017-law-made-in-frankfurt/> accessed January 2022.

[79] German Chambers Legislative Proposal 2018, Draft Art. 184 (2) and (3) the German Courts Constitution Act.

[80] German Parliament (*Deutscher Bundestag*), Legislative Proposal for the Establishment of Chambers for International Commercial Disputes (*Entwurf eines Gesetzes zur Einführung von Kammern für internationale Handelssachen*), Drucksache 17/2163 of 16 June 2010, available at <http://dipbt.bundestag.de/dip21/btd/17/021/1702163.pdf>; German Parliament (*Deutscher Bundestag*), Legislative Proposal for the Establishment of Chambers for International Commercial Disputes (*Entwurf eines Gesetzes zur Einführung von Kammern für international Handelssachen*), Drucksache 18/1287 of 30 April 2014, available at <http://dipbt.bundestag.de/dip21/btd/18/012/1801287.pdf> all accessed January 2022.

[81] Hess and Boerner (n 72) 38-39.

[82] *Inter alia* Tobias Handschell, 'English als Gerichtssprache?' (2010) Zeitschrift für Rechtspolitik 103; Christian Stubbe, 'English als Gerichtssprache?' (2010) Zeitschrift für Rechtspolitik 195; Axel Flessner, 'Deutscher Zivilprozess auf English – Der Gesetzentwurf des Bundesrats im Lichte von Staatsrecht, Grundrechten und Europarecht' (2011) Neue Juristische Online-Zeitschrift 1913; Bisping (n 75) 541; Wolfgang Hau, 'Fremdsprachengebrauch durch deutsche Zivilgerichte – vom Schutz legitimer Parteiinteressen zum Wettbewerb der Justizstandorte' in Ralf Michaels and Dennis Solomon (eds), *Liber Amicorum Klaus Schurig* (Sellier European Law Publishers 2012) 49, 61-62; Herbert Roth, 'Modernisierung des Zivilprozesses'(2014) Juristenzeitung 801, 805.

The proposal's wording is identical to that of the earlier 2010 and 2016 proposals, and therefore may not fully capture the incentives that are driving the establishment of the German Chambers for International Commercial Disputes. For instance, the 'Brexit' rationale is totally absent, although relevant, as the 'Frankfurt Justice Initiative' indicates.[83] It nevertheless briefly outlines the drivers for an international commercial court in Germany. Germany faces a downward trend in the number of cross-border commercial disputes before its courts. According to the proposal, this trend is attributed to the lack of English language court proceedings, and this results in foreign parties being reluctant to litigate in a German court. The lack of English language court proceedings is not only detrimental to the popularity of German courts but also to German companies doing business in an international context. Lastly, the intention of the proposal is that a choice in favour of the German courts will bring with it a choice in favour of German law.[84]

Meanwhile, various states in Germany took the initiative to introduce English language court proceedings and to create so-called 'Commercial Courts' within Regional Courts. In May 2018, the Hamburg Regional Court introduced English as the court language for cross-border civil and commercial disputes.[85] In November 2020, 'Commercial Courts' were established within the Stuttgart and Mannheim Regional Courts.[86] These are specialised chambers that focus on both domestic and international disputes in the fields of corporate, financial and commercial law. Just as the Frankfurt Chamber for International Commercial Courts, the use of English before the Hamburg, Stuttgart and Mannheim chambers lacks legislative underpinning and is based on a lenient interpretation of existing rules. Furthermore, in March 2021, a revised proposal was submitted to the German parliament. It takes up the previous proposals for the establishment of Chambers for International Commercial Disputes within Regional Courts and at the same time authorises the states to establish 'Commercial Courts' within the Higher

[83] Burkhard Hess, 'The Justice Initiative Frankfurt am Main 2017', *Conflict of Laws.net*, 31 March 2017, available at <conflictoflaws.net/2017/the-justice-initiative-frankfurt-am-main-2017-law-made-in-frankfurt/>; Hess and Boerner (n 72) 38. However, see *Justizstandort Deutschland – Stärkung der Gerichte in Wirtschaftsstreitigkeiten*, Diskussionspapier, 3, available at <https://www.justiz.nrw/JM/organisation/aufgaben/abtII/zt_commercial_courts/2019-02-07-Diskussionspapier-Symposium_2018-09-03.pdf> all accessed January 2022.

[84] German Chambers Legislative Proposal 2018, Explanatory Statement (*Begründung*), 5-6.

[85] Regional Court Hamburg Official Website, available at <https://justiz.hamburg.de/landgericht-hamburg/zustaendigkeit/> accessed January 2022.

[86] Commercial Court Stuttgart/ Mannheim Official Website, available at <https://www.commercial-court.de/commercial-court> accessed January 2022. See also Patrick Melin, 'Der neue Stuttgart Commercial Court' (2020) 48 Betriebs Berater 2702.

Regional Courts for both domestic and cross-border claims exceeding 2.000.000 Euros.[87] Apart from the use of English as the court language and the focus on commercial disputes, two novel features are noteworthy. The proposal slightly increases court and statutory legal fees for high-value disputes,[88] and it expands the right of the parties to request confidentiality orders.[89]

2.4.3. The Netherlands Commercial Court

Although the Paris International Chamber and the German initiatives date back to before Brexit, UK's departure from the European Union explains the recent rebranding of the Paris International Chamber and the simultaneous revival of the efforts to create specialised, English language chambers in Germany. Similarly, the idea of a NCC predates Brexit. It was mooted in 2014, when Frits Bakker, Chairman of the Dutch Council for the Judiciary, first introduced the idea to set up an English language court specialised in international commercial disputes. A year later, the Dutch Council for the Judiciary published the 'Plan for the Establishment of the Netherlands Commercial Court'.[90] According to the judiciary's plan, high-value and complex international commercial matters are increasingly decided by foreign courts, such as the LCC, or by international commercial arbitration. As a result, Dutch courts, despite their knowledge and expertise, deal less and less with complex international cases.[91] In a similar vein, the Dutch legal services sector is losing cases abroad.[92] Therefore, one of the NCC's main aims is to attract commercial litigants that often hasten abroad or resort to arbitration.

While establishing the NCC, the Netherlands aimed at avoiding extensive legislative amendments and leaving the courts' budget intact.[93] Based on a market survey conducted by

[87] German Chambers Legislative Proposal 2021, Article 1 – Amending the Courts Constitution Act (*Änderung des Gerichtsverfassungsgesetzes*), Draft Articles 119 (4) and 119b Courts Constitution Act.
[88] Ibid., Article 4 – Amending the Law on Court Fees (*Änderung des Gerichtskostengesetzes*) and Article 5 – Amending the Law on Lawyers' Fees (*Änderung des Gesetzes über die Vergütung der Rechtsanwältinnen und Rechtsanwälten*).
[89] Ibid., Article 2 – Amending the Code of Civil Procedure (*Änderung der Zivilprozessordnung*), Draft Article 510 (5) and (6).
[90] Dutch Council for the Judiciary, NCC Plan 2015.
[91] *Ibid.*, 4-5; Parliamentary Papers II 2016/17 (*Kamerstukken II*), 34 761, no. 3, Amendments to the Code of Civil Procedure and the Civil Court Fees Act with regard to the introduction of English-language case law at the international commercial chambers of the Amsterdam District Court and the Amsterdam Court of Appeal (*Wijziging van het Wetboek van Burgerlijke Rechtsvordering en de Wet griffierechten burgerlijke zaken in verband met het mogelijk maken van Engelstalige rechtspraak bij de internationale handelskamers van de rechtbank Amsterdam en het gerechtshof Amsterdam*), Explanatory Statement (*Memorie van Toelichting*), 1-3 (hereafter: NCC Law 2017).
[92] Eddy Bauw, 'Commercial Litigation in Europe in Transformation: The Case of the Netherlands Commercial Court' (2019) 12 Erasmus Law Review 15, 16.
[93] NCC Plan 2015, 4, 9, 12; NCC Explanatory Statement 2017, 4; Eddy Bauw, 'Ondernemerschap in de rechtspleging. Over de kansen van een Netherlands Commercial Court' (2016) Ars Aequi 97; Eddy Bauw, 'Procederen in internationale handelszaken bij een Netherlands Commercial Court' (2016) Trema 182; Bauw (n 92) 17.

the Boston Consulting Group,[94] the judiciary's plan highlighted the uncertain and in any case small number of cases coming before the NCC during its first years. The uncertainty of such a start-up phase did not justify broad legislative amendments and vast expenses.[95] With these goals in mind, the NCC law restricted itself to two main amendments offering the legal basis for the pronouncement of court judgments in the English language and introducing the higher – when compared to the ordinary Dutch courts – court fees.[96]

In contrast to the Paris International Chambers or the German International Commercial Courts, which are mostly organisational measures, rudimental yet legislative amendments paved the way to the NCC. The reasons behind the creation of the NCC therefore found formal expression in the NCC law. The Explanatory Statement regarding NCC law lays down the need for and justifies its establishment. As well as reversing the downward trend of international commercial disputes heard by the Dutch courts and thereby assisting them in retaining their relevance,[97] the NCC would also bring economic benefits. It would strengthen the Dutch business climate and raise the competitiveness of the Dutch economy.[98] It would save Dutch companies, especially small and medium-sized enterprises, the costs of litigating abroad, especially before the more expensive English courts; speed up economic activities; and boost the Dutch legal services sector.[99]

It therefore becomes apparent that a number of incentives prompted the creation of European international commercial courts. Nevertheless, it is justifiable to assert that Brexit fuelled the surge or resurgence of international commercial courts in Europe.[100] The establishment of

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[94] The Boston Consulting Group, *Market Survey Netherlands Commercial Court* (*Marktverkenning Netherlands Commercial Court*) (hereafter: The Boston Consulting Group, Market Survey NCC).
[95] NCC Plan 2015, 9.
[96] Art. 30r Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*), available in English in Alex Burrough, Stephen Machon, Duco Oranje, Lincoln Frakes and Willem Visser (eds), *Code of Civil Procedure, Selected Sections and the NCC Rules* (Eleven International Publishing 2018) (hereafter: DCCP); Art. 9a Act on Court Fees in Civil Proceedings (*Wet griffierechten in burgerlijke zaken*); Art. 10.1. Council for the Judiciary (*Raad voor de Rechtspraak*), Rules of Procedure for the International Commercial Chambers of the Amsterdam District Court (NCC District Court) and the Amsterdam Court of Appeal (NCC Court of Appeal), NCC Rules/NCCR, December 2018, available at <https://www.rechtspraak.nl/SiteCollectionDocuments/ncc-procesreglement-en.pdf> accessed January 2022.
[97] NCC Plan 2015, 17; The Boston Consulting Group, Market Survey NCC, 2.
[98] NCC Plan 2015, 7-8, 17-18.
[99] NCC Plan 2015, 6-7, 17; The Boston Consulting Group, Market Survey NCC, 15; NCC Law, Explanatory Statement 2017, 2. See also Bauw (n 93) Ars Aequi 94-95; Bauw (n 93) 15-16.
[100] Eddy Bauw, 'Een Netherlands Commercial Court vanuit Rechtsplegingsperspectief', 9 in Bauw, Koster and Kruisinga (n 20); Michael Stürner, 'Deutsche Commercial Courts?' (2019) 74 Juristenzeitung 1122, 1124; Jeroen A. van der Weide, 'The Netherlands Commercial Court (NCC): Its Challenges and Perspectives', 82 in Lei Chen and André Janssen (eds), *Dispute Resolution in China, Europe and World, Ius Gentium: Comparative Perspectives on Law and Justice 79* (Springer 2020).

international commercial courts was the culmination of an ongoing 'courtly competition'[101] in Europe that Brexit further sealed.[102] It is claimed that the United Kingdom, and in particular London, could lose some of its charm as a global legal hub if Brexit results in the non-applicability of the European regulations such as the Brussels Ibis Regulation[103] ensuring the recognition and enforcement of choice of court agreements; the uniform allocation of jurisdiction between the courts in different Member States; and the expedited recognition and enforcement of court judgments.[104]

2.5. A Court For 'The Belt and Road Initiative': The China International Commercial Courts

In mid-2018, international commercial courts opened up in the Chinese dispute resolution market. China established the First International Commercial Court in Shenzhen and the Second International Commercial Court in Xi'an (hereafter collectively: CICC). The CICC deals with international commercial disputes between private parties that arise from the 'Belt and Road Initiative'.[105]

The initiative was introduced by President Xi Jinping in September 2013. It is a development strategy involving investments and infrastructure projects situated on various continents, and aims at improving China's trade connectivity and enhancing its regional and global influence. The CICC was created to safeguard the smooth implementation of the 'Belt and Road

[101] The Economist, 'Courtly Competition, Foreign Jurisdictions Try to Lure Legal Business from London', 31 August 2017, available at <https://www.economist.com/finance-and-economics/2017/08/31/foreign-jurisdictions-try-to-lure-legal-business-from-london> accessed January 2022.

[102] For a civil justice systems competition, see Stefan Vogenauer, 'Regulatory Competition Through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence' (2013) European Review of Private Law 13; Gerhard Wagner, *Rechtsstandort Deutschland im Wettbewerb* (Beck 2017); Erlis Themeli, *The Great Race of Courts, Civil Justice System Competition in the European Union* (Eleven International Publishing 2018); Xandra Kramer and John Sorabji, 'International Business Courts in Europe and Beyond – A Global Competition for Justice?' (2019) 12 Erasmus Law Review 1.

[103] Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), *OJ* 2012, L 351/1.

[104] Mukarrum Ahmed, 'Brexit and English Choice of Courts Agreements: A Survey of the Post-referendum Legal Landscape' (2016) European Business Law Review 989; Burkhard Hess, 'Back to the Past: Brexit und das europäische internationale Privat- und Verfahrensrecht' (2016) Praxis des Internationalen Privat- und Verfahrensrecht 409; Giesela Rühl, 'Die Wahl englischen Rechts und englischer Gerichte nach dem Brexit' (2017) 72 Juristenzeitung 72; Michael Sonnentag, *Die Konsequenzen des Brexit für das Internationale Privat- und Zivilverfahrensrecht* (Mohr Siebeck 2017).

[105] China International Commercial Court Official Website, About the CICC, Introduction, available at <http://cicc.court.gov.cn/html/1/219/193/195/index.html>; Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions, available at <http://cicc.court.gov.cn/html/1/219/208/210/819.html>; Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court, Preamble available at <http://cicc.court.gov.cn/html/1/219/208/210/817.html> all accessed January 2022.

Initiative' by offering a dispute resolution mechanism and is therefore part of its judicial backbone.

In line with some of the international commercial courts in Europe, the CICC was not the product of constitutional amendments and legislative acts, but was created on the basis of an interpretation issued by the Supreme People's Court.[106] Consequently, the court is deeply embedded in the Chinese court and legal system, and has only a few innovative features.[107] Although most international commercial courts conduct trials in English, Chinese remains the language of CICC proceedings.[108] Unlike other international commercial courts, only Chinese nationals may serve as judges at the CICC.[109] Lastly, the CICC combines litigation, mediation, and arbitration by promoting alternative dispute resolution methods and hosting international commercial mediation and arbitration institutions under its roof.[110] However, in line with Chinese laws,[111] only domestic mediation and arbitration institutions may participate in the CICC's 'one-stop' dispute resolution centre.[112]

Leaving aside the courts' Chinese characteristics, national legislation further undermines the CICC's potential to attract international litigants. For instance, although the CICC establishes

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[106] Zhengxin Huo and Man Yip, 'Comparing the International Commercial Courts of China with the Singapore International Commercial Court' (2019) 68 International and Comparative Law Quarterly 908-909.

[107] Ning Zhao, 'The CICC: An Endeavour Towards the Internationalization and Modernization of Chinese Courts' 161, 175-176 in Kramer and Sorabji (n 1); Huo and Yip (n 106) 936; Sheng Zhang, 'China's International Commercial Court: Background, Obstacles and the Road Ahead' 11 (2020) Journal of International Dispute Settlement 150, 164-165.

[108] Art. 11 and 262 Civil Procedure Law of the People's Republic of China (2017 Amendment), available at <http://cicc.court.gov.cn/html/1/219/199/200/644.html> accessed January 2022 (hereafter: CPL).

[109] Art. 4 Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court; Art. 33 Law on the Organization of the People's Court; Art. 12 (1) Judges Law of the People's Republic of China (2019), available at <https://www.chinalawtranslate.com/en/judges-law-of-the-prc-2019/>. For the CICC judges, see CICC Official Website, About the CICC, Judges, available at <http://cicc.court.gov.cn/html/1/219/193/196/index.html> all accessed January 2022.

[110] Art. 11 Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court.

[111] Art. 10-15 Arbitration Law of the People's Republic of China, available at <http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201312/20131200432698.shtml>. However, see Art. 4 *General Plan for Lin'gang New Area of China (Shanghai) Pilot Free Trade Zone, available in Chinese at* <http://www.gov.cn/zhengce/content/2019-08/06/content_5419154.htm>; Martin Rogers and Noble Mak, 'Foreign Administered Arbitration in China: The Emergence of a Framework Plan for the Shanghai Pilot Free Trade Zone', 6 September 2019, *Kluwer Arbitration Blog*, available at <http://arbitrationblog.kluwerarbitration.com/2019/09/06/foreign-administered-arbitration-in-china-the-emergence-of-a-framework-plan-for-the-shanghai-pilot-free-trade-zone/>; Jian Zhang, 'Can Foreign Arbitration Institutions Conduct Arbitration in Mainland China?', 13 October 2019, *China Justice Observer*, available at <https://www.chinajusticeobserver.com/a/can-foreign-arbitration-institutions-conduct-arbitration-in-mainland-china> all accessed January 2022.

[112] Notice of the Supreme People's Court on Inclusion of the First Group of International Commercial Arbitration and Mediation Institutions in the "One-stop" Diversified International Commercial Dispute Resolution Mechanism, 5 December 2018, available at <http://cicc.court.gov.cn/html/1/219/208/210/1144.html> accessed January 2022. See also Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions (n 105).

its jurisdiction based on choice of court agreements, national rules requiring an 'actual connection' between the chosen court and the dispute put a strain on the court's consensual jurisdiction.[113] In a similar vein, the parties' choice of foreign law is frequently disregarded by Chinese courts, and Chinese law is applied instead.[114] Taking further into consideration that Chinese judgments enjoy limited recognition and enforcement abroad,[115] it becomes apparent that the establishment of an international commercial court in China is just one of the many steps required to improve the country's judicial system and its attractiveness to foreign litigants.

As previously mentioned, the CICC deals with 'Belt and Road' disputes. However, a closer look at the court's procedural rules reveals that even disputes lacking a connection to the initiative may be heard by the court.[116] After all, the 'Belt and Road Initiative' is constantly expanding to involve more countries and projects. The CICC's dubious link to the 'Belt and Road Initiative' and its lack of international characteristics supports the claim that the court is mainly a symbol.[117] It symbolises China's ongoing efforts to revamp its justice system and internationalise its judicial profile. The CICC contributes to the initiative's judicial airs, while the initiative lends to the CICC's visionary graces. Lastly, the court's stark Chinese elements have invited criticism that the CICC is an expression of China's judicial nationalism.[118] It is

[113] Huo and Yip (n 106) 915, 922; Georgia Antonopoulou, 'Procedure before International commercial and ordinary courts: A comparative perspective' in Brekoulakis and Dimitropoulos (n 1). For the actual connection requirement, see Guangjian Tu, *Private International Law in China* (Springer 2016) 131; Yong Gan, 'Jurisdiction Agreements in Chinese Conflict of Laws: Searching for Ways to Implement the Hague Convention on Choice of Court Agreements in China' (2018) Journal of Private International Law 295, 304.

[114] Art. 17 Supreme People's Court, Interpretation (1) on the Implementation of Act on the Application of Laws on Foreign-related Civil Relationships of the People's Republic of China (*Zuigao Renmin Fayuan Guanyu Shivong Zhonghua Renmin Gongheguo Shewai Minshi Faly Guanxi Shiyongfa Ruogan Wenti de Jieshi Yi*), Bulletin of Supreme People's Court 24 (*Zuigao Renmin Fayuan Gongbao*) 24. See also Zhengxin Huo, 'Two Steps Forward, One Step Back: A Commentary on the Judicial Interpretation on the Private International Law Act of China' (2013) Hong Kong Law Journal 685, 702, 709-709; Qingkun Xu, 'The Codification of Conflicts of Law in China: A Long Way to Go' (2017) 65 American Journal of Comparative Law 919, 937-940; Zhengxin Huo, 'Proof of Foreign Law under the Background of the Belt and Road Initiative' 125, 136 in Poomintr Sooksripaisarnkit and Sai Ramani Garimella (eds), *China's One Belt One Road Initiative and Private International Law* (Routledge 2018).

[115] Weidong Zhu, 'Some Considerations on the Civil, Commercial and Investment Dispute Settlement Mechanisms Between China and the other Belt and Road Countries' (2017) Transnational Dispute Settlement 1, 10-12; Jiaxiang Hu and Jie (Jeanne) Huang, 'Dispute Resolution Mechanisms and Organizations in the Implementation of 'One Belt, One Road' Initiative: Whence and Whither' (2018) 52 Journal of World Trade 815, 831-833; King Fung Tsang, 'Enforcement of Foreign Commercial Judgments in China' (2018) Journal of Private International Law 262; Zheng Sophia Tang, 'The Belt and Road and Cross-border Judicial Cooperation' (2019) 49 Hong Kong Law Journal 121, 141-144.

[116] Art. 2 Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court.

[117] Zhao (n 107) 185.

[118] Jacob Mardell, 'Dispute Settlement on China's Terms: Beijing's New Belt and Road Courts', *Mercator Institute for China Studies*, 14 February 2018, available at <https://www.merics.org/en/blog/dispute-settlement-chinas-terms-beijings-new-belt-and-road-courts> accessed January 2022; Huo and Yip (n 106) 912, 922-923. See

perceived as a court aiming to retain China's control over disputes involving Chinese parties and, in particular, state-owned enterprises currently active in the various state-backed 'Belt and Road' projects. Nevertheless, the previous sections have stressed that each country establishing an international commercial court aims at providing national companies, among others, with an additional judicial avenue and at increasing the application of their national laws through the choice of their courts.

2.6. The Fall of the Court: The Brussels International Business Court

In October 2017, the Belgian government announced its intention to create an international commercial court – the BIBC.[119] After being greeted with a prominent lack of enthusiasm, in March 2019 the legislative proposal for the establishment of the BIBC was finally shelved.[120] In the case of the BIBC, it is not the incentives driving its establishment that are interesting – these are along the lines of the rest of the European international commercial courts – but the disincentives for establishing an international commercial court. While, as noted, France, Germany, and the Netherlands had their reasons for establishing an international commercial court, it appears that Belgium had reasons not to.

Although some international commercial courts promise arbitration-like court proceedings, the BIBC was undoubtedly the court that came the closest to arbitration. The court would apply not the Belgian rules of civil procedure but the UNCITRAL Model Law on International Commercial Arbitration[121].[122] The Model Law was chosen because it reconciles civil and common law approaches especially with regard to its evidentiary rules, and offers parties versed in arbitration a familiar and therefore predictable set of rules.[123]

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also Zhou Qiang, the President of the Supreme People's Court, Speech on the 1st Session of the Thirteenth Plenary Session of the Eighteenth National People's Congress, 9 March 2018, available at <http://cicc.court.gov.cn/html/1/219/208/210/777.html> accessed January 2022, where the CICC is described as a measure for providing '*solid judicial protection for overseas trade and investment of Chinese enterprises*'.

[119] BIBC Preliminary Draft Law, Explanatory Statement, 5. See also Sophia Tang, 'EU Member State Sees Opportunities in Brexit: Belgium is Establishing a New English-language Commercial Court', *Conflict of Laws.net*, 8 November 2017 available at <http://conflictoflaws.net/2017/eu-member-state-sees-opportunities-in-brexit-belgium-is-establishing-a-new-english-language-commercial-court/>; Guillaume Croissant, 'The Belgian Government Unveils its Plan for the Brussels International Business Court (BIBC)', *Conflict of Laws.net*, 22 May 2018, available at <http://conflictoflaws.net/2018/the-belgian-government-unveils-its-plan-for-the-brussels-international-business-court-bibc/> accessed January 2022.

[120] Matthias Verbergt, 'Controversiëlle 'Kaviarrechtbank' van Geens wordt begraven', *De Standaard*, 21 March 2019, available at <https://www.standaard.be/cnt/dmf20190321_04272272> accessed January 2022.

[121] BIBC Preliminary Draft Law 2018, Art. 2.

[122] UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf> accessed January 2022 (hereafter: Model Law).

[123] BIBC Preliminary Draft Law 2018, Explanatory Statement, 11. See also Erik Peetermans and Philippe Lambrecht, 'The Brussels International Business Court: Initial Overview and Analysis' (2019) 12 Erasmus Law Review 42, 52.

The exclusion of Belgian civil procedure law and the application of arbitration rules exposed the BIBC to severe criticism. It was characterised as being an arbitral tribunal in the guise of a state court, and therefore its very identity as a court was called into question. Moreover, the application of arbitration rules challenged the court's added value. The Belgian Supreme Court characteristically observed that the draft proposal brought to mind a previous law amending Belgian arbitration law,[124] and thus had an air of *déjà vu*. Since the Belgian arbitration law is already based on the UNCITRAL Model Law, the BIBC lacked distinctive and attractive features.[125]

Lastly, due to scarce public funds, the BIBC would have to be budget neutral.[126] Parties litigating before the BIBC would need to pay on top of the enrolment fees a flat fee amounting to 20,000 Euros on first instance.[127] Due to its higher court fees the BIBC was considered a court for the few, for rich companies able to afford it. It was feared that the court would create a two-tiered justice system.[128] Owing to these and other objections targeting the use of English as the language of court proceedings and the appointment procedure of the judges, the BIBC proposal was finally withdrawn.[129]

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[124] Act of 24 June 2013 Amending the Sixth Part of the Judicial Code Relating to Arbitration, published in the Belgian Official Gazette of 28 June 2013 and the (limited) amendments made by the Act of 25 December 2016 to Amend the Legal Status of Prisoners and the Supervision of Prisons, and Containing Various Provisions Related to the Judicial Authorities, published in the Belgian Official Gazette of 30 December 2016.

[125] André Henkes, *About Cross-border Taxation, other International Economic Issues and the Contribution of the Court of Cassation* (*Over grensoverschrijdende fiscaliteit, andere internationale economische vraagstukken en de bijdrage van het Hof van Cassatie*), Ceremonial Opening Session of the Belgian Supreme Court (*Plechtige openingszitting van het Hof van Cassatie van België*), 3 September 2018, II. Incidental Considerations on the Brussels International Business Court and Crypto-currencies, nr. 35, available at <https://justitie.belgium.be/sites/default/files/downloads/mercuriale2018_nl_site.pdf> (hereafter: Henkes, Ceremonial Opening Session of the Belgian Court of Cassation 2018); Open Letter from the Magistrates of the Brussels Court of Appeal (*Lettre ouverte des magistrats de la cour d'appel de Bruxelles*), 1 December 2018, available at <http://o0.llb.be/file/5a218368cd7095d1cd315c1b.pdf> all accessed January 2022. See also Geert van Calster, 'The Brussels International Business Court: A Carrot Sunk by Caviar' 107, 111 in Kramer and Sorabji (n 1).

[126] Policy Statement of the Minister of Justice (*Algemene Beleidsnota/Note de politique générale*), Parliamentary Documents *(Parl. St./Doc. parl.):* Belgian House of Representatives (*Belgische Kamer van Volksvertegenwoordigers/ Chambre de représentants de Belgique*) 54, 2708/029, 49.

[127] BIBC Preliminary Draft Law 2018, Explanation by Article (*Artikelsgewijze toelichting*), Art. 37.

[128] Verbergt (n 120).

[129] See Council of State (*Conseil d' État/Raad van State*), Legislation Section *(Section de Législation/Afdeling Wetgeving*), *Opinion 62.411/2/AG of 2 March 2018 on a Preliminary Draft Law 'Establishing the Brussels International Business Court'* (*Avis 62.411/2/AG du 2 mars 2018 sur un avant-projet de loi 'instaurant la Brussels International Business Court/Advies 62.411/2/AG van 2 Maart 2018 over een voorontwerp van wet houdende oprichting van het Brussels International Business Court*); High Council of Justice (*Hoge Raad voor de Justitie/ Conseil Superieur de la Justice*), *Ex Officio Opinion* (*Avis d'office*), *Preliminary Draft Law Establishing the Brussels International Business Court* (*Avant-projet de loi instaurant la Brussels International Business Court*), March 2018, 2-6, available at <https://hrj.be/nl/publicaties/2018/ambtshalve-advies-voorontwerp-van-wet-houdende-de-oprichting-van-het-brussels-international-business-court> accessed January 2022 (hereafter: High Council of Justice, Opinion on BIBC Preliminary Draft Law 2018).

The application of arbitration rules to the exclusion of Belgian procedural rules made the BIBC a true hybrid court.[130] Nevertheless, its innovative – even radical – institutional and procedural features contributed to its collapse. But what mainly led to the fall was the general state of civil justice in Belgium. This factor might also explain the proposal's stark desire to 'unplug' the BIBC from the application of Belgian law and to apply arbitration rules.[131] In a country with piling case dockets and severe cuts in court funding, the BIBC seemed a procedural luxury, advantageous to business disputes but detrimental to other kinds of disputes.[132] While a specialised court with proceedings tailored to the needs of international commercial disputes might improve access to justice for international commercial litigants, it could at the same time neglect the fact that other disputes also deserve specialised fora with proceedings adjusted to their particular needs.[133] Consequently, the plan for the creation of an international commercial court in Belgium left a bad taste suggestive of a rich man's justice that would create procedural inequality and a one-percent procedure.[134]

3. Why Are International Commercial Courts Forum Selling?

The above illustrates that international commercial courts are presented as the means to many ends. They improve the business climate, attract investment, generate business for the legal services sector, and enhance access to justice in international commercial disputes. Among the various reasons behind the establishment of these courts, the economic ones are predominant. This part explains how the broader, economic policies underpinning the establishment of international commercial courts prompts them to attract cases and engage in forum selling. It also explores how some of the courts' features may similarly translate into forum selling motives.

Recall that according to a more conventional account, public courts and judges lack the economic incentives to attract cases and are therefore untroubled by competitive forces. Low court fees and fixed judicial salaries insulate the courts and judges from entrepreneurial aspirations.[135] However, according to the literature, there are various institutional and

[130] van Calster (n 125) 114.
[131] BIBC Preliminary Draft Law, Explanatory Statement, 10-11.
[132] See High Council of Justice, Opinion on BIBC Preliminary Draft Law, 6-7; Henkes, *Ceremonial Opening Session of the Belgian Court of Cassation 2018, II. Incidental Considerations on the Brussels International Business Court and Crypto-currencies*, nr. 34. See also the criticism by the Belgian judge Ilse Couwenberg as reported in Georgia Antonopoulou and Erlis Themeli, 'Seminar Report: Innovating International Business Courts, 10 July 2018, Erasmus University Rotterdam' (2019) 5 European Review of Private Law 1209, 1214.
[133] High Council of Justice, Opinion on BIBC Preliminary Draft Law, 7-8.
[134] Brooke D. Coleman, 'One Percent Procedure' (2016) 91 Washington Law Review 1005.
[135] Vogenauer (n 102) 27-29.

individual reasons as to why some courts engage in forum selling. Institutional reasons focus on the courts and the states hosting them and explain why these may have an interest in attracting cases. Individual reasons have to do with judges, and why they may have a personal interest in an increased caseload. The most prominent institutional reasons are the prospects of increased court revenue and benefits for the local economy.[136] A larger number of incoming cases generates revenue from court fees, which can also be used to cross-subsidise other courts within a state. For instance, Bechtold, Frankenreiter, and Klerman claim that the court fees earned from an increased patent caseload at the Regional Court of Düsseldorf are a major contributor to the funding of the whole justice system in the Federal State of North Rhine-Westphalia.[137] At the same time, attracting litigation may have a positive spill-over effect on the local economy.[138] Foreign litigants benefit the local economy, because they need a city hotel room in which to stay, a local restaurant in which to dine, and, more significantly, local counsel to represent them in court.[139]

As regards judges, although a greater caseload does not increase judicial salaries, it is claimed in the literature that other non-monetary motives encourage judges to engage in forum selling. These motives are mainly the intellectual challenge of handling complex cases and an increased reputation. It is asserted that judges particularly enjoy the intellectual challenge that comes with attracting complex disputes in specialised fields of law.[140] The increased expertise in a specialised field of law results in turn in an enhanced reputation. Just as most other people often like to be famous, judges like to be popular with the local bar or they enjoy the media attention that high-stake cases may attract.[141] However, one cannot completely rule out the prospects of indirect economic gain. Judges may derive additional income from 'off the bench' activities, such as giving speeches at conferences or authoring books.[142]

With regard to international commercial courts, economic incentives have a predominant influence on the courts and the judges at these courts in terms of competing for cases. This is

[136] Jonas Anderson, 'Court Competition for Patent Cases' (2015) 163 University of Pennsylvania Law Review 631, 664-665; Daniel Klerman and Greg Reilly, 'Forum Selling' (2016) 89 Southern California Law Review 241, 272-275; Stefan Bechtold, Jens Frankenreiter and Daniel Klerman, 'Forum Selling Abroad' (2019) 92 Southern California Law Review 487, 519-520.
[137] Bechtold, Frankenreiter and Klerman (n 136) 518-519.
[138] Klerman and Reilly (n 136) 271-275.
[139] Klerman and Reilly (n 136) 273-274.
[140] Anderson (n 136) 661-662; Klerman and Reilly (n 136) 271; Bechtold, Frankenreiter and Klerman (n 136) 514, 535.
[141] Anderson (n 136) 636-637; Klerman and Reilly (n 136) 271-272; Bechtold, Frankenreiter and Klerman (n 136) 516, 535-536.
[142] Klerman and Reilly (n 136) 275-277.

because, as noted above, multiple international commercial courts are part of broader policy objectives to attract foreign investment and create business for the legal services sector. In addition, some international commercial courts impose fees higher than those of the ordinary courts, while others condition judicial salaries on caseload. Consequently, in the context of international commercial courts, economic incentives play a significant role in prompting them to engage in forum selling.

3.1. Benefits For the National Economy

International commercial courts benefit a state's economy by improving the business climate and creating jobs for the legal services sector. In contrast to the literature on forum selling that focuses on courts participating in an intrastate competition, the commercial courts in question compete on an international level. As such, they benefit not only the local but also the national economies of the host countries.

The World Bank Doing Business Reports exemplify the link between justice and the economy. According to the reports, specialised commercial courts facilitate contract enforcement, and are therefore regarded as being conducive to a good business climate.[143] The explicit aim of some countries that established international commercial courts was, among others, to climb the ladder of international rankings.[144] The role of courts in attracting investment indicates that the competition among civil justice systems may not be a self-standing one but a corollary of another competition; namely, the competition to attract companies and foreign investment. The fact that international commercial courts in Europe were established in the wake of Brexit indicates that the courts could be one of the many 'attractions' to lure corporations away from the city of London. Similarly, the fact that the creation of the Paris International Chambers followed on the heels of a report by the Legal High Committee for Financial Markets of Paris on the implications of Brexit on judicial cooperation in civil and commercial matters hints at the chambers' potential contribution in attracting corporate business.[145] This rationale is

[143] World Bank Group, *Doing Business 2020, Comparing Business Regulation in 190 Economies*, 91, 96, 98 109 126 available at <https://openknowledge.worldbank.org/bitstream/handle/10986/32436/9781464814402.pdf> accessed January 2022. See also Kramer and Sorabji (n 102) 1; Sai Ramani Garimella and M.Z. Ashraful, 'Commercial Courts in India – All for Ease of Doing Business' 187 in Kramer and Sorabji (n 1); Nicholas Mouttotos, 'Reform of Civil Procedure in Cyprus – Delivering Justice in a More Efficient and Timely Way' (2020) 49 Common World Law Review 99, 125-127.

[144] Dutch Council for the Judiciary, NCC Plan 2015, 7; QICDRC Official Website, Media Centre, 'Qatar International Court Contributes in Two of the World Bank's Indexes', 27 October 2019, available at <Qatar International Court contributes to enhancing World Bank's Qatar Indexes | The Peninsula Qatar> accessed January 2022.

[145] Legal High Committee for Financial Markets of Paris, *Report on the Implications of Brexit on Judicial Cooperation in Civil and Commercial Matters*, 30 January 2017, available at <https://publications.banque-

especially evident in the case of international commercial courts in the Middle East and Kazakhstan. These courts are established in Special Economic Zones, and are part of broader strategies to attract offshore corporate and financial services.[146]

Investment attraction considerations aside, international commercial courts may directly benefit national economies. They attract litigation and thereby business for the legal services sector. Legal services contribute directly to GDP as a result of law firms' turnover and third-party funders.[147] Especially in economies that rely heavily on the services sector, legal services are considered a vital part of the economy. For instance, the SICC was established as part of Singapore's broader policy objective to become Asia's dispute resolution hub.[148] In a conference speech in 2015, Indranee Rajah, the former Senior Minister of State for Law, underlined that the SICC aimed to attract disputes that would otherwise not end up in Singapore. The court's objective was to attract litigation and thereby boost legal services.[149]

Similar to forum selling in the context of domestic courts, forum selling in the context of international commercial courts may have positive spill-over effects for other economic sectors as well. More significant in this regard are the benefits for small- and medium-sized enterprises. Some international commercial courts were launched as an alternative to litigation abroad or arbitration, and are therefore expected to be of particular benefit to domestic companies that are unable to bear the increasing costs of foreign courts and arbitration.[150] In addition, it is expected that attracting litigation will translate into business for hotels, restaurants, couriers, and translation services.[151]

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france.fr/sites/default/files/rapport_05_a.pdf> accessed January 2022. See also German Chambers Legislative Proposal 2021, Explanatory Statement, 11.

[146] Zambrana-Tevar (n 31) 122; Bookman (n 1) 240-246. Similarly, literature on the Delaware Court of Chancery and its appeal to litigants studies the court as one of the many advantages Delaware offers to corporations and associates the court with the broader competition for corporate charters in the United States. See *inter alia* William J. Moon, 'Delaware's New Competition' (2020) 114 Northwestern University Law Review 1403.

[147] Dutch Council for the Judiciary, NCC Plan 2015, 8. See also Geert van Calster, 'LugaNON. My brief thoughts on the European Commission's refusal to support the UK's accession to Lugano 2007, and a clarification of the procedure and required majorities' *GAVC Law – Geert van Calster*, available at <https://gavclaw.com/2021/05/07/luganon-my-brief-thoughts-on-the-european-commissions-refusal-to-support-the-uks-accession-to-lugano-2007-and-a-clarification-of-the-procedure-and-required-majorities/> accessed January 2022.

[148] SICC Committee Report 2013, para. 4 (a); SICC Official Website, Establishment of the SICC, available at <https://www.sicc.gov.sg/about-the-sicc/establishment-of-the-sicc> accessed January 2022.

[149] Indranee Rajah, *Speech by Senior Minister of State for Law at the Litigation Conference 2015*, 16 March 2015, paras. 15, 25, available at <https://app.mlaw.gov.sg/news/speeches/speech-by-senior-minister-of-state-for-law--indranee-rajah--at-t> accessed January 2022.

[150] Dutch Council for the Judiciary, NCC Plan 2015, 7; German Chambers Legislative Proposal 2021, Explanatory Statement, 11.

[151] Ibid. 8.

3.2. Increased Court Fees

As previously remarked, some international commercial courts impose higher fees compared to ordinary courts within the same jurisdiction. In particular, the NCC charges 15,000 Euros per party on first instance and 20,000 Euros per party on appeal.[152] The draft proposal for the establishment of the BIBC proposed increased court fees amounting to 20,000 Euros on first instance.[153] Similarly, the SICC levies higher court fees calculated on the basis of a distinct fee schedule.[154] In Europe, the courts' higher fees encountered criticism. The fear of a two-tiered justice system stalled adoption of the NCC law by the Dutch Senate, and was one of the reasons the BIBC proposal was ultimately withdrawn from the Belgian parliament.[155]

The justification for higher court fees has to do with establishing international commercial courts in a budget-neutral way, where parties themselves bear the costs of high-value, complex, and time-consuming litigation. However, the fees of international commercial courts do not only cover costs but may also result in a profit. For instance, the NCC Market Survey, conducted by the Boston Consulting Group, estimated that in the long term the NCC should annually receive 100 cases on first instance and 25 cases on appeal.[156] This means that by the time the NCC indeed reaches this approximation, the start-up costs, estimated at 3.8 million Euros, will be paid and the NCC will start making a profit. When asked how the NCC proceeds would be used, the Dutch Minister of Justice replied that part of the NCC's revenues would cross-subsidise the ordinary Dutch courts.[157] In contrast to the NCC, the Paris International Chambers, the Chambers for International Commercial Disputes established in Frankfurt and Hamburg, and the Commercial Courts established in Stuttgart and Mannheim charge parties

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[152] Art. 9a Act on Court Fees in Civil Proceedings (*Wet griffierechten in burgerlijke zaken*).
[153] BIBC Preliminary Draft Law, Explanatory Statement, Article 37.
[154] SICC Practice Directions, Part VII, Fees. See also Lawrence Teh, 'Cost Recovery in the SICC: A Different Regime' available at <https://www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/-costs-recovery-in-the-sicc-a-different-regime-mr-lawrence-teh-dentons-rodyk-davidson-llp_8a224afc-96aa-48c4-8394-7c83ffc3f3bd.pdf> accessed January 2022.
[155] Parliamentary Papers I 2017/2018 (*Kamerstukken I*), 34761, A, Amendments to the Code of Civil Procedure and the Civil Court Fees Act With Regard to the Introduction of English-language Case Law at the International Commercial Chambers of the Amsterdam District Court and the Amsterdam Court of Appeal (*Wijziging van het Wetboek van Burgerlijke Rechtsvordering en de Wet Griffierechten Burgerlijke Zaken in Verband Met Het Mogelijk Maken van Engelstalige Rechtspraak bij de International Handelskamers van de Rechtbank Amsterdam en het Gerechtshof Amsterdam*), Preliminary Report of the Standing Committee for Justice and Security (*Voorlopig Verslag Van De Vaste Commissie Voor Justitie and Veiligheid*), 17 April 2018, 2-3; Verbergt (n 120). See also Kramer and Sorabji (n 102) 2.
[156] The Boston Consulting Group, Market Survey NCC, 6.
[157] Parliamentary Papers I 2017/2018 (*Kamerstukken II*), 34761, B, Amendments to the Code of Civil Procedure and the Civil Court Fees Act With Regard to the Introduction of English-language Case Law at the International Commercial Chambers of the Amsterdam District Court and the Amsterdam Court of Appeal (*Wijziging van het Wetboek van Burgerlijke Rechtsvordering en de Wet Griffierechten Burgerlijke Zaken in Verband Met Het Mogelijk Maken van Engelstalige Rechtspraak bij de International Handelskamers van de Rechtbank Amsterdam en het Gerechtshof Amsterdam*), Statement of Reply (*Memorie van Antwoord*), 31 Mei 2018, 5.

the regular court fees.[158] However, the latest legislative proposal for the establishment of Chambers for International Commercial Disputes and Commercial Courts in Germany slightly raises the court and statutory legal fees for high-value claims.[159] This is very important for Germany, which has traditionally been more reluctant than other European Member States to establish international commercial courts and participate in a global competition for courts. It therefore becomes apparent that some international commercial courts could generate significant revenue by imposing increased court fees, and therefore possess the economic incentive to attract cases and engage in forum selling.

3.3. Reputation

Although strong, these economic incentives, do not fully explain why international commercial courts and their judges engage in forum selling. As in the case of a domestic forum selling, reputation is an additional reason that international commercial courts engage in the activity. However, in the context of international commercial courts, reputation functions as a forum selling incentive, not only for the judges but also for international commercial courts themselves and the surrounding justice systems.

As mentioned earlier, international commercial courts are significant not only for the justice system but also for the national economy and the legal services sector of host countries. Therefore, being appointed as a judge to an international commercial court signals expertise in international commercial dispute resolution and elevated standing in the judicial community. A glance at the international judges appointed to these courts reveals indeed that they are internationally renowned legal figures. An appointment as an international judge verifies and enhances their worldwide reputation. Although international commercial courts in Europe are staffed by national judges, the fact that these were appointed to an international commercial court because of their increased expertise and English language skills singles them out among their peers and boosts their reputation. Particularly in countries like the Netherlands, where the NCC judges were chosen from among a national pool of judges across the country,[160] an NCC

[158] Chamber for International Commercial Disputes at the Regional Court Frankfurt am Main Official Website, available at <https://ordentliche-gerichtsbarkeit.hessen.de/ordentliche-gerichte/lgb-frankfurt-am-main/lg-frankfurt-am-main/chamber-international>; Regional Court Hamburg Official Website, available at <https://justiz.hamburg.de/landgericht-hamburg/zustaendigkeit/>; Commercial Court Stuttgart/ Mannheim Official Website, available at <https://www.commercial-court.de/commercial-court> all accessed January 2022.
[159] German Chambers Legislative Proposal 2021, Article 4 – Amending the Law on Court Fees (*Änderung des Gerichtskostengesetzes*) and Article 5 – Amending the Law on Lawyers' Fees (*Änderung des Gesetzes über die Vergütung der Rechtsanwältinnen und Rechtsanwälten*).
[160] Bauw (n 92) 17.

appointment may result in an enhanced reputation. Therefore, being appointed to an international commercial court increases a judge's national and international standing.

In a similar vein, international commercial courts increase the reputation and thereby the overall attractiveness of national justice systems to foreign parties. Such courts signal a well-functioning justice system that is sensitive to the needs of the business community. This may at the same time make national substantive laws more attractive to foreign parties and encourage companies to incorporate or do business in the countries hosting international commercial courts. Consequently, reputation functions as a forum selling incentive not only for the judges at an international commercial court but also for the courts themselves and the surrounding justice systems.

3.4. Judicial Income

One of the most innovative features of international commercial courts is their diverse bench. These courts in the Middle East, Kazakhstan, and Singapore have appointed foreign nationality judges to their bench. Through the appointment of international judges, the DIFC Courts, the QIC, the ADGM Courts, the AIFC Court, and the SICC draw on expertise, neutrality, and an international reputation. The international judges add expertise in commercial disputes and foreign laws, and convey the impression that international commercial courts are more neutral than their national counterparts.

What is more interesting for present purposes is that a different appointment and remuneration regime applies to international judges. Unlike their national counterparts, international judges lack tenure, and are appointed for a fixed period on the basis of private contracts. According to informal discussions, their remuneration is calculated based on an hourly fee for the time spent on each case assigned. This illustrates that international judges profit from an increased caseload, and therefore have an economic interest in being appointed to the bench of an international commercial court, assigned to cases, and reappointed once their contract expires.

In addition, some international judges are at the same time practising lawyers or arbitrators, and are included in the list of arbitrators, which is maintained by reputable arbitration institutes.[161] Serving at an international commercial court that has successfully acquired a significant caseload may therefore translate into more legal business and appointments as

[161] Lord Mance is listed as a barrister on the website of the law firm 7KBM, available at <https://7kbw.co.uk/barrister/lord-mance/>; Former Chief Justice of the DIFC Courts Michael Hwang is currently practicing as a barrister and arbitrator, available at <https://www.mhwang.com/intro1.htm>; SICC International Judges Anselmo Reyes and Douglas Samuel Jones are members of the SIAC Panel, see SIAC Official Website, SIAC Panel, available at <https://www.siac.org.sg/our-arbitrators/siac-panel> all accessed January 2022.

arbitrators. Further, some international judges have transitioned from one international commercial court to another, or are serving simultaneously at various international commercial courts.[162] Side activities such as giving speeches at conferences and authoring books on international commercial courts may add to international judges' income prospects.[163]

3.5. Voluntary Jurisdiction

A study of the motives of international commercial courts to engage in forum selling would be incomplete without examining some of the features that might contribute to the courts' activities in this regard. International commercial courts and their judges engage in forum selling not only on the basis of economic and reputational motives. Another explanation can be found in the courts' voluntary source of jurisdiction.

The literature on forum selling claims that it is especially evident in the case of specialised courts.[164] Court specialisation creates an institutional environment that facilitates and fosters forum selling. The small number of judges in specialised courts trumps random case assignment rules, and increases the odds that these judges will handle the interesting and intellectually challenging cases.[165] At the same time, this makes it easier for litigants to predict and have some control over who will hear their case. Consequently, court specialisation allows some degree of judge shopping, and makes specialised courts more appealing to litigants.[166] The more a judge's specialisation increases, the more the reputational benefits that come with it.[167] What also explains why forum selling is common among specialised courts is the fact that it requires some degree of coordination among judges. Judges are required to agree on and adhere to the forum selling techniques that will sway litigants in their favour. Coordination is easier in specialised courts or chambers staffed by fewer judges.[168] Moreover, in the case of

[162] In 2007, Lord Woolf was the first President of the Qatar Financial Centre Civil and Commercial Court. In 2018, he was appointed as the Head Justice of the AIFC Court. Lord Mance is an International Judge at the SICC and at the moment of writing Chief Justice of the AIFC Court. Sir Jeremy Cook is an International Judge at the SICC and the DIFC Courts, available at <https://court.aifc.kz/who-we-are/>, <https://www.sicc.gov.sg/about-the-sicc/judges> and <https://www.difccourts.ae/about/court-structure/judges> all accessed January 2022.

[163] Some books related to international commercial courts and authored or co-authored, edited or co-edited by judges at international commercial courts are: Burrough, Machon, Oranje, Frakes and Visser (n 96); Anselmo Reyes, *Recognition and Enforcement of Judgments in Civil and Commercial Matters* (Hart Publishing 2019).

[164] Anderson (n 136) 636-637, 685-687; Klerman and Reilly (n 136) 288; Bechtold, Frankenreiter and Klerman (n 136) 514, 552-553.

[165] Lynn LoPucki, *Courting Failure: How Competition for Big Cases is Corrupting the Bankruptcy Courts* (University of Michigan Press 2005) 81-82; Bechtold, Frankenreiter and Klerman (n 136) 514.

[166] Anderson (n 136) 673-674.

[167] Anderson (n 136) 685.

[168] Bechtold, Frankenreiter and Klerman (n 136) 553. See also Anderson (n 136) 656.

specialised courts, caseload becomes an existential issue. A small number of incoming cases may call into question the necessity of specialised courts and therefore their existence.[169]

In the case of international commercial courts, a closer look at their jurisdiction rules reveals that they deal with a wide range of civil and commercial disputes.[170] In contrast to the literature on domestic forum selling that has focused on courts specialising in a specific type of cases such as patent or bankruptcy disputes, international commercial courts deal with various case types. What explains forum selling in the context of international commercial courts is therefore not so much their subject matter jurisdiction, but the way they establish international jurisdiction.

In particular, international commercial courts mainly base their jurisdiction on the parties' agreement.[171] Parties wishing to bring their disputes before this type of court have to agree on the court's jurisdiction in a choice of court agreement. Although in the case of some international commercial courts a transfer of cases from the ordinary courts is possible,[172] their 'actual' numerical success is measured by the number of cases in which parties directly and on their own initiative choose the court.[173] Choice of court agreements are equally important for the international commercial courts established in special economic zones in the Middle East and Kazakhstan. Although these courts are vested with compulsory and exclusive jurisdiction over disputes arising within the special economic zones, and therefore their caseload does not

[169] Anderson (n 136) 685-686.

[170] Art. 5 (A) (1) and (2) Law No. (16) of 2011 Amending Certain Provisions of Law No. (12) of 2004 concerning Dubai International Financial Centre Courts; Art. 8 (3) (c) Qatar Financial Centre Law, Law No. (7) of 2005; Art. 13 (6) Law No. (4) of 2013 Concerning Abu Dhabi Global Market; SICC Rules, Order 110, rule 1 (2) (b) (i); Art. 26 AIFC Court Regulations; Art. 1.2. Protocol – International Chamber of the Paris Commercial Court; Explanatory Notes to Art. 1.3.1. (a) NCC Rules; Art. 95 Courts Constitution Act.

[171] For the SICC Rules, Order 110, rule 7 (1) (b); for the NCC, Art. 30r (1) Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) (hereafter: DCCP), available in English in Alex Burrough, Stephen Machon, Duco Oranje, Lincoln Frakes and Willem Visser (eds), *Code of Civil Procedure, Selected Sections and the NCC Rules* (Eleven 2018); for the CICC, see Art. 2 (1) Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court (hereafter: CICC Provisions), available at <http://cicc.court.gov.cn/html/1/219/208/210/817.html>; for the BIBC, BIBC Preliminary Draft Law 2018, Art. 15 all accessed January 2022.

[172] SICC Rules, Order 110, rule 7 (1) (a), rule 12 (3B) and (4); Art. 2 (2) and (5) Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court.

[173] Singapore International Commercial Court, 'A Landmark First Case filed in the Singapore International Commercial Court' (SICC News 2028), 11, available at <https://www.sicc.gov.sg/docs/default-source/modules-document/media-resources/sicc-newsletter-issue-no-11_8239f5c5-8e7f-42bf-81b0-cb581c33a349.pdf>. See also Chapter 4.

depend on the parties' choice,[174] choice of court agreements in their favour open up these courts to an international constituency and to cross-border disputes lacking a connection to the zone.

The voluntary jurisdiction of international commercial courts limits the number of cases that may come before them. Unlike ordinary courts, which enjoy compulsory jurisdiction, international commercial courts depend on the parties' choice. It therefore becomes apparent that what turns caseload into an existential issue in the case of these courts is not so much their narrow subject matter jurisdiction but their voluntary jurisdiction.

4. Conclusion

Diverse reasons exist for the establishment of international commercial courts. These courts aim at improving the business climate, attracting investment, creating business for the legal services and other economic sectors, and improving access to justice in international commercial disputes. Despite differences from court to court and country to country, an economic thinking is prevalent. International commercial courts are central to broader policy objectives to attract foreign investment and dispute resolution.

The present chapter argues that the economic reasons behind the establishment of international commercial courts may at the same time translate into forum selling motives. The importance of these courts for the national economies of the hosting states explains why they have an interest in attracting cases and in forum selling. In addition, the fact that international commercial courts aim at attracting disputes involving high-value claims and parties from different parts of the world promises an enhanced and international reputation not only to judges who sit in these courts but also to the courts themselves and to the surrounding justice systems. Forum selling in the context of international commercial courts also finds its explanation in some of the courts' institutional and procedural features. In particular, some international commercial courts charge higher court fees. If successful in attracting litigants, the resulting fees could generate increased revenues and cross-subsidise the justice system. Moreover, case dependent remuneration motivates international judges to engage in forum selling. What further accounts for the forum selling of international commercial courts is their predominantly voluntary source of jurisdiction. Apart from the courts in Middle East and Kazakhstan, the fact that international commercial courts base their jurisdiction on choice of court agreements, and therefore lack compulsory jurisdiction, limits the pool of cases eligible

[174] Art. 5 (A) (1) Law No. (16) of 2011 Amending Certain Provisions of Law No. (12) of 2004 concerning Dubai International Financial Centre Courts; Art. 8 (3) (c) Qatar Financial Centre Law, Law No. (7) of 2005; Art. 13 (6) Law No. (4) of 2013 Concerning Abu Dhabi Global Market; Art. 26 AIFC Court Regulations.

to be heard, and turns caseload into an existential issue. Following on from the explanations as to why international commercial courts engage in forum selling, the subsequent chapters explore how forum selling is shaping the courts' rules, case law, and practices.

CHAPTER 3: FORUM MARKETING

1. Introduction

According to the literature on domestic forum selling, courts and judges make themselves attractive to prospective litigants by adopting various techniques, such as speeding up trials, increasing the predictability of judgments, or adopting pro-claimant approaches.[1] However, international commercial courts do not simply make their procedures more attractive to prospective litigants − they actively promote their procedural advantages and reach out to litigants by engaging in forum marketing. Contrary to forum selling, that takes place 'behind the scenes', forum marketing brings courts and judges into the spotlight.

The present chapter explains why international commercial courts engage in forum marketing, shows exactly how the courts market themselves, and examines the broader implications of forum marketing. Forum marketing is defined as the courts' use of strategic communication and advertising in order to attract cases. It has been shown that forum marketing is especially evident in the case of international commercial courts, largely owing to the voluntary character of their jurisdiction, coupled with the increased competition in international commercial dispute resolution. In addition, international commercial courts market themselves because they are reputation sensitive. The marketing tools wielded by these courts are various, ranging from court websites, social media pages, promo-videos, newsletters, and conferences, even reaching the realm of academic literature. Forum marketing can have both positive and negative implications relating to civil procedure and access to justice.

In this chapter, the focus is mainly on the Dubai International Financial Centre Courts, the Singapore International Commercial Court, the Netherlands Commercial Court, the German International Commercial Courts, the Paris International Chambers, and the China International Commercial Courts. Part 2 explores why international commercial courts engage in marketing. Forum marketing finds its explanation mainly in the voluntary and overlapping jurisdiction of international commercial courts, and in the fact that these courts are reputation sensitive. Part 3 describes the various forum marketing techniques employed by international commercial courts. International commercial courts adopt brand names; associate their reputation with the established reputation of the cities hosting them; seek the endorsement of

[1] Jonas Anderson, 'Court Competition for Patent Cases' (2015) 163 University of Pennsylvania Law Review 631, 668-677; Daniel Klerman and Greg Reilly, 'Forum Selling' (2016) 89 Southern California Law Review 241, 250-270, 289, 294-295, 297-299; Stefan Bechtold, Jens Frankenreiter and Daniel Klerman, 'Forum Selling Abroad' (2019) 92 Southern California Law Review 487, 502-513, 523-534.

internationally renowned legal figures; have created a network with other jurisdictions and commercial courts; and showcase their procedural innovations through academic literature and case law. In addition, some of the courts' innovative features lack tangible innovations, and therefore contribute to the marketing of international commercial courts mainly by sending signals of quality and familiarity to foreign litigants. Part 4 explores the broader implications of forum marketing regarding civil procedure and access to justice. The last part concludes that the forum marketing techniques employed by international commercial courts, together with their implications, mainly reveal how the courts stand closer to private dispute resolution methods, and signal the commodification of justice.

2. The Reasons Behind Forum Marketing

The reasons behind forum marketing are largely similar to those that incite the courts to engage in forum selling. As observed in chapter 2, international commercial courts are significant for national economies being part of broader strategies to attract foreign investment as well as dispute resolution. The significance of international commercial courts for the attainment of broader state policies triggers the courts to attract cases and engage in forum selling. In addition, forum selling lies in some of the courts' features. For example, the fact that some international commercial courts charge higher fees means that, if successful in acquiring a caseload, they may generate significant income that could subsequently be poured into the funding of ordinary courts. Notwithstanding these economic considerations, forum selling also finds its explanation in reputational motives. International commercial courts promise their judges and the surrounding national justice system the gaining of a worldwide reputation, because they focus on high-value claims that involve parties and counsel from different parts of the world. Furthermore, the courts' voluntary source of jurisdiction limits the pool of cases that may be resolved in an international commercial court, and turns caseload into an existential issue. All of this explains why, unlike most ordinary courts, international commercial courts have an interest in attracting cases and engaging in forum selling.

However, certain reasons for forum marketing differ from the common ones that apply to courts engaging in forum selling, and they are intrinsic to international commercial courts. This part examines the reasons behind forum marketing in the specific context of international commercial courts, such as their predominantly voluntary source of jurisdiction, the jurisdictional overlap with other courts and dispute resolution methods, and the fact that international commercial courts are reputation sensitive.

2.1. The Voluntary and Overlapping Jurisdiction of International Commercial Courts

According to the literature on a domestic forum selling, courts make themselves more attractive to prospective litigants in non-contractual disputes by adopting various techniques including pro-claimant approaches. Forum selling courts favour claimants because they bear the initiative in where to file a dispute, and are therefore the actual case-placers. In contrast, international commercial courts deal with contractual disputes, and therefore their jurisdiction depends on the choice made by both parties. Favouring one party over the other would harm a court's reputation, and would discourage some parties from choosing in its favour, thereby decreasing the overall demand for international commercial courts.[2] Consequently, in the context of international commercial courts, pro-claimant approaches are an unsuitable forum selling technique. Unable to favour one party over the other, international commercial courts have to persuade both parties to choose in their favour. These courts therefore reach out to litigants, and actively promote and market their features in order to make themselves attractive.

A further reason for international commercial courts to engage in forum marketing is that they are recently established institutions, and parties may not be aware of them. I asked a court member why they promote and market the international commercial court more than the rest of the national courts, and he replied:

'*In the rest of the courts, cases do not come to you on a voluntary basis. Therefore, we have to make people aware of what we are doing*'.[3]

In a similar vein, another court member underlined:

'*One party may say let's go to the [name of international commercial court] and the other party might say: Oh, I never heard of it. We crossed the first hurdle, which is awareness. We crossed the second hurdle, which is the recommendation of our jurisdiction clause. So now we are starting to see results regarding the third hurdle, which is that both parties say: Ok, let's agree on a [name of international commercial court] jurisdiction clause*'.[4]

The interviewees' replies give reveal that parties and their lawyers may be unaware of the courts. Before parties can begin to insert international commercial courts clauses in their

[2] See also Richard Posner, 'Judicial Behavior and Performance: An Economic Approach' (2005) 32 Florida State University Law Review 1259, 1260-1261.
[3] Interview with court personnel (6 June 2019).
[4] Interview with court personnel (18 February 2020).

contracts, these courts need to have made the public aware of their recent establishment. They do this by engaging in forum marketing.

In addition, most international commercial courts did not strip ordinary courts from the disputes they aim to handle. The ordinary courts remain competent for international commercial disputes, and parties can either resolve their disputes before an ordinary court or before an international commercial court. This lack of exclusive jurisdiction means that the jurisdiction of international commercial courts overlaps, and is therefore the same as the jurisdiction of ordinary courts. In a similar vein, international commercial courts and international commercial arbitration deal with almost the same kind of disputes. The co-existence of various dispute resolution venues offers parties a wide range of options and creates a fertile ground for the competition of international commercial courts, ordinary courts, and private dispute resolution methods such as international commercial arbitration.[5] Parties in international commercial disputes may either choose an international commercial court, stick to the ordinary courts, or resort to arbitration.

This competition among themselves and other dispute resolution methods is an important aspect of international commercial courts. In particular, some international commercial courts were seen as a response to the diminishing number of cross-border commercial disputes resolved before ordinary courts and were established in the wake of Brexit with the aim of prising litigation away from London and from arbitration. Other courts, such as the SICC or the CICC, are geared towards disputes arising from China's 'Belt and Road Initiative', and a certain degree of competition between them is noticeable.[6]

International commercial dispute resolution and the competing forces within it challenge international commercial courts, most of which were created only recently. In order to acquire a significant number of cases and therefore be viable, they need to raise awareness of their existence; to stand out from other dispute resolution methods; to persuade both parties to choose in their favour; and, consequently, to carve out their own piece of international commercial dispute resolution. To achieve this goal, international commercial courts are forced to rise above the burgeoning competition by engaging in forum marketing.

[5] For how jurisdiction or venue rules may trigger a jurisdictional competition, see Klerman and Reilly (n 1) 247; Bechtold, Frankenreiter and Klerman (n 1) 552; Erlis Themeli, *The Great Race of Courts, Civil Justice System Competition in the European Union* (Eleven International Publishing 2018) 81.
[6] Man Yip, 'The Singapore International Commercial Court: The Future of Litigation?' (2019) 12 Erasmus Law Review 81, 94.

2.2. International Commercial Courts as Reputation Sensitive Courts

The voluntary and overlapping jurisdiction of international commercial courts with ordinary courts and other dispute resolution methods does not suffice to explain why international commercial courts engage in forum marketing. International commercial courts market their attractive features and strive especially to establish an excellent reputation; they are aware that the reputation factor is what largely drives parties' choice of court.

In particular, international commercial courts have adopted various innovative features so as to distinguish themselves from ordinary courts, and ultimately to attract disputes. These features aim predominantly at enhancing the courts' expertise in cross-border commercial disputes, at increasing the quality and predictability of their judgments, and at cutting down litigation time. Since choice of court agreements often go hand in hand with choice of law agreements,[7] international commercial courts highlight, among others, the merits of their national substantive laws.[8] Nevertheless, international commercial courts are aware that parties' court preferences are not based entirely on the procedural merits of the chosen court

[7] Theodore Eisenberg and Geoffrey Miller, 'The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts' (2009) 30 Cardozo Law Review 1505. For arbitration, see White & Case and School of International Arbitration, Queen Mary University of London, *2010 International Arbitration Survey: Choices in International Arbitration*, 8 and Chart 6, available at <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf> accessed January 2022.

[8] DIFC Official Website, Business, Laws and Regulations, available at <https://www.difc.ae/business/laws-regulations/>; *Report of the Singapore International Commercial Court Committee*, November 2013, para. 1 (hereafter: SICC Committee Report 2013), available at <https://www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/-report-of-the-singapore-international-commercial-court-committee-_90a41701-a5fc-4a2e-82db-cc33db8b6603-1.pdf>; Rieme Jan Tjittes, 'Een Netherlands Commercial Court Vereist Reclame voor Nederlands Recht' (2014) Rechtsgeleerd Magazijn Themis 261-262; Zhou Qiang, the President of the Supreme People's Court, Speech on the 1st Session of the Thirteenth Plenary Session of the Eighteenth National People's Congress, 9 March 2018, available at <http://cicc.court.gov.cn/html/1/219/208/210/777.html>; German Parliament (*Deutscher Bundestag*), Legislative Proposal for the Establishment of Chambers for International Commercial Disputes (*Entwurf eines Gesetzes zur Einführung von Kammern für internationale Handelssachen*), Drucksache 19/1717 of 18 April 2018, Explanatory Statement (*Begründung*), 5-6 available at <http://dipbt.bundestag.de/dip21/btd/19/017/1901717.pdf> (hereafter: German Chambers Legislative Proposal 2018); Federal Council (*Bundesrat*), Drucksache 219/21, Draft Proposal submitted by the Federal States of North Rine-Westphalia and Hamburg (*Gesetzesantrag der Länder Nordrhein-Westfalen und Hamburg*), Legislative Proposal for Strengthening the Courts in Commercial Disputes (*Entwurf eines Gesetzes zur Stärkung der Gerichte in Wirtschaftsstreitigkeiten*), 17 March 2021, Explanatory Statement (*Begründung*), 11 available at <https://www.bundesrat.de/SharedDocs/beratungsvorgaenge/2021/0201-0300/0219-21.html> (hereafter: German Chambers Legislative Proposal 2021); Eddy Bauw, 'Een Netherlands Commercial Court vanuit Rechtsplegingsperspectief', 21-22 in Eddy Bauw, Harold Koster and Sonja Kruisinga (eds), *De Kansen Voor Een Netherlands Commercial Court* (Boom juridisch 2018); Andrew Dahdal, 'International Commercial Courts: The Qatari Experience', 237-238 in Xandra Kramer and John Sorabji (eds), *International Business Courts* (Eleven International Publishing 2019). See also Ministry of Justice and Consumer Protection (*Bundesministerium der Justiz und für Verbraucherschutz*), *Law Made in Germany*, Bundesnotarkammer, 3rd Edition, 2014 available at <https://www.lawmadeingermany.de/Law-Made_in_Germany_EN.pdf> all accessed January 2022.

and the substantive merits of the chosen law.[9] Parties choose a court for a variety of reasons, such as the quality of the judges or the speed of the dispute resolution.[10] However, some of these factors are unrelated to the quality of a court and the justice system surrounding it. After all, comparing courts and justice systems is a complex, laborious, and time-consuming task with an uncertain outcome.[11] Familiarity with a court or established market practices equally motivate parties' decisions to opt in favour of a specific court.[12] It would therefore be misguided to think that the founders of international commercial courts gathered around a table, deliberated for hours, mastered the subtle variations of procedural laws, and came up with the optimal institutional and procedural features of international commercial courts. They did not – just as lawyers do not when drafting dispute resolution clauses.[13] Based on the assumption that parties tend to gravitate towards the familiar and are often guided by a court's sheer reputation, international commercial courts and some of their features aim primarily at sending signals of quality[14] and at evoking a sense of familiar procedures.[15] This conclusion permits us to better understand the actual incentives that prompted the adoption of specific features, and to decode some of their proclaimed procedural merits.

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[9] Stefan Vogenauer, 'Regulatory Competition Through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence' (2013) 21 European Review of Private Law 13, 53; Erlis Themeli, 'Matchmaking International Commercial Courts and Lawyers' Preferences in Europe' (2019) 12 Erasmus Law Review 70, 75.

[10] Stefan Vogenauer, 'Perceptions of Civil Justice Systems in Europe and their Implications for Choice of Forum and Choice of Contract Law: An Empirical Analysis', Question 33 in Stefan Vogenauer and Christopher Hodges (eds), *Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law* (Hart Publishing 2009); Themeli (n 9) 75.

[11] Gillian Hadfield, 'The Price of Law: How the Market for Lawyers Distorts the Justice System' (1999-2000) 98 Michigan Law Review 953, 968-972; Gary Low, 'A Psychology of Choice of Laws' (2013) 24 European Business Law Review 363, 372-378; Vogenauer (9) 19-22.

[12] Vogenauer (n 9) 42, 43; Themeli (n 5) 299. For the general reputation and recognition of an arbitration seat and an arbitration institution as one of the most important reasons for parties' preferences for certain arbitration seats and institutions, see White & Case and School of International Arbitration, Queen Mary University of London, *2018 International Arbitration Survey*, Charts 8 and 13, available at <https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-19.pdf> accessed January 2022.

[13] For lawyers as the real decision-makers, see White & Case and School of International Arbitration, Queen Mary University of London, *2010 International Arbitration Survey: Choices in International Arbitration*, Chart 7; Themeli (n 5) 174-182.

[14] Hadfield (n 11) 971-972.

[15] The Boston Consulting Group, *Market Survey Netherlands Commercial Court* (*Marktverkenning Netherlands Commercial Court*), 2, 8, 10 and 16 available at <https://docplayer.nl/111900001-Raad-voor-de-rechtspraak-marktverkenning-netherlands-commercial-court.html> accessed January 2022 (hereafter: The Boston Consulting Group, Market Survey NCC); Council for the Judiciary (*Raad voor de Rechtspraak*), *Plan for the Establishment of the Netherlands Commercial Court* (*Plan tot oprichting van de Netherlands Commercial Court*), November 2015, 9, available at <www.rechtspraak.nl/SiteCollectionDocuments/plan-netherlands-commercial-court.pdf> accessed January 2022 (hereinafter: Dutch Council for the Judiciary, NCC Plan 2015); Harold Koster and Mark Beer, 'The Dubai International Financial Centre (DIFC) Courts: A Specialised Commercial Court in the Middle East' 195-197 in Bauw, Koster and Kruisinga (n 8); Matthijs Kuijpers, *The Netherlands Commercial Court* (Ars Aequi Libri 2019) 36; Philippe Lambrecht and Erik Peetermans, 'The Brussels International Business Court: Initial Overview and Analysis' (2019) 12 Erasmus Law Review 42, 52. See also Alyssa King, 'Global Civil Procedure' (2021) 62 Harvard International Law Journal 223, 250.

3. Forum Marketing Techniques

International commercial courts are specialised courts with proceedings tailored to the particular needs of international commercial disputes. Unlike ordinary courts, they have innovative features that improve the litigation of international commercial disputes and make them more attractive to prospective litigants. However, some of the courts' practices and features mainly contribute to the marketing of international commercial courts by raising awareness, distinguishing them from other dispute resolution methods and cultivating a positive reputation. These practices and features may therefore function as forum marketing techniques. I shall now begin to map the various marketing techniques applied by international commercial courts.

3.1. Brand Names

One of the marketing techniques employed refers to the use of brand names; this makes it easier for litigants to identify the courts and therefore creates recognition. Although this chapter uses the term international commercial courts indistinctively, the European international commercial courts are not self-standing but are actually chambers within courts. The only international commercial court in Europe designed to be a self-standing court was the BIBC.[16] As previously mentioned, this organisational set-up as chambers within courts was primarily prompted by time and budgetary constraints. It allowed the rapid set-up of the European international commercial courts, while avoiding the time and costs of establishing separate courts.

One should therefore bear in mind that although the NCC calls itself a court, it is actually a court chamber. Indeed, the new Article 30r DCCP refers to the NCC and the Netherlands Commercial Court of Appeal (NCCA) as the International Commercial Chambers of the Amsterdam District Court and Court of Appeal, respectively. So do the NCC Rules.[17] This divergence between its name and its actual institutional design is largely due to the court's

[16] Legislative Proposal Establishing the Brussels International Business Court (*Wetsontwerp houdende oprichting van het Brussels International Business Court/ Project de loi instaurant la Brussels International Business Court*), Parliamentary Documents (*Parl. St./Doc. parl.*): Belgian House of Representatives (*Belgische Kamer van Volksvertegenwoordigers/ Chambre de représentants de Belgique*) 54, 3072/001, 15 May 2018, Explanatory Statement (*Memorie van Toelichting/Expose de motifs*), 11 available at <http://www.dekamer.be/FLWB/PDF/54/3072/54K3072001.pdf> accessed January 2022 (hereafter: BIBC Preliminary Draft Law 2018).

[17] Art. 1.1.1. Rules of Procedure for the International Commercial Chambers of the Amsterdam District Court (NCC District Court) and the Amsterdam Court of Appeal (NCC Court of Appeal), December 2020, available at <https://www.rechtspraak.nl/SiteCollectionDocuments/NCC-Rules-second-edition.pdf> (hereafter: NCC Rules) accessed January 2022.

desire to brand itself under a separate name that raises its visibility and sets it apart from the various chambers within a court.

As regards the German Chambers for International Commercial Disputes, these are not courts but an English language version of the already existing Chambers for Commercial Disputes within the Frankfurt am Main and Hamburg Regional Courts.[18] Although the Frankfurt chamber avoids labelling itself as a court, its establishment was nevertheless launched as part of a broader initiative bearing the inspiring and more marketable name 'Frankfurt Justice Initiative'.[19] Similarly, the recently established Commercial Courts in Stuttgart and Mannheim present themselves as self-standing courts despite being chambers within existing courts.[20] Like the NCC and the German international commercial courts, the Paris International Chambers are divisions of the Paris Commercial Court and Court of Appeal. In the wake of Brexit, what started in France as the European Union and the International Law Chambers of the Paris Commercial Court was relaunched as the International Chamber. The merger of the two existing chambers into the new International Chamber did not solely aim at creating a chamber specialised in international commercial disputes. Renaming and repackaging the older chambers was a marketing technique designed to raise their visibility.[21]

Similarly, the SICC is a division of the General Division of the Singapore High Court, which in turn is part of the Supreme Court of Singapore.[22] Inspired by the LCC, the SICC is a division of the High Court but is branded as a separate commercial court. Yip observes that branding the court as a stand-alone court conveys a sense of detachment from the national judicial system and gives the impression of it being a separate and therefore novel court.[23] It offers parties the

[18] Frankfurt am Main Regional Court Official Website, Chamber for International Commercial Disputes, available at <https://ordentliche-gerichtsbarkeit.hessen.de/ordentliche-gerichte/lgb-frankfurt-am-main/lg-frankfurt-am-main/chamber-international>; Regional Court Hamburg Official Website, available at <https://justiz.hamburg.de/landgericht-hamburg/zustaendigkeit/> all accessed January 2022. See also German Chambers Legislative Proposal 2018, Explanatory Statement, 15-16; Draft Art. 114a and114c Courts Constitution Act; German Chambers Legislative Proposal 2021, Draft Art. 114a and 114c Courts Constitution Act.

[19] Burkhard Hess, 'The Justice Initiative Frankfurt am Main 2017', *Conflict of Laws. Net* , 31 March 2017, available at <conflictoflaws.net/2017/the-justice-initiative-frankfurt-am-main-2017-law-made-in-frankfurt/>; Burkhard Hess and Timon Boerner, 'Chambers for International Commercial Disputes in Germany: the State of Affairs' (2019) 12 Erasmus Law Review 33, 34-38; Marta Requejo Isidro, 'International Commercial Courts in the Litigation Market' (2019) 9 International Journal of Procedural Law 21-23.

[20] Commercial Court Stuttgart/ Mannheim Official Website, available at <https://www.commercial-court.de/commercial-court> accessed January 2022.

[21] See Chapter 2, 12.

[22] Art. 94 (1) Constitution of the Republic of Singapore, available at <https://sso.agc.gov.sg/Act/CONS1963#pr94->; Supreme Court of Judicature Act, Section 18A, available at <https://sso.agc.gov.sg/Act/SCJA1969> all accessed January 2022.

[23] For the BIBC, see BIBC Preliminary Draft Law 2018, Explanatory Statement, 10-11. For the SICC, see Yip (n 6) 82.

clear choice between two different strands of courts: namely, ordinary courts and the international commercial court, both of which significantly differ from each other.[24]

Whether international commercial courts are self-standing courts or chambers within courts is not merely a matter of nomenclature but has repercussions regarding their procedural rules. Being chambers within courts influences the jurisdiction of international commercial courts by hinging their jurisdiction on that of the court of which they are a part. The chamber's international, territorial, and subject matter jurisdiction presupposes the international, territorial, and subject matter jurisdiction of the court. Moreover, while European international commercial courts additionally make their jurisdiction dependent on the parties' agreement, their establishment as chambers calls into question whether such agreements are choice of court agreements or merely agreements in favour of a chamber within a court.[25] The answer to this question is decisive for the applicability of international, European, or national rules on choice of court agreements, and is central with regard to the binding force of agreements in favour of these courts.[26]

3.2. Brand Cities and Buildings

In addition to the use of brand names, some international commercial courts attempt to increase their recognition by establishing links to the reputation of the cities in which they are located and to the buildings hosting them. The NCC is an example of an international commercial court that makes use of such a marketing technique. In particular, the official website of the NCC hosts a video with the court's main features on display.[27] According to the video, the court is situated in Amsterdam, '*a city with a proud history of commerce and justice*'. The video states that interested parties can easily reach the NCC in the Palace of Justice in Amsterdam, as it is just twenty minutes away from Schiphol airport.

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[24] Yip (n 6) 82. In favour of a separate, self-standing German international commercial court to achieve greater visibility, see Michael Stürner, 'Deutsche Commercial Courts?' (2019) 74 Juristenzeitung 1122, 1124.

[25] Parliamentary Papers II 2016/17 (*Kamerstukken II*), 34 761, no. 3, Amendments to the Code of Civil Procedure and the Civil Court Fees Act with regard to the introduction of English-language case law at the international commercial chambers of the Amsterdam District Court and the Amsterdam Court of Appeal (*Wijziging van het Wetboek van Burgerlijke Rechtsvordering en de Wet griffierechten burgerlijke zaken in verband met het mogelijk maken van Engelstalige rechtspraak bij de internationale handelskamers van de rechtbank Amsterdam en het gerechtshof Amsterdam*), Explanatory Statement (*Memorie van Toelichting*), 5-6 (hereafter: NCC Law, Explanatory Statement); German Chambers Legislative Proposal 2018, Explanatory Statement, 14; Emmanuel Jeuland, 'The International Chambers of Paris: A Gaul Village', 69-70 in Kramer and Sorabji (n 8); Georgia Antonopoulou, 'Requirements upon Agreements in Favour of the NCC and the German Chambers – Clashing with the Brussels Ibis Regulation?' (2019) 12 Erasmus Law Review 56, 66; Kuijpers, (n 15) 8.

[26] Georgia Antonopoulou, 'Defining International Disputes – Reflections on the Netherlands Commercial Court Proposal' (2018) Nederlands Internationaal Privaatrecht 740, 750; Antonopoulou (n 25) 65-68; Jeuland (n 25) 70.

[27] NCC Official Website, available at <https://www.rechtspraak.nl/english/ncc/Pages/default.aspx> accessed January 2022.

Watching the video could lead one to wonder whether it is advertising the NCC or the city of Amsterdam. This link between the NCC and Amsterdam indicates that the marketing of international commercial courts is intertwined with the marketing of the cities in which they are located. The reputation of the latter boosts the recognition of the former. Indeed, with the goal of saving expenses, the NCC Plan stressed that the NCC should make use of the marketing facilities of the city of Amsterdam.[28] In a similar vein, the Palace of Justice hosts the newly established court, and therefore fulfils the Dutch judiciary's plan for an NCC building that 'exudes allure'.[29]

The NCC video is not the first of its kind. Almost a decade ago, in 2011, TheCityUK, an industry-led body representing UK-based financial services,[30] released the video 'Unlocking Disputes'.[31] The video boasts that London is the most widely used venue for international disputes. This is linked to the city's position as a global trading centre and as a leader in international finance and business services. The video ends by underlining that the Chancery Division, the Commercial Court, and the Technology and Construction Courts are located in the Rolls Building, a '*world class business court in a world class business city: London*'.

The NCC and the LCC are examples of international commercial courts whose marketing narrative is closely linked to the marketing of the cities and the buildings that host them. Similarly, one can only with difficulty separate the Frankfurt Chamber for International Commercial Disputes from Frankfurt am Main and the reputation that comes with its status as a financial centre in one of Europe's biggest economies.[32] In light of Brexit, hopes are high that Frankfurt will acquire an even greater role in the financial industry. According to commentators, this time the use of English before German courts has a greater chance of success, given the banking and financial institutions, the internationally oriented bar, and the major law firms that are already there.[33]

Nonetheless, the link between the marketing of international commercial courts and that of the cities hosting them makes sense when one considers the cities' established reputation and the

[28] Dutch Council for the Judiciary, NCC Plan 2015, 18.
[29] Ibid., 14.
[30] The City UK Official Website, available at <https://www.thecityuk.com/> accessed January 2022.
[31] The City UK, Unlocking Disputes, available at <https://www.youtube.com/watch?v=iNmnUeQbgSY&t=30s> accessed January 2022.
[32] Burkhard Hess, 'The Justice Initiative Frankfurt am Main 2017', *Conflict of Laws.net*, 31 March 2017, available at <conflictoflaws.net/2017/the-justice-initiative-frankfurt-am-main-2017-law-made-in-frankfurt/> accessed January 2022; Hess and Boerner (n 19) 34.
[33] Requejo Isidro (n 19) 22; Hess and Boerner (n 19) 34. Critical Matthias Lehmann, 'The Export Engine Shutters, Law Made in Germany' 83, 86-87 in Kramer and Sorabji (n 8).

fact that commercial disputes with cross-border elements tend to cluster in bigger cities with economic and business activities. It is also understandable how a convenient location coupled with a sophisticated bar justifies the establishment of an international commercial court. In the case of the Chinese international commercial courts, the CICC, the cities hosting the courts hold in addition a symbolic value. Remember that the First China International Commercial Court is in Shenzhen, while the Second China International Commercial Court is in Xi'an. Both cities are included in the 'Belt and Road Initiative'; Shenzhen is considered the starting point of the 'Belt' route, while Xi'an is the starting point of the 'Road' route. The symbolism of both cities is so strong that it found its way into the jurisdiction of the courts. Disputes with a territorial connection to the 'Belt' route fall under the jurisdiction of the Shenzhen court, while disputes with a connection to the 'Road' route fall under the jurisdiction of the Xi'an court.[34] This unclear division of jurisdiction between the first and second Chinese international commercial courts might be of minor practical relevance, since parties may choose the court they prefer despite the lack of a territorial link;[35] nevertheless, the vague demarcation of jurisdiction between the courts highlights once again that in their communications the Chinese courts prioritise symbolism over procedure.

3.3. Courting and Networking

In addition to using brand names and associating their establishment with the reputation of the cities and the buildings hosting them, some international commercial courts market themselves by seeking the endorsement of internationally renowned legal figures and by creating a network.

The international commercial courts in the Middle East and Kazakhstan are situated in special economic zones that – unlike the jurisdictions surrounding them – apply a separate framework of rules and regulations modelled on English law. In a similar vein, the courts apply procedural rules that are predominantly modelled on the English Civil Procedure Rules. Therefore, the DIFC Courts, the QICDRC, the ADGM Courts, and the AIFC Court host foreign judges on their benches, mostly drawn from common law jurisdictions, who can better understand the respective substantive and procedural rules. In addition, it is claimed that the involvement of

[34] Yu Chen, 'The First Anniversary of China International Commercial Courts', *China Justice Observer*, 18 August 2019, available at <https://www.chinajusticeobserver.com/a/review-the-first-anniversary-of-china-international-commercial-courts> accessed January 2022.

[35] Supreme People's Court, Answers to Questions Arising out of Trial Practice of Commercial and Maritime Cases with Foreign Elements, Answer 6, available in Chinese at <http://www.lawtime.cn/info/maoyi/myzc/20081217111.html> accessed January 2022; Yong Gan, 'Jurisdiction Agreements in Chinese Conflict of Laws: Searching for Ways to Implement the Hague Convention on Choice of Court Agreements in China' (2018) 14 Journal of Private International Law 295, 304-306.

foreign judges enhances judicial expertise regarding international commercial matters, facilitates the application of foreign law, increases the perception of international commercial courts' as a third-country, neutral venue, and adds an international flair to the courts. Indeed, most of the judges currently deciding cases at the Middle Eastern international commercial courts were formerly judges in jurisdictions such as Australia, Hong Kong, or England and Wales and, in particular, the LCC.[36] Similarly, the SICC employs judges from other common law jurisdictions, who have served in renowned commercial courts such as the LCC or the Delaware Court of Chancery.[37] Other foreign judges come from countries that have strong economic ties with the jurisdictions where the international commercial courts are situated, as these ties frequently translate into disputes involving their nationals and laws.[38] Since China did not amend its laws according to which only Chinese nationals may serve as judges, the CICC is exclusively composed of Chinese judges. Nevertheless, the CICC bypassed statutory prohibitions by establishing an International Commercial Expert Committee. The committee members are Chinese and foreign legal experts, and take on the task of mediating disputes and providing advisory opinions on specialised legal issues.[39]

However, the international judges' expertise in commercial law does not provide the full picture as regards their appointment. Some judges sitting on the international commercial courts or the Chinese International Commercial Expert Committee – even if primarily appointed for their expertise – contribute to the marketing of these courts owing to their international reputation and their extended network.[40] Notable foreign judges who have been or are sitting at international commercial courts are among others Lord Harry Woolf, Lord

[36] DIFC Courts Official Website, About, Court Structure, Judges, available at <https://www.difccourts.ae/about/court-structure/judges>; Qatar International Court and Dispute Resolution Centre Official Website, Court Overview, available at <https://www.qicdrc.com.qa/court-overview>; ADGM Courts Official Website, Judges, available at <https://www.adgm.com/adgm-courts/judges>; AIFC Court Official Website, Justices, available at <https://court.aifc.kz/who-we-are/justices/> all accessed January 2022.

[37] SICC Official Website, About the SICC, Judges, available at <https://www.sicc.gov.sg/about-the-sicc/judges> accessed January 2022.

[38] In the DIFC Courts, Chief Justice Zaki Azmi comes from Malaysia, Justices Roger Giles, Robert French and Wayne Martin come from Australia, and former DIFC Courts Justice Judith Prakash comes from Singapore, available at <https://www.difccourts.ae/about/court-structure/judges>; in the QIC, Justices Dr. Rashid Hamad Al-Anezi, Chelva Rajah SC, George Arestis and Fritz Brand come from Kuwait, Singapore, Cyprus and South Africa respectively, available at <https://www.qicdrc.gov.qa/courts/court> all accessed January 2022.

[39] CICC Official Website, 'The Supreme People's Court Established the International Commercial Expert Committee', 26 August 2018, available at <http://cicc.court.gov.cn/html/1/219/208/209/981.html> accessed January 2022.

[40] Similarly, Sheng Zhang, 'China's International Commercial Court: Background, Obstacles and the Road Ahead' (2020) 11 Journal of International Dispute Settlement 158.

Mance,[41] Lord John Thomas of Cwmgiedd,[42] Sir Anthony Evans,[43] and Sir William Blair.[44] In some instances, international commercial courts even share their human and symbolic capital by exchanging judges among themselves. Lord Woolf first headed the Civil and Commercial Court of the Qatar Financial Centre[45] and then the AIFC Court.[46] Former Chief Justice of the DIFC Courts, Michael Hwang, is at the time of writing a member of the CICC Expert Committee.[47] SICC judges Anselmo Reyes and Steven Chong are at the same time members of the CICC Expert Committee.[48] Justice Sir Jeremy Cooke is a judge at both the SICC and the DIFC Courts.[49] In addition, arbitration practitioners and academics such as Albert Jan van den Berg, Gabrielle Kaufmann-Kohler, Gary Born,[50] and Douglas Samuel Jones[51] have been or still are members of the SICC and the CICC Expert Committee. These appointments hint at the strong ties international commercial courts aim to forge not only among each other but also with the arbitration community.

Judges at the international commercial courts, these 'grand old men',[52] have endorsed the establishment of these courts by lending them their expertise and reputation. Especially in jurisdictions that are often dismissed as authoritarian or whose judicial system lacks international standing, international judges add the recognition and credibility of their established judicial systems and mitigate the relatively short history of international commercial courts in dispute resolution. However, hearing and deciding cases is not their only

[41] AIFC Court Official Website, Chief Justice, available at <https://court.aifc.kz/who-we-are/> accessed January 2022.
[42] QICDRC Official Website, available at <https://www.qicdrc.gov.qa/> accessed January 2022.
[43] DIFC Courts Official Website, Sir Anthony Evans, The Chief Justice of the DIFC Courts Speech During the Inauguration of the DIFC Courts, 17 April 2007, available at <https://www.difccourts.ae/media-centre/newsroom/17-april-2007-sir-anthony-evans-chief-justice-difc-courts-speech-during-inauguration-difc-courts> accessed January 2022.
[44] QICDRC Official Website, Court Overview, available at <https://www.qicdrc.gov.qa/the-courts/overview> accessed January 2022.
[45] Neil Rose, 'Qatar: A Centre for 'Quality' International Dispute Resolution?', *The Guardian*, 14 December 2010, available at <https://www.theguardian.com/law/2010/dec/14/qatar-international-dispute-resolution-law> accessed January 2022.
[46] Lord Woolf, *A Vision of the AIFC Court*, Edited by Christopher Campbell-Holt (AIFC Court 2019), available at <https://court.aifc.kz/uploads/02-1%20AIFC%20Court%20Book%202019%20ENG.pdf> accessed January 2022.
[47] CICC, Expert Committee, available at <http://cicc.court.gov.cn/html/1/219/235/237/1864.html> accessed January 2022.
[48] SICC Official Website, About the SICC, Judges, available at <https://www.sicc.gov.sg/about-the-sicc/judges>; CICC, Expert Committee, available at <http://cicc.court.gov.cn/html/1//219/235/237/list3.html> all accessed January 2022.
[49] DIFC Courts and SICC Official Websites.
[50] CICC Official Website, Expert Committee.
[51] SICC Official Website.
[52] Yves Dezalay and Bryant Garth, *Dealing in Virtue, International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1996) 34-41.

task. A judge at an international commercial court does not only speak justice but also speaks for the court. Touring and campaigning for disputes by participating and giving speeches at conferences is their additional judicial duty.[53] Some international commercial courts organise or sponsor conferences and key legal events.[54] Lastly, the establishment of the Standing International Forum of Commercial Courts (SIFoCC) has helped international commercial courts to cooperate with each other and to create a network.[55]

The DIFC Courts were connected to other commercial courts in foreign jurisdictions by signing, among others, cooperation agreements such as Memoranda of Understanding. Memoranda of Understanding are indeed a final illustration of how international commercial courts attempt to raise awareness of their existence by establishing and widening their network. The DIFC Courts were the first to pick up this practice, and to date have signed various such agreements.[56] The Memoranda of Understanding are cooperation agreements signed with commercial courts or arbitration institutes in foreign jurisdictions as well as with regulatory authorities within the United Arab Emirates. The signing parties are supposed to identify synergies and jointly organise conferences and seminars, outreach programs, publications, and other networking events. As the agreements characteristically mention, '*both parties shall explore the joint marketing of their services through engaging in public relations and marketing communication materials*'. Interestingly enough, the memoranda signed with regulatory authorities do not solely aim at promoting and marketing the DIFC Courts. Among their explicit aims is the diffusion of DIFC Courts' dispute resolution clauses in their transactions. In particular, the regulatory authorities are to encourage the companies they supervise to opt for the DIFC Courts.[57] In the footsteps of the DIFC Courts, the QIC and the

[53] Dutch Council for the Judiciary, NCC Plan 2015, 13; DIFC Courts, *Strategic Plan 2016-2021*, Section F, International Connectivity and Enforcement, para. 10, available at <https://demo.difccourts.ae/media-centre/publications/strategic-plan-2016-2021/building-court-future-8>; QICDRC Official Website, Events, available at <https://www.qicdrc.gov.qa/>; SICC Official Website, News No. 20, available at <https://www.sicc.gov.sg/docs/default-source/modules-document/media-resources/sicc-news-no-20-(jan-2020)_f6739f4b-3be2-4f16-95ae-c9809546f6ae.pdf> all accessed January 2022.

[54] QICDRF Official Website, News; SICC Official Website, News No. 20.

[55] SIFoCC, About Us, available at <https://www.sifocc.org/about-us/> and SIFoCC, Resources, available at <https://sifocc.org/resources/resources-2/>. See also Sundaresh Menon, Response by Chief Justice Sundaresh Menon, Opening of the Legal Year 2020, 6 January 2020, para. 23 available at <https://www.lsc.gov.sg/publications/speeches> all accessed January 2022.

[56] For an overview, see DIFC Courts Official Website, About, Protocols and Memoranda, available at <https://www.difccourts.ae/about/protocols-memoranda> accessed January 2022.

[57] MoU between the DRA and JAFZA, 20 September 2016, para. 4.1.2.4, available at <https://www.difccourts.ae/about/protocols-memoranda/memorandum-understanding-between-dra-and-jafza> accessed January 2022.

CICC have signed various Memoranda of Understanding with foreign courts, arbitration institutions, and universities.[58]

3.6. Academic Literature and Case Law

During an annual lecture at Durham University Institute of Commercial and Corporate Law, Sir William Blair[59] stated with regard to the variety of options available to parties in international commercial dispute resolution:

'*All this has tended to foster a competitive environment in which different states and systems and commercial actors seek to create optimal conditions to encourage use of their particular dispute resolution mechanisms. At times, some of the vast amount written on the subject seems more of a sales pitch than an attempt at analysis*'.

The quotation points out that the competition among various dispute resolution methods stimulates these to sell and market their virtues. At the same time, it underlines that this competition obscures the analysis and turns legal writing into a marketing exercise. In a similar vein, literature on international commercial courts has at times adopted a congratulatory tone that lacks substantive analysis. However, in the case of international commercial courts it is not only the increased competition that explains why academic writing may function as one more technique in the courts' marketing apparatus but also the active involvement of academics and legal practitioners in their establishment.

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[58] QICDRF Official Website, News, 'Chartered Institute of Arbitrators to Open Branch at QICDRC', 19 December 2017, available at <https://www.qicdrc.gov.qa/media-center/news/chartered-institute-arbitrators-open-branch-qicdrc>;'Foundation of Qatar Sports Arbitration Signs a MoU With the Qatar International Court and Dispute Resolution Centre', 1 March 2018, available at <https://www.qicdrc.gov.qa/media-center/news/foundation-qatar-sports-arbitration-signs-mou-qatar-international-court-and>; 'QICDRC signs MoU with LexisNexis to Become Strategic Alliance Partner', 11 November 2018, available at <https://www.qicdrc.gov.qa/media-center/news/qicdrc-signs-mou-lexisnexis-become-strategic-alliance-partner>; 'Qatar International Court and HBKU College of Law Sign Memorandum of Understanding, 6 November 2019, available at <https://www.qicdrc.gov.qa/media-center/news/qatar-international-court-and-hbku-college-law-sign-memorandum-understanding>. For the CICC, see CICC Official Website, 'The 2nd China-Singapore Legal and Judicial Roundtable Successfully Held in Singapore – Zhou Qiang Attended and Delivered a Speech', 31 August 2018, available at <http://cicc.court.gov.cn/html/1/219/208/209/1104.html>; 'Zhou Qiang Led Delegation to Morocco and Expressed: to Deepen Judicial Exchanges and Cooperation between China and Morocco, and Promote Economic, Trade and Cultural Exchanges to Better Benefit the People of the Two Countries', 23 September 2018, available at <http://cicc.court.gov.cn/html/1/219/208/209/1110.html>. For the SICC, SICC News, Issue No. 19/December 2019, 4 available at <https://www.sicc.gov.sg/docs/default-source/modules-document/media-resources/sicc-news-no-19-(dec-2019)_cdc4ae5a-7343-4526-a91c-0880bef2a760.pdf> all accessed January 2022.

[59] Sir William Blair served as a High Court Judge in England and Wales and was Judge in charge of the LCC from 2016. Presently, he sits as a Deputy Judge of the Court of First Instance of the High Court of Hong Kong, as a judge of the Qatar International Court and is a member of the CICC's International Commercial Expert Committee. For more information, see *inter alia* <https://www.law.ox.ac.uk/people/sir-william-blair-qc> accessed January 2022.

Indeed, some international commercial courts sought the advice of academics with regard to their desired institutional and procedural features.[60] Through their writings and conference speeches, academics subsequently spread the word with respect to the arrival of these courts and their innovative features. The active participation of academia in the rule-making process and the promotion of international commercial courts may therefore skew academic discourse and infuse a marketing narrative into the literature. This frustrates our ability to understand these courts' innovative features and to objectively assess their added value in the resolution of international commercial disputes.

In a similar vein, international commercial courts sought the input of lawyers, and their initial caseload was largely dependent on a domestic buy-in. As with academics, legal practitioners in some instances participated in drafting the rules of international commercial courts, and provided their opinion on the courts' institutional and procedural design.[61] With regard to their caseload, although the courts ultimately aim to attract disputes not necessarily related to their jurisdiction, during their first years of functioning it is anticipated that the majority of cases will derive from the ordinary courts. As pointed out during the parliamentary debate with regard to the Hague Convention on Choice of Court Agreements[62] and its impact on the SICC:

'*... we also need to think about the mechanics of getting our courts to be chosen as the exclusive choice of court in the jurisdiction clause of the commercial agreements that international parties enter into. We have to persuade people to put Singapore courts or SICC into their contracts as a court of choice to adjudicate any dispute that may arise. We need to approach MNCs and other international companies. We can start by persuading our own Singapore companies to use our SICC or Singapore jurisdiction clauses. We need to persuade them to*

[60] For the Frankfurt Chamber, see Requejo Isidro (n 19) 22: '*The proposal arose in 2016 in an academic context with good connections to the judiciary and to the Ministry of Justice in the Land of Hesse; representatives of the legal profession and the Chambers of Industry and Commerce took part in the project expressing the needs, expectations and preferences of the main stakeholders*'; Hess and Boerner (n 25) 34: '*Hence, in a joint effort of academia, the bar and the judiciary (including the president of the Frankfurt Court of Appeal), a plan was drawn up to transform Frankfurt am Main into a more service-friendly place for litigation*'.

[61] For the Paris International Chambers, see Legal High Committee for Financial Markets of Paris, 'Recommendations for the Creation of Special Tribunals for International Business Disputes', 3 May 2017, para. 6, available at <https://publications.banque-france.fr/sites/default/files/rapport_07_a.pdf> (hereafter: Legal High Committee for Financial Markets of Paris, Recommendations 2017) para. 21: '*Discussions with lawyers who are accustomed to cross-border disputes confirm that adapting our commercial courts to meet the requirements of a competitive handling of international commercial cases would entail the achievement of several quality objectives*'; for the Frankfurt Chamber, see (n 60); for the SICC, see the members of the SICC Committee, Report of the SICC Committee 2013, 3-4; Interview with court personnel (18 February 2020): '*We basically ask practitioners: What do you like, especially in international arbitration today, that you think we can adopt in this court?*'.

[62] Hague Conference on Private International Law, Convention of 30 June 2005 on Choice of Court Agreements, available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98> accessed January 2022.

fight for such clauses to be used, even in the face of their international business counterparts disagreeing'.[63]

In a similar vein, the Boston Consulting Group market survey emphasised with regard to the NCC that during the court's start-up years the majority of cases would be those involving a Dutch and a foreign company currently submitted to the ordinary Dutch courts.[64] It therefore becomes apparent that at least the initial caseload of international commercial courts largely relies on the support of the local bar. For that reason, it is key in the numerical success of international commercial courts to cultivate and maintain a close relationship with legal practitioners.

At the same time, the marketing of international commercial courts facilitates the marketing for legal practitioners. While the newly established courts were looking forward to hearing their first disputes, some lawyers were looking forward to appearing first before an international commercial court. After appearing before the newly established courts, they boasted a new field of expertise – that of litigating before an international commercial court. One lawyer explained:

'*There was quite a lot of attention. For instance, one of the colleagues, as soon as the hearing began, took a picture and put it on LinkedIn, and within one day it was liked, like 100 times. And in the weeks afterwards, every time I met lawyers from other firms they were: Oh, you were before the [name of international commercial court]. So yes, it is...it has some commercial value appearing before the [name of international commercial court]*.

Well, my firm does a lot of referral work. A lot of cases come into this firm from other lawyers when there is a conflict of interests or if they do not have specific knowledge of the case. Therefore, to be known as one of the lawyers who has appeared before the [name of international commercial court] might result in other work coming in. But it also depends...at some point it will either become quite rare for the [name of international commercial court] to have any proceedings, and then it has not so much value or it will become quite common and then it does not really matter. So it is just for now. Hopefully, if some foreign party will appear

[63] Dennis Tan Lip Fong**,** *Singapore Parliamentary Debates: Official Report*, Parliament of Singapore 2016, 94, available at <https://sprs.parl.gov.sg/search/sprs3topic?reportid=bill-207> accessed January 2022.
[64] The Boston Consulting Group, Market Survey NCC, Figure 4 and 11.

before the [name of international commercial court] they will think of the lawyers that have experience before it'.[65]

In exchange, some international commercial courts praised the skills and competence of the lawyers that offered them their maiden cases.[66] As in the case of academia, the courts' reliance on the legal services sector may blur the incentives motivating lawyers to bring cases before these new fora and muddy their perspectives on the courts' functioning.

However, at the same time few lawyers were sceptic to bring their case before an international commercial court. As one interviewee explained, they were worried that their case may become a 'showcase', a platform for the court to broadcast its innovative features. Case notes written shortly after the courts received their first cases indeed lay down the courts' innovative features and how these were applied in the cases at hand and might therefore lend some merit to the practitioner's concerns.[67]

It thus becomes apparent that international commercial courts have developed a close and collaborative relationship with academia and the legal profession that may in some instances result in puffery and marketing narratives that obscure the courts' real institutional and procedural merits. Academic literature and case law may function as one more marketing technique for international commercial courts to showcase their distinctive features.

3.4. Brand Features

The previous section highlighted the various ways international commercial courts attempt to advertise and market themselves as dispute resolution fora by using brand names, associating themselves with the established reputation of the cities and buildings hosting them, leveraging the fame of internationally renowned legal figures, creating a network and showcasing their distinctive features through academic literature and case law. This section focuses on four features of international commercial courts: namely, the use of English as the court language;

[65] Interview with lawyer (16 May 2019).

[66] See '*Justice Loh, who is hearing the case with international judges Vivian Ramsey from England and Anselmo Reyes from Hong Kong, lauded SC Xavier and SC Singh and their teams for their "brisk and business-like" approach "reflecting the best traditions of the bar"*' K. C. Vijayan, 'Singapore International Commercial Court, $1.1b Dispute is First Case Heard', *The Straits Times*, 21 November 2015, available at <https://www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/-singapore-international-commercial-court-1-1b-dollar-dispute-is-first-case-heard-the-straits-times_6c8b6ed8-1053-4700-b242-a19da8b482b2-1.pdf>; Netherlands Commercial Court, NCC Update Nr. 6, available at <https://www.rechtspraak.nl/English/NCC/news/Pages/NCC-Update-nr-6.aspx> all accessed January 2022.

[67] Teh Hwee Hwee, Justin Yeo and Colin Seow, 'The Singapore International Commercial Court in Action – Illustrations from the First Case' (2016) 28 Singapore Academy of Law Journal 692; Justin Yeo, 'On Appeal from Singapore International Commercial Court' (2017) 29 Singapore Academy of Law Journal.

the application of common law and arbitration rules and practices; the signing of Memoranda of Guidance; and the courts' claim to gradually develop a new *lex mercatoria*. The section illustrates that these features are used in the marketing of international commercial courts, and clarifies that in the case of some courts the actual scope and the added value of these features is limited.

3.4.1. English as the Court Language

One of the innovative features of international commercial courts is the use of English as the language of court proceedings. Except for the CICC, which conducts trials in Chinese,[68] and the SICC, which is located in an English-speaking jurisdiction, the rest of the international commercial courts have introduced English as the court language. Especially in Europe, the use of English is one of the main innovative features of international commercial courts. The majority of policy documents that paved the way for the establishment of the European international commercial courts, such as the Recommendations of the Legal High Committee for Financial Markets of Paris, the Explanatory Statement to the NCC law, the German proposal, and the BIBC proposal, underlined the significance of English as the *lingua franca* of international commerce.[69] As such, it is claimed that English should enter the court room in order to facilitate the resolution of cross-border commercial disputes by saving parties from translation costs, easing the communication among parties and their foreign parent companies, and rendering public court proceedings understandable and therefore more accessible to foreign parties.[70]

While English as a court language is a welcome feature, it should be borne in mind that if it is not accompanied by additional institutional or procedural innovations its potential to draw litigants to public courts is limited. This limited added value in turn calls into question the claim that international commercial courts in continental Europe and their English language court proceedings will seize the Brexit opportunity and successfully reverse the trend of litigating international commercial disputes in common law courts and arbitration.

[68] Art. 11 and 262 Civil Procedure Law of the People's Republic of China (Revised in 2017) available in English at <http://cicc.court.gov.cn/html/1/219/199/200/644.html> accessed January 2022.

[69] Legal High Committee for Financial Markets of Paris, Recommendations 2017, para. 21; NCC Law, Explanatory Statement, 1-2; German Chambers Legislative Proposal 2018, Explanatory Statement, 5; BIBC Preliminary Draft Law 2018, Explanatory Statement, 5; German Chambers Legislative Proposal 2021, Explanatory Statement, 6.

[70] The Boston Consulting Group, Market Survey NCC, 4; Legal High Committee for Financial Markets of Paris, Recommendations 2017, para. 21; German Chambers Legislative Proposal 2018, Explanatory Statement, 5; German Chambers Legislative Proposal 2021, Explanatory Statement, 6-7.

The limited potential of English as a court language to attract disputes is illustrated by the fact that it does not fully account for the popularity of English courts. Parties' choice in favour of the English courts is driven by a host of factors, among which the most prominent are the reputation and experience of English judges and the parties' preference for English law.[71] Although court language does feature among the elements that parties take into consideration when opting for an English court, it is not the key factor in the decision-making process.[72] Similarly, the claim that one of the reasons for adopting English as the language of court proceedings is because international arbitration procedures are increasingly conducted in English[73] loses sight of some of the factors that make arbitration attractive. Among these factors are the nearly worldwide enforceability of arbitration awards, the parties' desire to avoid specific jurisdictions and courts, the flexibility of arbitration proceedings, the parties' ability to select arbitrators, and the privacy and confidentiality of the proceedings.[74] Therefore, however welcome the use of English before continental courts might be, its capacity to attract litigation should not be overestimated. Previous attempts to introduce English to the courts of Rotterdam, Cologne, Aachen, and Bonn found little success, and highlighted the fact that language on its own bears limited potential to attract disputes.[75] Lastly, it should be noted that although the use of English is a common feature among international commercial courts, its scope significantly varies from court to court. While some international commercial courts allow for a full-fledged trial in English, others confine its use to specific parts of the procedure.

[71] Eva Lein, Robert McCorquodale, Lawrence McNamara, Hayk Kupelyants and José del Rio, British Institute of International and Comparative Law, *Factors Influencing International Litigants Decisions to Bring Commercial Claims to the London Based Courts*, Ministry of Justice Analytical Series 2015, 14-15 available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/396343/factors-influencing-international-litigants-with-commercial-claims.pdf>. See also Legal UK, *The Strength of English Law and the UK Jurisdiction*, 2017, available at <https://www.judiciary.uk/wp-content/uploads/2017/08/legaluk-strength-of-english-law-draft-4-FINAL.pdf>; The Law Society, *England and Wales, A World Jurisdiction of Choice*, December 2019, available at <https://www.studocu.com/en-gb/document/university-of-manchester/llb/england-and-wales-world-jurisdiction-of-choice-december-2019/7820658> all accessed January 2022.

[72] Themeli (n 5) 299. For language as a factor in choice of law, see Vogenauer (n 9) 25, 59.

[73] NCC Law, Explanatory Statement, 2; German Chambers Legislative Proposal 2018, Explanatory Statement, 6; German Chambers Legislative Proposal 2021, Explanatory Statement, 6; 'Ein richtiger Schritt auf einem langen Weg. Englischsprachige Kammer für Handelssachen am LG Frankfurt am Main: Einschätzungen aus der Praxis' (2018) 4 Deutscher Anwaltsspiegel 17, 20.

[74] White & Case and School of International Arbitration, Queen Mary University of London, 2018 International Arbitration Survey, Chart 3.

[75] Similarly, Gerhard Wagner and Arvid Arntz, 'Commercial Courts in Germany', 16 in Lei Chen and André Janssen (eds), *Dispute Resolution in China, Europe and World* (Ius Gentium: Comparative Perspectives on Law and Justice, Springer 2020).

The Paris International Chambers are among the international commercial courts that use English in a limited manner. In particular, in line with Article 2 of the French Constitution and Articles 110 and 111 of the Ordonnance de Villers-Cotterêts of 25 August 1539, French remains the language of the procedural acts, the pleadings, the record of the hearing, and the court's orders and judgment.[76] For ease of enforcement, the final judgment is accompanied by a sworn translation in English, to be paid for by the parties.[77] According to Article 2.5 of the Protocol on the Procedural Rules of the International Chamber of the Paris Commercial Court parties, experts, third-party witnesses, and legal counsel who are not French nationals may use the English language. However, what Article 2.5 gives with one hand Article 6.3 takes with the other. Pursuant to Article 6.3, when a party, a party's counsel, an expert, or a third-party witness uses a language other than French, simultaneous interpretation services must be arranged, with the expenses borne by the party that chose to use a language other than French.[78] The Protocol on the Procedural Rules of the International Chamber of the Paris Court of Appeals entails an identical provision.[79] Provisions like these cancel in effect the claim that the use of English in the Paris International Chambers will save parties from translation costs, and indicate that the use of English mainly involves the submission of documentary evidence.[80] Lastly, the use of English does not extend to proceedings before the Cour de Cassation. Similarly, and in contrast to the NCC and the NCCA, the Dutch Supreme Court holds proceedings in Dutch and publishes its judgments in that language.[81]

The German international commercial courts also introduced English as a trial language. However, as in the case of the French chambers, the use of English is limited to certain parts

[76] Protocol on Procedural Rules Applicable to the International Chamber of the Paris Commercial Court, Art. 2.2. – 2.6, 7, available at <https://www.avocatparis.org/system/files/editos/protocole_barreau_de_paris_-_tribunal_de_commerce_de_paris_version_anglaise.pdf> (hereafter: Protocol – International Chamber of the Paris Commercial Court); Protocol Relating to the Procedure Before the International Chamber of the Paris Court of Appeal, Art. 2.1. – 2.4. available at <file:///C:/Users/grgan/Downloads/Protocol_relating_to_the_procedure_before_the_International_Chamber_of_the_Paris_Court_of_Appeal%20(1).pdf> (hereafter: Protocol – International Chamber of the Paris Court of Appeal) all accessed January 2022.

[77] Protocol - International Chamber of the Paris Commercial Court, Art. 7; Protocol - International Chamber of the Paris Court of Appeal, Art. 7.

[78] Similarly, Protocol - International Chamber of the Paris Court of Appeal, Art. 3.3. and 4.4.2.

[79] Protocol - International Chamber of the Paris Court of Appeal, Art. 3.3. and 4.4.2.

[80] Nevertheless, if one of the parties contests the translation of a document provided by the other party, the judge may order a sworn translation at the expense of the party he will designate, see Protocol - International Chamber of the Paris Commercial Court, Art. 6.1. and Protocol - International Chamber of the Paris Court of Appeal, Art. 3.1.

[81] Dutch Council for the Judiciary, NCC Plan 2015, 12. The Supreme Court may accept without a translation in Dutch documents submitted to the NCC and the NCCA in the English language, see NCC Law, Explanatory Statement, 7.

of the procedure. In particular, the use of English refers only to the oral hearing. Pursuant to Article 184 Sentence 1 German Courts Organisation Act,[82] German remains the official language of court proceedings. The subsequent Article 185 (2) Courts Organisation Act, the provision offering the legal basis for the use of English, is limited to the oral hearing and does not extend to procedural documents such as the statements of claim and defence, the protocol,[83] and the court's judgment.[84] In addition, in order to preserve the publicity of the court hearing, a simultaneous translation in German takes place.[85] In contrast, the pending legislative proposal for the establishment of the German Chambers for International Commercial Disputes and Commercial Courts amends the German Code of Civil Procedure and the Courts Constitution Act, and thereby provides the legal basis for the whole conduct of proceedings – including pronouncement of the judgment – in the English language. However, before the German Supreme Court, proceedings may at the court's discretion be conducted in German.[86]

The limited attractiveness and scope of English as a court language shows that while English may assist the newly established courts to familiarise themselves with their international constituency, it does not suffice on its own to draw litigants to continental state courts unless it is extended in scope and accompanied by other procedural traits.[87] And while it is true that some European international commercial courts adopt various procedural innovations, others

[82] Courts Organization Act (*Gerichtsverfassungsgesetz*), Official Journal of the Federal Republic of Germany *(Bundesgesetzblatt)* I, 1077, available in English at <http://www.gesetze-im-internet.de/englisch_gvg/> accessed January 2022.

[83] Courts Organization Act, Art. 185 (1) Sentence 2.

[84] For the need to draft procedural documents in German at the chamber's first case, see Michael Sonnentag, 'Justiz & Brexit: Frankfurt Chamber for International Commercial Disputes – Veranstaltung in Frankfurt am Main am 9. August 2018' (2018) 26 Zeitschrift für Europäisches Privatrecht 967. See also Christian Hoppe, 'English als Verfahrenssprache – Möglichkeiten de lege lata und de lege ferenda' (2018) Praxis des Internationalen Privat- und Verfahrensrechts 374; Wolfgang Hau, 'Fremdsprachengebrauch durch deutsche Zivilgerichte – vom Schutz legitimer Parteiinteressen zum Wettbewerb der Justizstandorte' 49, 53-55 in Ralf Michaels and Dennis Solomon (eds), *Liber Amicorum Klaus Schurig* (Sellier European Law Publishers 2012).

[85] Sonnentag (n 84) 967.

[86] German Chambers Legislative Proposal 2021, Draft Art. 184 (3) Courts Constitution Act; Explanatory Statement, 11.

[87] German Federal Bar Association (*Bundesrechtsanwaltskammer*), Statement Nr. 23/2014 June 2014 With Regard to the Legislative Proposal for the Establishment of Chambers for International Commercial Disputes (*Stellungnahme Nr. 23/2014 Juni 2014 zum Entwurf eines Gesetzes zur Einführung von Kammern für internationale Handelssachen (KfiHG* 2014) 2, available at <https://www.brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2014/juni-1/stellungnahme-der-brak-2014-23.pdf>; Nordrhein Westfallen, *Justizstandort Deutschland - Stärkung der Gerichte in Wirtschaftsstreitigkeiten Diskussionspapier*, 16, available at <https://www.justiz.nrw/JM/organisation/abtII/lager_diskussionspapier/2019-02-07-Diskussionspapier-Symposium_2018-09-03.pdf> all accessed January 2022. For the view of practitioners on the use of English before the Frankfurt Chamber, see 'Ein richtiger Schritt auf einem langen Weg. Englischsprachige Kammer für Handelssachen am LG Frankfurt am Main: Einschätzungen aus der Praxis' 4 (2018) Deutscher AnwaltSpiegel 17, 20. See also The Boston Consulting Group, Market Survey NCC, Figure 2, where the language of proceedings – English – features as the 5th most important reason to bring a case before the NCC, and Figure 3 where 66% of the respondents believe that the use of English at the NCC should remain optional for the parties.

main – and only – procedural innovation is English as a trial language. As a lawyer who appeared before an international commercial court put it:

'*Same people, same court in English […]. But it pays special attention because of its international character [….]. If you go to a restaurant that you like and suddenly they ask you to sit at the chef's table, would you? Yes*!'[88]

3.4.2. Best Practices from Common Law Courts and Arbitration

Some international commercial courts employ features that resemble or emulate common law courts and arbitration. European courts especially, prompted by the outflow of disputes to English language courts and arbitral tribunals, openly state their intention to compete with common law courts and, in particular, the LCC, or with international commercial arbitration and to draw parties back to state courts.[89] Although this competition rationale is at times unclear, the UK's departure from the EU may create a vacuum in the European litigation market, and could result in offering a good marketing opportunity for European international commercial courts. In contrast, other international commercial courts, such as the SICC, are presented as just one more option complementing rather than competing with arbitration.[90] Despite these differences in rhetoric, international commercial courts, the LCC, and international commercial arbitration share the same target group in terms of disputes and litigants. Taking further into consideration that parties usually choose in favour of the familiar,[91] the adoption of best practices from common law courts and arbitration allows the newly established courts to become familiar, predictable, and therefore attractive in the eyes of international commercial litigants.

Nonetheless, and despite claims to the contrary, not all international commercial courts are common law or arbitration inspired. This holds particularly true for the European international commercial courts. Although the European courts borrow certain rules and practices from

[88] Interview with lawyer (3 October 2019).
[89] Dutch Council for the Judiciary, NCC Plan 2015, 5, 8-9; NCC Law, Explanatory Statement, 9; German Chambers Legislative Proposal 2018, Explanatory Statement, 6; German Chambers Legislative Proposal 2021, Explanatory Statement, 5-6.
[90] SICC Official Website, Who We Are, Establishment of the SICC, available at <https://www.sicc.gov.sg/about-the-sicc/establishment-of-the-sicc>. See also Menon (n 55) para. 26; Kannan Ramesh, 'International Commercial Courts: Unicorns on a Journey of a Thousand Miles', Conference on the Rise of International Commercial Courts, Doha, Qatar, 13 May 2018, para. 18, available at <https://www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/international-commercial-courts-unicorns_23108490-e290-422f-9da8-1e0d1e59ace5.pdf> all accessed January 2022.
[91] Vogenauer (n 9) 23, 53; Themeli (n 5) 299.

common law courts and arbitration, these are scarce and limited in scope. This fact might be explained if we consider that the European courts were the product of timid legislative amendments and cautious spending. This legislative and budgetary austerity stood in the way of legislative overhauls that would otherwise have been necessary for the establishment of courts with strong common law and arbitration features. The sheer volume of the BIBC legislative proposal testifies to the extent of the amendments necessary for the creation of arbitration-like courts. In the case of some international commercial courts, their English style or arbitration characteristics are therefore merely 'buzz' words aimed at appealing to parties versed in English-style litigation practices.

As regards the Paris International Chambers, the idea that gave rise to their creation was the notion of maintaining the present judicial organisation and the current legal framework.[92] Therefore, the Paris International Chambers are not the product of a statute or decree. The chambers' procedural rules can be found in the respective 'Protocols' signed between the Paris Bar, the Commercial Court for its International Chamber, and the Court of Appeal for its International Chamber.[93] The Protocols are an English translation of the relevant French rules of civil procedure. Hence, the Protocols do not modify the existing civil procedure rules.[94] The Paris International Chambers aim at resurrecting existing albeit underused rules and optimising their application.[95] According to the Legal High Committee for Financial Markets of Paris, the chambers do not directly transpose the methods of common law courts but adopt their mechanisms.[96]

In particular, the Paris Chambers gave up the French minimalist approach to civil proceedings such as the courts' preference for the written production of evidence, written submissions in reply, and the limitation of oral hearings. Although these practices were mostly driven by the fact that French courts are severely overloaded, the Paris International Chambers are nevertheless aware that, as in common law courts, foreign litigants are accustomed to more detailed case preparation and extended hearings.[97] In addition, the Paris International Chambers

[92] Legal High Committee for Financial Markets of Paris, Recommendations 2017, paras. 55-57.
[93] Protocol – International Chamber of the Paris Commercial Court and Protocol – International Chamber of the Paris Court of Appeal.
[94] Jeuland (n 25) 69-70.
[95] Legal High Committee for Financial Markets of Paris, Recommendations 2017, paras. 25, 47. See also Alexandre Biard, 'International Commercial Courts in France: Innovation without Revolution?' (2019) 12 Erasmus Law Review 24, 28; Jeuland (n 25) 65.
[96] Ibid., para. 27.
[97] Legal High Committee for Financial Markets of Paris, Recommendations 2017, para. 47.

strictly enforce time frames, are more lenient regarding the discovery of documents, and leave the door open for the cross-examination of witnesses.[98]

With regard to the NCC proceedings, it was deemed that any adaptations could be easily incorporated into existing Dutch litigation practice without any legislative amendment.[99] Consequently, the NCC and its procedural rules remain within the Dutch legal framework.[100] The NCC Rules are mainly a translation of the relevant Dutch civil procedure rules in English.[101] Similarly, most of the NCC's English and arbitration-style features are mainly logistical and operational in nature.[102] These include the rule that the same judge is to remain responsible for the case from the beginning until the end of the proceedings; the conducting of an early case management conference in order to discuss with the parties the disputed issues and set a procedural timetable; the increased use of technology; and, in particular, use of the NCC digital portal and the use of court reporters, who – contrary to current Dutch practice – will keep a verbatim report of the trial.[103] These features are modelled on market leaders in international commercial dispute resolution, such as the LCC and international arbitration institutes, and lead to a recognisable litigation manner.[104]

Similar to the approach of the remaining European international commercial courts, the Frankfurt Chamber incorporates best practices from common law courts and international commercial arbitration.[105] In particular, the first hearing is used as a case management conference where the parties and the judges identify the disputed factual and legal issues and establish a procedural 'road map'.[106] Moreover, within the framework of the existing German rules of civil procedure, the chamber makes increased use of written witness statements and the disclosure of documents.[107] In addition, modelled on arbitration proceedings, the Frankfurt Chamber prepares a full recording of the hearing and sends to the parties a textual recording.[108] The limited scope of the chamber's common law and arbitration features is in line with the fact

[98] Protocol – International Chamber of the Paris Commercial Court, Art. 4.3., 5.1 and 5.4.4; Protocol – International Chamber of the Paris Court of Appeal, Art. 3 and 4. See also Biard (n 95) 29; Jeuland (n 25) 77.
[99] Dutch Council for the Judiciary, NCC Plan 2015, 12.
[100] NCC Law, Explanatory Statement, 6; Bauw (n 8) 12.
[101] Art. 1.2.2. NCC Rules.
[102] Bauw (n 8) 15.
[103] Dutch Council for the Judiciary, NCC Plan 2015, 11; Eddy Bauw, 'Ondernemerschap in de rechtspleging. Over de kansen van een Netherlands Commercial Court' (2016) 65 Ars Aequi 93, 97; Bauw (n 8) 13-15.
[104] Dutch Council for the Judiciary, NCC Plan 2015, 11.
[105] Hess and Boerner (n 19) 36-37; Requejo Isidro (n 19) 23.
[106] Ibid., 36.
[107] Ibid.
[108] Ibid., 37.

that the Frankfurt Chamber lacks a law underpinning its establishment, is based on a lenient interpretation of existing German rules, and is therefore a court whose innovative features are mostly of an organisational nature.

In this manner, it becomes apparent that the common law or arbitration features of the Paris International Chambers, the NCC, and the Frankfurt Chamber are limited in scope and mostly organisational. The European international commercial courts apply national rules of civil procedures that leave little room for the application of common law or arbitration rules. If this is so, one may wonder why the European international commercial courts emphasise their common law or arbitration features. The answer may lie in the forum marketing of international commercial courts. Being aware that parties usually resort to common law courts or arbitration for the resolution of their international commercial disputes, the continental international commercial courts invoke common law or arbitration features, ultimately aiming at signalling the quality and familiarity of their procedures to foreign parties.

3.4.3. Memoranda of Guidance

Another feature of international commercial courts that has contributed to their marketing are Memoranda of Guidance. The Memoranda of Guidance are court-to-court agreements aimed at providing general information concerning the enforcement of each party's money judgments in the other party's courts.[109] The memoranda offer interested litigants clarity on the rules and

[109] DIFC Courts Official Website, Memorandum of Guidance as to Enforcement between the Dubai International Financial Centre Courts and the Commercial Court Queen's Bench Division England and Wales, 23 January 2013 paras. 1-2, available at <https://www.difccourts.ae/2013/01/23/memorandum-of-guidance-as-to-enforcement-between-the-difc-courts-and-the-commercial-court-queens-bench-division-england-and-wales/>; DIFC Courts Official Website, Memorandum of Guidance Between The Federal Court of Australia and the DIFC Courts, 28 March 2014, paras. 1-2, available at <https://www.difccourts.ae/2014/03/28/memorandum-guidance-federal-court-australia-difc-courts/>; DIFC Courts Official Website, High Court of Kenya, Memorandum of Guidance between the Dubai International Financial Centre Courts and The High Court of Kenya, Commercial & Admiralty Division, 27 November 2014, paras. 1-2, available at <https://www.difccourts.ae/2014/11/27/memorandum-guidance-dubai-international-financial-centre-courts-high-court-kenya-commercial-admiralty-division/>; DIFC Courts Official Website, Memorandum of Guidance as to Enforcement between the Supreme Court of Singapore and the Dubai International Financial Centre Courts, 19 January 2015, paras. 1-2, available at <https://www.difccourts.ae/2015/01/21/memorandum-guidance-enforcement-difc-courts-supreme-court-singapore/>; DIFC Courts Official Website, United States District Court for the Southern District of New York, Memorandum of Guidance between Dubai International Financial Centre Courts and the United States District Court for the Southern District of New York, 22 March 2015, paras. 1-2, available at <https://www.difccourts.ae/2015/03/29/memorandum-of-guidance-between-the-difc-courts-united-states-district-court-for-the-southern-district-of-new-york-sdny/>; DIFC Courts Official Website, Supreme Court of the Republic of Kazakhstan, Memorandum of Guidance as to Enforcement between the Supreme Court of the Republic of Kazakhstan and the Dubai International Financial Centre Courts, 28 August 2015, paras. 1-2, available at <https://www.difccourts.ae/2015/08/28/memorandum-of-guidance-as-to-enforcement-between-supreme-court-of-the-republic-of-kazakhstan-difc-courts/>; DIFC Courts Official Website, National Court Administration of the Supreme Court of Korea, Memorandum of Guidance as to Enforcement between the Dubai International Financial Centre Courts and the National Court Administration of the Supreme Court of Korea, 4 November 2015, paras. 1-2, available at <https://www.difccourts.ae/2015/11/09/memorandum-of-guidance-as-to-enforcement-between-the-national-court-administration-of-the-supreme-court-of-korea-the-difc-courts/>;

processes governing recognition and enforcement of the international commercial court judgments in the counterparty jurisdictions and vice versa. As all the Memoranda of Guidance underline, their ultimate goal is to clarify the enforcement procedures and thereby improve the parties' confidence in the recognition and enforcement of international commercial court judgments abroad.[110]

Indeed, one of the main challenges facing international commercial courts is the recognition and enforcement of their judgments abroad.[111] This recognition and enforcement gains even more significance in the context of international, cross-border disputes where parties and their assets are often spread across various jurisdictions. Taking further into consideration that international commercial courts aspire to attract disputes that are loosely or not at all related to the forum – referred to as offshore disputes – the potential for actual recognition and enforcement of the courts' judgments abroad then becomes inevitable.[112] While international commercial arbitration is often preferred by parties due to the nearly worldwide reach of the New York Convention on the Recognition and Enforcement of Arbitral Awards, the absence of such a widely applicable treaty or convention for foreign judgments makes the prospect of the recognition and enforcement of the judgments of these international commercial courts more precarious. Recent developments such as the Hague Conventions on Choice of Court Agreements or the Recognition and Enforcement of Foreign Judgments in Civil and

DIFC Courts Official Website, High Court of the Hong Kong Special Administrative Region of the People's Republic of China, Memorandum of Guidance as to Enforcement between the Dubai International Financial Centre Courts and the High Court of the Hong Kong Special Administrative Region of the People's Republic of China, paras. 1.2-1.3., available at <https://www.difccourts.ae/wp-content/uploads/2018/08/Memorandun-of-Guidance-as-to-Enforcement-between-The-Dubai-International-Financial-Courts-and-The-Hight-Court-of-the-Hong-Kong-Special-Administrative-Region-of-the-Peoples-Republic-of-China.pdf>. See also Koster and Beer (n 15) 210; Jayanth Krishnan and Priya Purohit, 'A Common Law Court in an Uncommon Environment: The DIFC Judiciary and Global Commercial Dispute Resolution' 25 (2014) The American Review of International Arbitration 497, 512.

[110] MoG between the DIFC Courts and the Commercial Court, Queen's Bench Division (2013), para. 3; MoG between the Federal Court of Australia and the DIFC Courts (2014), para. 3; MoG between the DIFC Courts and The High Court of Kenya, Commercial & Admiralty Division (2014), para. 3; MoG between the Supreme Court of Singapore and the DIFC Courts (2015), para. 3; MoG between the DIFC Courts and the United States District Court for the Southern District of New York (2015), para. 3; MoG between the Supreme Court of the Republic of Kazakhstan and the DIFC Courts (2015), para. 3; MoG between the DIFC Courts and the National Court Administration of the Supreme Court of Korea (2015), para. 3; MoG between the Federal Court of Malaysia and the DIFC Courts (2017), para. 3; MoG between DIFC Courts and the High Court for Zambia (2017), para. 1.4.; MoG between the DIFC Courts and the High Court of the Hong Kong (2018), para. 1.4.

[111] Singapore International Dispute Resolution Academy, *International Dispute Resolution Survey: Currents of Change*, Preliminary Report, Singapore Management University 2019, 19, available at <https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/documents/SIDRA2019_IDR_Survey_Preliminary_Report.pdf> accessed January 2022.

[112] Anselmo Reyes, 'Recognition and Enforcement of Interlocutory and Final Judgments of the Singapore International Commercial Court' (2015) 2 Journal of International and Comparative Law 337, 338.

Commercial Matters[113] hold a promising potential, but it is too soon to assess their effectiveness.

Being one of the first international commercial courts, the DIFC Courts were faced early on with concerns over the recognisability and enforceability of their judgments.[114] The subsequent tension between DIFC Courts and the regular Dubai courts over the exact delineation of their jurisdiction, and the reluctance of the latter to recognise and enforce judgments of the former added to these concerns.[115] So as to enhance the recognition and enforcement of their judgments and to dampen concerns, DIFC Courts have signed various Memoranda of Guidance with courts in foreign jurisdictions. According to the DIFC Courts Strategic Plan, until 2021 the courts will further formalise connections with courts in key trading markets such as Asia, and will sign additional such agreements.[116]

However, it should be noted that the Memoranda of Guidance are legally non-binding agreements. Despite the lack of a legally binding force, Mark Beer, the former CEO of the DIFC Courts, defended their potential to enhance enforcement. He stated:

'*If the DIFC Courts were not held in such high regard, and if enforcement was going to be a problem, then why would eminent jurists from different jurisdictions even meet, let alone sign cooperative agreements that impact their own reputations?*'[117]

Similar to the DIFC Courts, the SICC has signed Memoranda of Guidance on the enforcement of money judgments with commercial courts in other jurisdictions.[118] In light of Singapore's

[113] Hague Conference on Private International Law, Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137> accessed January 2022.

[114] Krishnan and Purohit (n 109) 510-512; Jayanth Krishnan, *The Story of the Dubai International Financial Center Courts: A Retrospective*, DIFC Academy of Law 2018, 59, available at <https://issuu.com/difccourts/docs/difc_courts_10_years> accessed January 2022.

[115] Dubai Decree No. 19 of 2016 concerning the Establishment of a Judicial Tribunal for the Dubai Courts and DIFC Courts. See also Michael Black and Tom Montagu-Smith, 'A Curb on the Jurisdiction of the DIFC Courts?', *XXIV Barrister's Chambers*, available at <https://xxiv.co.uk/a-curb-on-the-jurisdiction-of-the-difc-courts/> accessed January 2022.

[116] DIFC Courts, *Strategic Plan 2016-2021*, 28, available at <https://issuu.com/difccourts/docs/difc_courts_strategic_plan_2016-202?e=29076707/47176868> accessed January 2022.

[117] As quoted in Krishnan and Purohit (n 109) 528.

[118] SICC, Memorandum of Guidance as to Enforcement between the Supreme Court of Singapore and the Dubai International Financial Centre Courts, available at <https://www.sicc.gov.sg/docs/default-source/guide-to-the-sicc/dubai-mog-2015-cj-menon-and-cj-of-difc-(memorandum-of-guidance)4bb63033f22f6eceb9b0ff0000fcc945.pdf>; SICC, Memorandum of Guidance as to Enforcement of Money Judgments between the Supreme Court of the Republic of Singapore and Abu Dhabi Global Market Courts, available at <https://www.sicc.gov.sg/docs/default-source/guide-to-the-sicc/mog-as-to-enforcement-between-supreme-court-of-singapore-and-adgm-courts---signed40b63033f22f6eceb9b0ff0000fcc945.pdf>; SICC, The Honourable Justice Kim Hargrave, Commercial Court, Supreme Court of Victoria, Exchange of Letters on Cross-border Enforcement of Money Judgments between Singapore International Commercial Court and

aspiration to become the 'Belt and Road' dispute resolution gateway, the SICC lays particular importance on the recent Memorandum of Guidance between the Singapore Supreme Court and China's Supreme People's Court.[119] As a SICC employee boasted:

'*The DIFC Courts never got anything signed with China. Wood Mallesons gave a statement, but it is not as clear as what we have. It is the first time that China has signed any memorandum with a common law jurisdiction*'.[120]

However, as in the case of the DIFC Courts, the Memoranda of Guidance between the Singapore Supreme Court and the China's Supreme People's Court lack a legally binding force. When I asked whether the legally non-binding character of the memorandum could question its potential to improve the recognition and enforcement of SICC judgments, a SICC employee replied, echoing Mark Beer, that it is unlikely that courts will ignore a memorandum signed by the Chief Justices of the signing jurisdictions. I was then advised to read the Nanning Statement.

Indeed, in the Nanning Statement signed during the 2nd China-ASEAN Justice Forum in 2017, the participating countries agreed to facilitate the mutual recognition and enforcement of civil or commercial judgments. It was additionally stated that in the absence of an international treaty on the matter, both countries may, subject to their domestic laws, presume the existence of their reciprocal relationship, provided that the courts of the other country had not refused to

Supreme Court of Victoria, available at <https://www.sicc.gov.sg/docs/default-source/guide-to-the-sicc/here09b63033f22f6eceb9b0ff0000fcc945.pdf>; SICC, Memorandum of Guidance as to Enforcement of Money Judgments between the Supreme Court of Singapore and the Supreme Court of Bermuda, available at <https://www.sicc.gov.sg/docs/default-source/guide-to-the-sicc/mog-with-bermuda-(6sep2017)2ab63033f22f6eceb9b0ff0000fcc945.pdf>; SICC, Supreme Court of the Republic of Singapore, QICDRC, Memorandum of Guidance as to Enforcement of Money Judgments between the Supreme Court of the Republic of Singapore and Qatar International Court and Dispute Resolution Centre, 17 October 2017, available at <https://www.sicc.gov.sg/docs/default-source/guide-to-the-sicc/2017_qatar-mog---enforcement-of-judgements-between-the-qatar-international-court-and-dispute-resolution-centre-and-the-supreme-court-of-singapore35b63033f22f6eceb9b0ff0000fcc945.pdf>; SICC, Supreme People's Court of the People's Republic of China, Supreme Court of the Republic of Singapore, Memorandum of Guidance between the Supreme People's Court of the People's Republic of China and the Supreme Court of Singapore on Recognition and Enforcement of Money Judgements in Commercial Cases, 31 August 2018, available at <https://www.sicc.gov.sg/docs/default-source/guide-to-the-sicc/spc-mog-english-version---signed.pdf> all accessed January 2022.

[119] MoG between Supreme People's Court of the People's Republic of China and Supreme Court of the Republic of Singapore (2018); CICC Official Website, 'The 2nd China-Singapore Legal and Judicial Roundtable Successfully Held in Singapore, Zhou Qiang Attended and Delivered a Speech', 31 August 2018, available at <http://cicc.court.gov.cn/html/1/219/208/209/1104.html>. See also Hariz Baharudin, 'China, S'pore Courts Sign Agreement On Handling Judgments in Money Disputes', *The Straits Times*, available at <https://www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/-china-s'pore-courts-sign-agreement-on-handling-judgments-in-money-disputes-the-straits-times_5595f944-8470-48b3-8218-87d2539ed8f3.pdf> accessed January 2022.

[120] Interview with court personnel (18 February 2020).

recognise or enforce such judgments on the ground of lack of reciprocity.[121] It is therefore claimed that the participating countries such as China, which previously relied on the existence of a *de facto* reciprocity for the recognition and enforcement of foreign judgments, will – subject to the Nanning Statement – relax their requirements and shift to a *de jure* reciprocity.[122] This means that it will not be required to be shown that at least one Chinese judgment had been enforced by the other country in the past, but merely that as a matter of law a Chinese judgment could be enforced by the other country. If China switches to the requirement of *de jure* reciprocity, then it is additionally alleged that the Memoranda of Guidance signed between Chinese and foreign courts could indicate this type of reciprocity.[123] However, it should be borne in mind that it is questionable whether Memoranda of Guidance could effectively evidence a *de jure* reciprocity since they are not laws. Therefore, it remains to be tested whether the Memoranda of Guidance have the potential to improve the recognition and enforcement of court judgments and their usefulness apart from them being a marketing technique able to improve public perceptions on the receptivity of the international commercial courts' decisions.[124]

3.4.4. A New *Lex Mercatoria*

In a speech given in 2018 at a conference organised in Doha, Qatar, on the rise of international commercial courts, Kannan Ramesh, a judge at the SICC,[125] underlined that, similar to technology companies, international commercial courts address a market failure.[126] Differences between legal systems and traditions create legal uncertainty, increase transaction costs for companies, and in effect undermine the development of international commerce. Justice Ramesh added that arbitration could not contribute to the necessary harmonisation of

[121] Nanning Statement of the 2nd China-ASEAN Justice Forum, *China Justice Observer*, 8 June 2017, para. 7, available at <https://www.chinajusticeobserver.com/p/nanning-statement-of-the-2nd-china-asean-justice-forum> accessed January 2022.
[122] Yujun Guo, 'Country Report: The People's Republic of China', 49, 58 in Adeline Chong (ed), *Recognition and Enforcement of Foreign Judgements in Asia* (Asian Business Law Institute 2017); Anselmo Reyes and Kevin Tan, 'Recognition and Enforcement of International Commercial Court Judgments', 37 in Chen and Janssen (n 75). See also Sophia Tang, 'Chinese Court Enforces Singaporean Judgement Based on De Jure Reciprocity', *Conflict of Laws.net*, 2 December 2021, available at <Chinese Court Enforces Singaporean Judgment based on De Jure Reciprocity – Conflict of Laws> accessed January 2022.
[123] Reyes and Tan (n 122) 37.
[124] On the potential of MoG to promote the positive perception of SICC judgments, see also *SICC Committee Report 2013*, para. 51; Gilles Cuniberti, 'Signaling the Enforceability of the Forum's Judgments Abroad' (2020) Rivista Di Diritto Internazionale Privato e Prozessuale 33.
[125] SICC Official Website, About the SICC, Judges, available at <https://www.sicc.gov.sg/about-the-sicc/judges> accessed January 2022.
[126] Ramesh (n 90) para. 3. See also Sundaresh Menon, 'International Commercial Courts: Towards a Transnational System of Dispute Resolution', Opening Lecture for the DIFC Courts Lecture Series 2015, paras. 14-15.

commercial law due to the confidentiality of arbitral awards.[127] Instead, a network of international commercial courts could develop a publicly available commercial jurisprudence, and gradually forge a new *lex mercatoria*.[128] The ability of international commercial courts to develop a new *lex mercatoria* over time has also been highlighted by the Chief Justice of Singapore.[129]

This Section does not purport to rebut that claim. As international commercial courts acquire a caseload and develop case law, it remains to be seen how they will interpret commercial law, and whether exchange among the courts will gradually lead to some degree of harmonisation and to a new commercial law. However, this Section highlights that the international commercial courts' claim to forge a new *lex mercatoria* has in addition some marketing value. Past research on the application of a new *lex mercatoria* in international commercial arbitration is instructive in that respect.

Dezalay and Garth have noted the limited practical relevance of the new *lex mercatoria*, its primarily symbolic value, and have characteristically referred to it as the *'most academic of doctrines*'.[130] Similarly, Drahozal examined the extent to which parties in international commercial arbitration opt out of national law and opt instead in to a transnational commercial law.[131] He found that the use of transnational law in international arbitration is not at all common.[132] Therefore, according to Drahozal, the continuous discussion and analysis of the new law merchant mainly constitutes signalling behaviour by prospective international arbitrators. It signals arbitrators' transnational outlook and expertise in different legal systems.[133] Furthermore, Karton remarks that although the applicability of a new *lex mercatoria* in international commercial arbitration is controversial, it is central to arbitration's self-image.[134]

The notion of a new *lex mercatoria* is ambiguous. It could mean an autonomous legal order independent of national legal orders or simply a set of customs and trade usages supplementing

[127] Michael Hwang, 'Commercial Courts and International Arbitration: Competitors or Partners?' (2015) 31 Arbitration International 193, 196; Menon (n 126) para. 54; Ramesh (n 90) para. 6.
[128] Ramesh (n 90) para. 8. See also Menon (n 126) para. 55.
[129] Menon (n 126) paras. 29, 67 (b) and (d).
[130] Dezalay and Garth (n 52) 109.
[131] Christopher Drahozal, 'Contracting out of National Law: An Empirical Look at the New Law Merchant' (2005) 80 Notre Dame Law Review 523.
[132] Ibid., 536-544.
[133] Ibid., 549-551.
[134] Joshua Karton, *The Culture of International Arbitration and the Evolution of Contract Law* (Oxford University Press 2013) 46.

the otherwise applicable national laws.[135] The above research findings focus on the first definition. Although it is unclear what international commercial court stakeholders actually mean when referring to a new *lex mercatoria*, the reference to a new body of commercial law and to international commercial arbitration reveals that it excludes simple trade customs and usages. At the time of the present writing, the ability of the courts to develop a new commercial law is not sufficiently mature to assess. Nevertheless, the fact that the initial caseload of international commercial courts predominantly involves domestic parties and the application of domestic laws raises the question as to how these courts will set aside the application of national laws and develop a new *lex mercatoria*. Consequently, the claim that international commercial courts will forge a new *lex mercatoria* appears at the moment to be one more marketing technique that signals to prospective litigants the courts' more international outlook.

4. The Implications of Forum Marketing

Different international commercial courts adopt different forum marketing techniques. The European international commercial courts, for example, brand themselves as self-standing courts despite being only chambers. The use of 'brand names' distinguishes international commercial courts from ordinary courts and raises recognition of their establishment. In addition, some of these courts overstate the use of English in court proceedings or their arbitration inspired features to appeal to foreign litigants. The Asian international commercial courts, on the other hand, have appointed foreign nationality judges on their bench to enhance judicial expertise and improve their international reputation. They have also concluded Memoranda of Guidance with foreign jurisdictions to improve public perceptions on the recognition and enforcement prospects of their judgements. Furthermore, some international commercial courts engage in forum marketing more dynamically than others. This is so for the Asian international commercial courts, and it could be owed to the fact that they are older than their European counterparts, they find themselves in jurisdictions where constitutional and legislative amendments can be adopted without extensive parliamentary debates, they target a more international constituency as well as to the fact that unlike the European courts, they are less interdependent. The strong economic and jurisdictional ties between the European countries with an international commercial court could indeed discourage these from overly engaging in forum marketing. Despite the ongoing 'courtly competition' in Europe, the European international commercial courts are part of the Area of Freedom, Security and Justice

[135] Gralf-Peter Calliess, 'Lex Mercatoria', 1125 in Jürgen Basedow, Giesela Rühl, Franco Ferrari and Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017).

and therefore have to preserve the principle of 'mutual trust' and judicial cooperation in Europe.[136] In a similar vein, the strong ties between Singapore and China offer an explanation why the SICC has appointed foreign nationality judges from various jurisdictions on its bench − excluding China. The politics of the countries with an international commercial court shine through the courts' features and influence their marketing endeavours. Despite the different marketing techniques and the varying degrees of forum marketing, the preceding analysis lays bare that all international commercial courts both in Europe and in Asia engage in forum marketing. Forum marketing could therefore have broader implications with regard to the courts, the judges, the parties and civil justice as a whole.

4.1. Court Publicity

Forum marketing is signalling a change, disclosing that the days when courts spoke through their judgments are fading. In order to raise awareness of their recent establishment, to distinguish themselves from existing dispute resolution methods, and to attract disputes, the newly established courts have to engage in marketing. Hence, the flipside of forum selling is forum marketing.

By marketing their procedural features, international commercial courts break with the tradition of courts as being perceived as anonymous and disinterested in public appearances. Forum marketing reconceptualises court publicity by adding to its traditional definition of access to trials, court judgments, and legal argumentation, the idea that public courts and judges must become more visible and in effect more attractive to parties. Therefore, in the context of international commercial courts, court publicity takes on a new meaning; namely, that of marketing. International commercial courts reconceptualise court publicity, and instil a novel aspect into the axiom: '*Not only must Justice be done; it must also be seen to be done*'.[137]

This increased visibility increases transparency, connects international commercial courts with their constituents, and may therefore boost trust in the public justice system. Forum marketing makes not only the courts more visible, but also the judges at these courts. International commercial court judges do not remain aloof and majestic in their 'moldy robes'[138] but actively promote the courts' distinctive features through conference presentations or publications.

One could of course note that international commercial courts are not the only courts that engage in marketing practices. For example, various national courts use social media to inform

[136] Art. 81 Treaty on the Functioning of the European Union Official Journal C 326/1, 26 October 2012.
[137] *R* v *Sussex Justices*, ex parte McCarthy ([1924] KB 256, [1923] All ER Rep 233).
[138] John P. Dawson, *The Oracles of the Law* (Greenwood Press 1978) 431.

the public about recent case law and legal developments.[139] Similarly, judges in common law jurisdictions are traditionally more open to the public, including the media. However, in the context of international commercial courts, the use of marketing practices is more condensed, as almost all international commercial courts engage in it. More significantly, forum marketing in the context of these courts is more purposeful. International commercial courts do not engage in forum marketing simply to inform parties or spur public debate about legal rules and case law, but also to persuade parties to choose in their favour and attract cases. As the lack of a significant number of incoming cases would call into question the need for international commercial courts, forum marketing is central to the courts' functioning.

4.2. Misleading Advertisement

Although forum marketing may foster greater transparency and accessibility in the justice system, it may also have negative implications with regard to access to justice. As noted above, some of the procedural advantages of international commercial courts are limited in scope. This is the case with regard to the use of English as the court language as well as with the common law and arbitration features of the European international commercial courts. Similarly, the potential of the Memoranda of Guidance to enhance the recognition and enforcement of international commercial court judgments abroad is limited as the Memoranda lack a legally binding effect. Although the Memoranda clarify that their aim is to set out the procedures applicable to the recognition and enforcement of international commercial court judgments in the signatory states, stakeholders have vehemently defended their potential to ensure recognition and enforcement.

Cuniberti points out that Memoranda of Guidance may mislead parties in choosing an international commercial court.[140] Since the recognisability and enforceability of court judgments abroad is a significant factor in choice of court and dispute resolution methods, parties could choose a particular international commercial court in the erroneous belief that its judgments would be recognised and enforced abroad on the basis of a Memorandum of Guidance. He therefore notes that misrepresenting the enforceability of international commercial court judgments could be characterised as misleading or deceptive advertising. Deceptive advertisement normally results in public enforcement or tortious liability remedies.

[139] Andrew J.A. Mattan, Kate Puddister and Tamara A. Small, 'Tweet Justice: The Canadian Court's Use of Social Media' (2020) 50 American Review of Canadian Studies 229.
[140] Cuniberti (n 124) 52.

However, as such remedies are designed to regulate the practices of private actors they would be inapplicable in the case of international commercial courts.[141]

The above illustrates that forum marketing may mislead parties in their choice of court by overstating the courts' procedural merits and function as misleading or deceptive advertisement. International commercial courts may mislead parties by giving them the impression that they use English throughout court proceedings, that they incorporate multiple features from common law courts or international commercial arbitration and that the Memoranda of Guidance are sufficient to ensure the recognition and enforcement of judgments abroad. Existing legislative frameworks may be unable to capture and effectively regulate these misleading effects of forum marketing.

4.3. Independence and Impartiality Concerns

As remarked upon in the Introduction, the independence and impartiality of the judiciary is an indispensable feature of access to justice and the rule of law. However, some judges serve simultaneously at different international commercial courts or practice as lawyers or arbitrators. Although parallel judicial appointments and professional activities may contribute to the marketing of international commercial courts by creating links to other courts, to the bar and to the arbitration community, they could nevertheless call into question the independence and impartiality of the judges.

As we shall see in more detail in chapter 5, the United Kingdom Privy Council in 2018 removed Sir Creswell, former judge of the High Court of England and Wales, from a case at the Financial Services Division of the Grand Court of the Cayman Islands due to his parallel appointment as a Supplementary Judge at the Qatar International Court. At the Grand Court of the Cayman Islands, Sir Creswell was assigned to wind up of the BTU Power Company. BTU's preference shareholders, who held the effective economic interest in the company, were mainly Qatari interests including the Minister of Finance of Qatar. The appellant had challenged the independence of Judge Creswell, claiming an apparent bias owing to his position as a judge in Qatar and the involvement of the Minister of Finance, responsible for judicial appointments in the Qatar Civil and Commercial Court, in the Cayman Islands proceedings.[142] The Privy Council noted that the provisions of Qatari law governing the appointment and renewal procedure of judges at the Civil and Commercial Court are more opaque and less protective of judges than in the case of common law jurisdictions, such as the Cayman Islands and

[141] Ibid., 52-54.
[142] See Art. 4 Schedule No. 6, The Civil and Commercial Court, Qatar Financial Centre Law No (7) of 2005.

England.[143] It therefore ruled that a fair-minded and informed observer would see a real possibility that the judgment of the judge would be influenced, albeit sub-consciously, by his concurrent appointment.

This case illustrates that the parallel appointment of international judges to multiple courts – although a useful 'courting and networking' technique – may cast doubts on the judges' independence and impartiality. This is especially so if we take into consideration that some international commercial courts find themselves in states with thin independence and impartiality safeguards. Similarly, the dual practice of some international commercial court judges as lawyers or arbitrators may leave room for them to 'switch hats' and consequently give rise to conflicts of interest.[144]

Furthermore, according to the literature on court specialisation, specialist judges are more prone to capture than generalist judges. Court specialisation enhances the influence of certain interests on courts.[145] For example, the small number of judges serving at specialised courts and the frequent interaction between the specialised bench and the specialised bar facilitates and cultivates a certain degree of 'cosiness' among judges and lawyers. The fact that international commercial courts depend on local lawyers to acquire a caseload may exacerbate this cosiness. By steering cases to international commercial courts, lawyers may exert pressure on the courts to promote specific policies they consider favourable.[146] Furthermore, the courts' reliance on the local bar may encourage international commercial courts to offer litigants procedural advantages, such as swift resolution of the dispute in exchange for choosing in their favour. Hence, forum marketing may make courts amenable to providing procedural accommodations, thereby fostering a procedural *quid pro quo*.

4.4. The Role of Courts as Public Institutions

It has been revealed above that the forum marketing of international commercial courts may have various effects. A positive effect is that forum marketing makes the courts more transparent. However, under certain circumstances, forum marketing may mislead parties in choosing an international commercial court and may give rise to concerns about independence and impartiality. Nevertheless, the likelihood of forum marketing functioning as misleading advertising or calling into question the independence and impartiality of international

[143] *Almazeedi* v *Penner* [2018] UKPC 3, para. 17.
[144] For more analysis, see Chapter 5.
[145] Lawrence Baum, 'Probing the Effects of Judicial Specialization' (2009) 58 Duke Law Journal 1668, 1678.
[146] See also Lynn LoPucki, *Courting Failure: How Competition For Big Cases Is Corrupting the Bankruptcy Courts* (University of Michigan Press 2005) 19-24.

commercial court judges remains small. It is unlikely that sophisticated lawyers with experience in international commercial dispute resolution will trust the recognition and enforcement fate of court judgments in the legally non-binding Memoranda of Guidance. Similarly, chances are small that international judges sitting at an international commercial court will find themselves in the same type of uncomfortable position as Sir Creswell.

However, the inadequacy of current legislation to effectively mitigate the possibly misleading effects of forum marketing, and the increased overlap of various interests in the context of international commercial courts, have one thing in common. They underline that, unlike ordinary courts, international commercial courts operate in ways that bring them closer to private dispute resolution methods such as international commercial arbitration, where advertising practices and conflicts of interest are more intense.[147] The resemblance of international commercial courts to international commercial arbitration reveals a tension. While forum marketing encourages international commercial courts to reach out to litigants and serve the parties' wishes, it may also undermine the role of courts as public institutions. The use of market(-ing) practices in civil justice – a traditionally non-market space – hint at the commodification of public justice. By engaging in forum marketing, international commercial courts treat international commercial litigation as a product that can be marketed and sold. The concern that forum marketing commodifies justice brings to mind similar concerns regarding the right of lawyers to advertise their services. Legal advertising similarly raises fears of commercialising the legal profession and undermining its 'above trade' and public responsibility nature.[148] If one therefore takes a broader view of the role of courts as being significant not only to the parties in trial but also to third parties and society at large, forum marketing may then have undesirable implications, because it fosters a marketing culture that reduces justice to a commodity and minimises its public role.

5. Conclusion

The present chapter demonstrates that international commercial courts go beyond forum selling and engage in forum marketing. The reasons behind forum marketing are the same as those that encourage courts to engage in forum selling. However, some reasons underlying forum marketing are intrinsic to international commercial courts. The courts' voluntary source of

[147] For the use of marketing narratives in international commercial arbitration scholarship see: Ralf Michaels, 'Dreaming Law without a State: Scholarship on Autonomous International Arbitration as Utopian Literature' (2013) 1 London Review of International Law 35, 37; Karton (n 134) 59.
[148] *Bates* v *State Bar of Arizona* 433 U.S. 350 (1977). See also *Ohralik* v *Ohio State Bar Association*, 436 US 447 (1978).

jurisdiction, the jurisdictional overlap with other dispute resolution methods, and the fact that international commercial courts are reputation sensitive encourage these courts to engage in forum marketing. As recently established courts that depend on parties' choosing in their favour, they are challenged to raise awareness of their establishment, to rise above other dispute resolution options, to cultivate a positive reputation, and ultimately to carve out their own piece of international commercial dispute resolution. International commercial courts market themselves by employing multiple forum marketing techniques. They use brand names, associate their reputation with the established reputation of the cities and the buildings hosting them, seek the endorsement of internationally renowned legal figures, have created a network with other jurisdictions and commercial courts, and showcase their procedural innovations through academic literature and case law. In addition, some of the courts' features lack tangible innovations, and therefore contribute mainly to the marketing of international commercial courts by sending signals of quality and familiarity to foreign litigants.

Forum marketing may have various implications with regard to the courts, the judiciary, the parties, and society at large. It redefines court publicity by adding to the traditional notions of access to court trials and judgments the idea that courts and judges need to become more visible and more attractive to prospective litigants. This increased visibility may increase transparency and accessibility in civil justice, and thereby boost trust in public courts. However, under certain circumstances, forum marketing may also have negative implications regarding access to justice. Forum marketing could mislead prospective litigants in their choice of court by overstating the procedural merits of international commercial courts. The parallel judicial appointments and professional activities of international commercial court judges may give rise to conflicts of interest. However, the circumstances that could mislead parties in their choice of court and give rise to conflicts of interest are the exception rather than the norm. More significantly, the use of marketing practices in civil justice – a traditionally non-market space – signals the commodification of public justice. Forum marketing reduces civil justice to a commodity, and may therefore undermine the role of courts as public institutions. As forum marketing is only a prelude to forum selling, the following chapters turn to the forum selling of international commercial courts.

CHAPTER 4: CASTING A WIDE JURISDICTION NET

1. Introduction

Jurisdiction rules are frequently described as objective, neutral rules demarcating the power of the courts in terms of territory or subject matter. Less frequently discussed is how jurisdiction rules and their interpretation may facilitate courts in attracting cases, and in effect favour some courts over others. This could be due to a conventional account, according to which public courts and judges lack an interest in attracting cases, and therefore just float along on the waves of litigation.[1]

This account may hold true for the ordinary courts, but not for the recently established international commercial courts. Although, as discussed in chapter 2, the reasons behind the establishment of various international commercial courts differ, they all share the aim of attracting high-value commercial cases. This aim is in line with the broader policy objectives of the states hosting these courts to attract litigation, to create business for the legal services sector, and ultimately to become regional dispute resolution hubs.[2]

However, building a caseload presents international commercial courts with a challenge. What makes it challenging for them to build a caseload is the lack of compulsory jurisdiction and the jurisdictional overlap with the ordinary courts and international commercial arbitration. Most international commercial courts lack compulsory jurisdiction, and rely on being chosen by parties in a choice of court agreement. However, the fact that parties might not yet be familiar with international commercial courts indicates that they may not choose in favour of such a court over the next few years. In addition, the jurisdiction of international commercial courts largely overlaps with the jurisdiction of the ordinary courts and international commercial arbitration. Parties in international commercial disputes may either choose an international commercial court, stick to the ordinary courts, or resort to arbitration. The voluntary nature of their jurisdiction and the jurisdictional overlap with other courts and arbitration challenges

[1] Richard Posner, 'What do Judges and Justices Maximize? (The Same Thing Everybody Else Does)'(1993) Law & Economics Working Paper (University of Chicago Press) 1, 4; Stefan Vogenauer, 'Regulatory Competition Through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence' (2013) 21 European Review of Private Law 27-28.

[2] Xandra Kramer and John Sorabji, 'International Business Courts in Europe and Beyond – A Global Competition for Justice?' (2019) 12 Erasmus Law Review 1; Pamela Bookman, 'The Adjudication Business' (2020) 45 The Yale Journal of International Law 227; Matthew Erie, 'The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution' (2020) 60 Virginia Journal of International Law 225.

international commercial courts to raise awareness of their recent establishment, to acquire a caseload, and ultimately to carve out their own piece of international commercial dispute resolution. In order to overcome that challenge and to build a caseload, some international commercial courts adopt lenient jurisdiction rules, and interpret them in a way that facilitates the establishment of their jurisdiction.

Unlike most international commercial courts, those established in special economic zones are vested with compulsory jurisdiction over disputes linked to these zones. As such, international commercial courts in the Middle East and Kazakhstan do not depend solely on the parties' choice, and are assured of a steady stream of incoming, mostly domestic cases. Nevertheless, even for these courts, building a caseload has not been without challenges. Because these courts are established in special economic zones, that are geographically limited areas, their jurisdiction extends only to a small piece of land and, during their early years of functioning, to the few companies established there. Consequently, international commercial courts in the Middle East and Kazakhstan are similarly faced with the challenge of breaking through their narrow jurisdictional confines and acquiring a caseload.

Chapter 4 illustrates that while different international commercial courts opt for diverse jurisdiction rules and interpretations, what unites these is that they may facilitate the courts in attracting cases, and therefore function as forum selling techniques. In addition, the present chapter examines how forum selling reshapes jurisdiction rules and its broader implications regarding access to justice.

The chapter focuses on the Singapore International Commercial Court (SICC), the Netherlands Commercial Court (NCC), the China International Commercial Courts (CICC), the Paris International Chambers, the German Chambers for International Commercial Disputes, and the Dubai International Financial Centre (DIFC) Courts. Each Part describes a forum selling technique found among these courts. Part 2 focuses on choice of court agreements in favour of an international commercial court. It shows how the SICC and the NCC have relaxed existing rules and case law on choice of court agreements in order to facilitate the establishment of their jurisdiction. Part 3 turns to the transfer jurisdiction of the SICC, the CICC, and the Paris International Chambers. It illustrates how the ordinary courts transfer cases to these international commercial courts, and thereby enable them to acquire a caseload. Part 4 looks at the international character of the dispute, and examines how the SICC, the NCC, the German

Chambers for International Commercial Disputes, and the Paris International Chambers define international disputes. This Part demonstrates how the courts allow turning a domestic dispute into an international one simply on the basis of the parties' agreement, thereby expanding the courts' jurisdictional reach. Unlike the previous parts, Part 5 focuses on a single international commercial court: the DIFC Courts. It explores how the courts' broad array of exorbitant jurisdiction rules and their expansive interpretation provide ample evidence of the court's forum selling endeavours. Part 6 examines the implications of forum selling with regard to civil procedure and access to justice. The last Part concludes that forum selling reshapes civil procedure by prioritising party autonomy over other procedural requirements and by forging a right to substantive justice. Under certain circumstances, forum selling may disregard the lack of the parties' consent relating to the chosen court or lead to pro-claimant approaches.

2. Choice of Court Agreements in Favour of an International Commercial Court

Except for the courts established in the Middle East and Kazakhstan, international commercial courts lack compulsory jurisdiction, and their jurisdiction depends on the parties' agreement in their favour.[3] It is therefore claimed – reminiscent in a way of arbitration – that choice of court agreements are the jurisdictional cornerstone of international commercial courts.[4]

The significance of choice of court agreements is not only evident in the central role such agreements play in the courts' rules. The increasing importance that international commercial courts place on the parties' agreement and party autonomy in general has also prompted a differentiated and more lenient approach towards choice of court agreements in order to facilitate the courts' establishment of jurisdiction. This Part focuses on the SICC and the NCC and illustrates how the quest for cases influences the way that choice of court agreements in favour of these courts are treated in the courts' rules and case law.

[3] For the SICC, Rules of Court (Chapter 322, 2014 Revised Edition), Order 110, rule 7 (1) (b) (hereafter: SICC Rules), available at <https://sso.agc.gov.sg/SL/SCJA1969-R5>; for the NCC, Art. 30r (1) Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) (hereafter: DCCP), available in English in Alex Burrough, Stephen Machon, Duco Oranje, Lincoln Frakes and Willem Visser (eds), *Code of Civil Procedure, Selected Sections and the NCC Rules* (Eleven 2018); for the CICC, see Art. 2 (1) Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court (hereafter: CICC Provisions), available at <http://cicc.court.gov.cn/html/1/219/208/210/817.html>; for the BIBC, Legislative Proposal Establishing the Brussels International Business Court (*Wetsontwerp houdende oprichting van het Brussels International Business Court/ Project de loi instaurant la Brussels International Business Court*), Parliamentary Documents (Parl. St./Doc. parl.): Belgian House of Representatives (*Belgische Kamer van Volksvertegenwoordigers/ Chambre de représentants de Belgique*) 54, 3072/001, 15 May 2018, Preliminary Draft (*Voorontwerp/ Avant-projet*), Art. 15 (hereafter: BIBC Preliminary Draft Law 2018), available at <https://www.dekamer.be/FLWB/PDF/54/3072/54K3072001.pdf> all accessed January 2022.

[4] Adeline Chong and Man Yip, 'Singapore as a Centre for International Commercial Litigation: Party Autonomy to the Fore' (2019) 15 Journal of Private International Law 97, 106.

2.1. The SICC

The Report of the SICC Committee, which explored the idea of establishing the SICC, underlined the significance of choice of court agreements for the court's establishment of jurisdiction. In addition, the committee questioned whether the *forum non conveniens* doctrine remains modern and relevant to the SICC.[5] Since the SICC aspires to attract and deal with international disputes – not necessarily linked to Singapore – the traditional *forum non conveniens* inquiry into the dispute's links to the forum would contravene such an aspiration. The SICC Committee Report advocates a more lenient approach towards the exercise of extra-territorial jurisdiction and reveals the statutory intent motivating the SICC rules of jurisdiction.

A comparison between the jurisdiction rules of the Singapore High Court and the SICC is necessary to understand the SICC rules and their more lenient approach towards choice of court agreements. In Singapore, a choice of court agreement is a statutory basis for extra-territorial personal jurisdiction being one of the heads of jurisdiction under Order 11, Rule 1.[6] However, it should be underlined that a choice of court agreement does not dispense with the requirement to obtain the leave of court for service out of Singapore. By contrast, according to the SICC rules, if there is a SICC choice of court agreement, no leave of court for service on a foreign defendant is required.[7]

This difference in treatment between jurisdiction agreements in favour of the SICC and the High Court means that it is easier for the SICC to establish jurisdiction in a case involving a foreign defendant.[8] Commentators claim that such a difference is only a small step outside the traditional jurisdictional framework, and it is justified upon the notion of party autonomy and, in particular, the defendant's agreement to litigate at the SICC. After all, even where traditional

[5] *Report of the Singapore International Commercial Court Committee*, November 2013, para. 27 (hereafter: SICC Committee Report 2013), available at <https://www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/-report-of-the-singapore-international-commercial-court-committee- 90a41701-a5fc-4a2e-82db-cc33db8b6603-1.pdf> accessed January 2022. See also *Rappo* v *Accent Delight International Ltd* [2017] SGCA 27, para. 123.

[6] Supreme Court of Judicature Act, Section 16 (1) (a) (ii) and Rules of Court, Order 11, Rule 1 (d) (iv) and Rule 1 (r).

[7] SICC Rules, Rule 6 (2), (2A).

[8] Yeo Tiong Min, 'Staying Relevant: Exercise of Jurisdiction in the Age of the SICC' Eighth Yong Pung How Professorship of Law Lecture 2015, para. 23; Man Yip, 'The Resolution of Disputes Before the SICC' (2016) 65 International and Comparative Law Quarterly 439, 455.

rules apply, Singapore courts tend to grant a leave for service out of jurisdiction if there is an agreement in favour of Singapore courts.[9]

Having shown how a choice of court agreement influences the existence of jurisdiction, let us now turn to choice of court agreements and their impact on the exercise of jurisdiction of Singaporean courts in general. The effect a choice of court agreement has on the exercise of jurisdiction depends on whether it is exclusive or non-exclusive. If the parties have agreed on the exclusive jurisdiction of Singapore courts, the 'strong cause' test applies instead of the *Spiliada* test.[10] In particular, it rests on the defendant to show that there is a strong cause to disregard the parties' choice and therefore to stay proceedings in favour of a court other than the one chosen.[11] As a consequence, in the event of exclusive choice of court agreements, the threshold is very high, and disregarding the parties' choice of forum is rather unlikely.

When it comes to non-exclusive choice of court agreements, these were considered just one of the many factors taken into consideration by the court in the *Spiliada* analysis while determining whether or not to exercise jurisdiction.[12] However, in a recent ruling, the Singapore Court of Appeal differentiated between non-exclusive agreements in favour of foreign and Singapore courts. In *Shanghai Turbo Enterprises Ltd* v *Liu Ming*, the Court of Appeal ruled that if the parties have agreed on the non-exclusive jurisdiction of a foreign court, the choice of court agreement is then one of the factors the court will draw into consideration while applying the *Spiliada* test.[13] Conversely, if the parties have agreed on the non-exclusive jurisdiction of the Singapore courts, the defendant must again show 'strong cause' against the enforcement of the agreement.[14] In summary, if Singapore is the chosen forum, even in a non-exclusive choice of court agreement, the courts are inclined to exercise jurisdiction unless exceptional circumstances justify a deviation from the parties' agreement.

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[9] Yeo (n 8) 23; Chong and Yip (n 4) 128.
[10] *Amerco Timbers Pte Ltd* v *Chatsworth Timber Corp Pte Ltd* [1977-1978] SLR(R) 112; *Trisuryo Garuda Nusa Pte Ltd* v *SKP Pradiksi (North) Sdn Bhd* [2017] 2 SLR 814; *Vinmar Overseas (Singapore) pte Ltd* v *PTT International Trading Pte Ltd* [2018] 2 SLR 1271. See also Yeo Tiong Min, 'The Choice of Court Agreement: Perils of the Midnight Clause', 12th Yong Pung How Professorship of Law Lecture 2019, paras. 18-19.
[11] *The 'Jian He'* [1999] SGCA 71, [1999] 3 SLR(R) 432; *Golden Shore Transportation Pte Ltd* v. *UCO Bank* [2003] SGCA 43, [2004] 1 SLR(R) 6.
[12] *Orchard Capital I Ltd* v *Ravindra Kumar Jhunjhunwala* [2012] SGCA 16, [2012] 2 SLR 519.
[13] *Shanghai Turbo Enterprises Ltd* v *Liu Ming* [2019] SGCA 11, para. 88.
[14] Ibid. See also Chong and Yip (n 4) 104; Yeo Tiong Min, 'Singapore Court of Appeal Affirms Party Autonomy in Choice of Court Agreements', (2019) Research Collection School of Law 1, 2; Yeo (n 10) para. 37.

Turning to the SICC, the rules regulating its exercise of jurisdiction are significantly different from the High Court's rules. According to Order 110, Rule 8, the SICC may decline to assume jurisdiction if it is not appropriate for the action to be heard in the court. If there is a written jurisdiction agreement, the court must not decline jurisdiction solely on the ground that the dispute is connected to a jurisdiction other than Singapore. While determining whether or not to exercise jurisdiction, the SICC is required to take into consideration the international and commercial character of the dispute.[15]

The somewhat unclear wording of the rules has triggered various interpretations.[16] Despite variations, all interpretations concur that Order 110, Rule 8 significantly narrows the grounds for declining jurisdiction.[17] The *Spiliada* test remains applicable, but connections to competing fora should not be the sole consideration when determining whether or not to exercise jurisdiction. This is understandable if we take into consideration that the SICC was created with the aim of resolving international disputes often loosely connected to Singapore.[18] The SICC seeks to position itself as a neutral, third-party venue for resolving disputes between parties from different jurisdictions.[19] Therefore, requiring a connection between the dispute and Singapore would run counter to such a goal.[20]

The difficulty in striking a balance between the SICC's trajectory to become Asia's dispute resolution hub and common law principles of jurisdiction became evident in the *IM Skaugen*[21] ruling. There the Assistant Registrar noted that Order 110, Rule 8 (2), requiring the SICC not to decline jurisdiction solely on the ground of the dispute's connections to other jurisdictions, reveals a tension between the requirement of an international dispute and the *Spiliada* test, and added: '*As a matter of principle it seems incongruous that an international commercial court set up to cater to foreign parties and foreign laws […] would find itself hamstrung by rules on the assumption of long-arm jurisdiction that date back to laws promulgated in the 1800s […]*

[15] SICC Rules, Rule 8.
[16] Yeo (n 8) paras. 29-34; Kenny Chng Wei Yao, 'Exploring a New Frontier in Singapore's Private International Law: IM Skaugen SE v MAN Diesel & Turbo SE [2016] SGHCR 6' (2016) 28 Singapore Academy of Law Journal 649, 661-666; Yip (n 8) 456-458; Chong and Yip (n 4) 106-108.
[17] Yeo (n 8) para. 32; Chng (n 16) 664-665; Yip (n 8) 458; Chong and Yip (n 4) 107.
[18] Indranee Rajah, Speech by Senior Minister of State for Law at the Litigation Conference 2015, 16 March 2015, paras. 15, 25 <https://app.mlaw.gov.sg/news/speeches/speech-by-senior-minister-of-state-for-law--indranee-rajah--at-t> accessed January 2022.
[19] SICC Committee Report 2013 (n 5) para. 5.
[20] Chng (n 17) 662; Chong and Yip (n 4) 107.
[21] *IM Skaugen SE* v *MAN Diesel & Turbo SE* [2016] SGHCR 6.

which are rooted in outmoded conceptions of sovereignty as being tantamount to territorial control'.[22]

In light of Order 110, Rule 8, the SICC has given up the strict application of the *Spiliada* test and the traditional inquiry into the natural forum. As long as parties have chosen the SICC in a choice of court agreement, the court is disinclined to decline jurisdiction. Moreover, the rules do not distinguish between exclusive and non-exclusive jurisdiction agreements. Equating exclusive to non-exclusive choice of court agreements dispenses with the need to identify the nature of the agreement where parties have omitted to specify their agreement as exclusive or non-exclusive, and therefore alleviates any uncertainty about the characterisation of choice of court agreements.[23] In addition, the Supreme Court of Judicature Act, Section 18F (1) (a), establishes a presumption of exclusivity for SICC choice of court agreements, and has already lifted any uncertainty with regard to the interpretation of unclear choice of court agreements. It becomes apparent that treating non-exclusive choice of court agreements similarly to exclusive choice of court agreements favours the SICC's assumption of jurisdiction.

Lastly, if one takes into consideration that the SICC is only competent with regard to international and commercial disputes, the requirement to reconsider the nature of the dispute at the stage of determining the exercise of jurisdiction appears superfluous.[24] This overlap reveals that the SICC rules convolute the existence with the exercise of jurisdiction. Just like with dispensing with the leave of court for service outside of jurisdiction, the SICC rules constrict the court's discretionary powers to deny the exercise of jurisdiction.

In addition, how the SICC influences traditional common law rules of jurisdiction becomes apparent in the fact that the SICC and its unique features are considered one of the factors examined in the *forum non conveniens* analysis. In *Accent Delight International Ltd* v *Bouvier, Yves Charles Edgar*,[25] the High Court had to examine whether Singapore was the appropriate forum to resolve the dispute despite various links to Switzerland. The court ruled that while determining whether Singapore was an appropriate forum, the possibility of a transfer of proceedings to the SICC should be one of the factors considered in the *Spiliada* test. In

[22] Ibid., para. 144.
[23] Yip (n 8) 451.
[24] Yip (n 8) 459.
[25] *Accent Delight International Ltd* v *Bouvier, Yves Charles Edgar* [2016] SGHC 40.

particular, the perceived advantages or disadvantages of Switzerland being a more appropriate forum would be levelled out if the lawsuit remained in Singapore but was transferred to the SICC.[26] The fact that international judges sit at the SICC eliminates the difficulties of applying foreign law and dispenses with the need to translate documents into a foreign language. Although a number of documents were in French, the presence of international judge Dominique T. Hascher, who was equally fluent in French and English, erased any translation concerns with regard to time and costs.[27] Similarly, in *IM Skaugen SE* v *MAN Diesel & Turbo SE*,[28] the defendants argued that since German law was applicable, a German court would be more appropriate to resolve the dispute. Therefore, they applied to set aside the leave of service out of Singapore and for a stay of proceedings in favour of the German courts. In support of their application, the defendants added that a transfer to the SICC could not render Singapore an appropriate forum since the SICC does not have a German judge who can deal with issues of German law.[29] The judgment dismissed these arguments, and contended that although there was no German international judge at the SICC, other international judges hailing from civil law jurisdictions could deal with German law issues – in particular, a Japanese judge who had been appointed at the SICC. Taking into consideration that Japan's Civil Code has been historically influenced by the German civil code, the Japanese judge possessed the skills and experience to apply German law to the dispute.[30] Both judgments were reversed on appeal.[31] In particular, the Singapore Court of Appeal ruled that indeed the SICC and its capacities are a relevant consideration in the *forum non conveniens* analysis.[32] The ability to determine the content of foreign law based on submissions instead of proof, and the international bench capable of dealing with issues of foreign laws result in the application of foreign law carrying less weight in the *Spiliada* test.[33] However, the Court of Appeal deemed that the lower courts had assigned excessive weight to the possibility of a transfer to the SICC, and had treated the SICC as the only factor rather than one of the many factors in the *forum non conveniens* inquiry.[34] The presence of the SICC should not provide a reason for all cross-border cases to

[26] Ibid., paras. 111-116.
[27] Ibid., para. 116.
[28] *IM Skaugen SE* v *MAN Diesel & Turbo SE* [2018] SGHC 123.
[29] Ibid., para. 211.
[30] Ibid., para. 214.
[31] *MAN Diesel & Turbo SE* v *IM Skaugen SE* [2019] SGCA 80; *Rappo* v *Accent Delight International Ltd* [2017] SGCA 27.
[32] *Rappo* v *Accent Delight International Ltd* [2017] SGCA 27, para. 116, 122.
[33] Ibid., para. 122.
[34] Ibid., para. 123; *MAN Diesel & Turbo SE* v *IM Skaugen SE* [2019] SGCA 80, para. 139, 144.

be tried in Singapore.[35] Despite these more restrictive appellate rulings, the Court of Appeal, just like the High Court, considers the SICC to be one of the factors in the *Spiliada* test, and has therefore revisited the doctrine in favour of the SICC's establishment of jurisdiction.

It should be noted that for exclusive choice of court agreements falling under the Hague Convention on Choice of Court Agreements[36] (Hague Choice of Court Convention), the strong cause or *Spiliada* test are irrelevant, and the chosen court must decide the dispute unless the agreement is null and void according to its laws.[37]

This Section has laid down the SICC's jurisdictional rules, and has focused on these rules and on the case law that enable the court to establish jurisdiction. In sum, the SICC rules and case law:

- dispense with the need to obtain a leave of court to serve out of Singapore in the presence of a SICC choice of court agreement;
- establish a presumption of exclusivity when parties have failed to specify their SICC choice of court agreement as being exclusive or non-exclusive;
- decrease the significance of connections to competing fora, and in effect narrow down the grounds to deny jurisdiction under the *Spiliada* analysis;
- equate exclusive to non-exclusive choice of court agreements while determining whether to exercise jurisdiction;
- convolute the requirements for the SICC's existence of jurisdiction with those of exercise of jurisdiction, thereby further limiting the court's discretion to decline jurisdiction, and lastly;
- regard the SICC and its innovative features, such as the appointment of international judges, one of the factors in the *forum non conveniens* analysis.

[35] Ibid., para. 123.
[36] Hague Conference on Private International Law, Convention of 30 June 2005 on Choice of Court Agreements (hereafter: Hague Choice of Court Convention).
[37] Choice of Court Agreements Act 2016, Section 11. See also Man Yip, 'Navigating Singapore's Private International Rules in the Age of Cross-border Commercial Litigation Framework', 55, 64 in Poomintr Sooksripaisarnkit and Sai Ramani Garimella (eds), *China's One Belt One Road Initiative and Private International Law* (Routledge 2018).

All these rules and case law facilitate the SICC's establishment of jurisdiction. The following Section turns to the NCC. It demonstrates that although the NCC rules set strict formal requirements on NCC agreements, the NCC case law has relaxed these.

2.2. The NCC

The NCC's jurisdiction requires the parties' express and written agreement to litigate before it.[38] So does the pending legislative proposal for the establishment of Chambers for International Commercial Disputes and Commercial Courts in Germany.[39] Unlike the NCC and the German international commercial courts, the rest of the selected international commercial courts require an agreement in their favour but it is not to be an express one.[40]

The Explanatory Notes to the NCC rules clarify that when, for instance, an agreement in favour of the NCC is included in a party's general terms and conditions, it is without legal effect unless the other party has expressly and in writing accepted the clause.[41] Although the NCC rules refer only to the exclusion of an NCC clause in general terms and conditions, such an exclusion reveals that other forms of jurisdiction agreements, such as NCC agreements in the statute of a company, are precluded as well.[42] In addition, the requirement for an explicit clause blocks the participation of third parties in NCC trials. Indeed, the provision regarding an express agreement was prompted by the need to secure the procedural rights of procedurally weaker and third parties who have not expressly agreed to litigate before the NCC in English, and to pay the court fees, which are higher compared to the ordinary Dutch courts.[43]

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[38] Art. 30r (1) DCCP; 1.3.1 (d) NCC rules.

[39] Federal Council (*Bundesrat*), Drucksache 219/21, Draft Proposal submitted by the Federal States of North Rine-Westphalia and Hamburg (*Gesetzesantrag der Länder Nordrhein-Westfalen und Hamburg*), Legislative Proposal for Strengthening the Courts in Commercial Disputes (*Entwurf eines Gesetzes zur Stärkung der Gerichte in Wirtschaftsstreitigkeiten*), 17 March 2021, Article 1 – Amending the Courts Constitution Act (*Änderung des Gerichtsverfassungsgesetzes*), Draft Articles 114b, 119 (5) and 119b (2) (hereafter: German Chambers Legislative Proposal 2021).

[40] For the SICC, SICC Rules, rule 7 (1) (b); for the CICC, see Art. 2 (1) CICC Provisions; for the BIBC, BIBC Preliminary Draft Law 2018, Art. 15.

[41] Explanatory Notes to Art. 1.3.1 (d) NCC Rules.

[42] Serge Vlaar, 'IPR-aspecten van het NCC-wetsvoorstel' (2017) Nederlands Internationaal Privaatrecht 195, 202; Georgia Antonopoulou, 'Requirements upon Agreements in Favour of the Netherlands Commercial Court and the German Chambers - Clashing with the Brussels Ibis Regulation?' (2019) 12 Erasmus Law Review 56; Matthijs Kuijpers, *The Netherlands Commercial Court* (Ars Aequi Libri 2019) 13.

[43] Parliamentary Papers II 2016/17 (*Kamerstukken II*), 34 761, no. 3, Amendments to the Code of Civil Procedure and the Civil Court Fees Act with regard to the introduction of English-language case law at the international commercial chambers of the Amsterdam District Court and the Amsterdam Court of Appeal (*Wijziging van het Wetboek van Burgerlijke Rechtsvordering en de Wet griffierechten burgerlijke zaken in verband met het mogelijk maken van Engelstalige rechtspraak bij de internationale handelskamers van de rechtbank Amsterdam en het gerechtshof Amsterdam*), Explanatory Statement (*Memorie van Toelichting*), 10 (hereafter: NCC Law).

Being aware of its strict jurisdictional requirements, the NCC relaxed these in *McCourt Global Sports & Media LLC* v *Tennor Holding B.V.* (*McCourt Global Sports*).[44] In this case, the defendant contested the NCC's jurisdiction, and applied for an order to refer the case to the Amsterdam District Court and therefore for proceedings to be conducted in Dutch and at the lower, ordinary court fee.[45] In particular, the defendant objected that the parties had never concluded the NCC clause, since this was part of a Transaction Agreement that they had never signed.[46]

However, the parties had signed a Letter of Intent, which referred to the terms of the main Transaction Agreement, including the NCC clause, and the Agreement was attached to the Letter as an annex. According to the NCC ruling, the inclusion of an NCC clause in an agreement that the parties had not signed did not affect the NCC clause. The existence and validity of the clause was a separate issue, independent of the existence and validity of the main Transaction Agreement.[47] For the NCC's jurisdiction, it would suffice for the clause to be in writing and explicit, in the sense that it was not hidden in general terms and conditions, and that the parties were aware of its implications. Taking into consideration that the NCC clause was part of an agreement that the parties had negotiated extensively, the court ruled that the reference to the annexed agreement and its terms, including the NCC clause, was sufficient to establish jurisdiction. In addition, the NCC advocated in favour of a case-by-case approach, which takes the parties and their capacities into consideration.

In particular, the court ruled that each party has a major business with international operations, and is therefore experienced in international commerce. In addition, the parties regularly use English in their communications. As the court characteristically pointed out, the parties are not the '*hairdresser on the corner*'. Having major businesses with international operations and being familiar with English meant that the parties were not a small enterprise unable to predict an NCC trial.[48]

[44] *McCourt Global Sports & Media LLC* v *Tennor Holding B.V. document* [2020] NCC 20-014 ECLI:NL:RBAMS:2020:2277.
[45] Ibid., para. 4.2.
[46] Ibid., para. 5.2.
[47] Ibid., para. 5.7. (a).
[48] Ibid., para. 5.7. (c).

The NCC's ruling in *McCourt Global Sports* reiterated the separability of choice of court agreements and clarified the requirement of an explicit NCC clause. The NCC based its judgment on the fact that the clause was included in an agreement negotiated extensively by the parties, and that there was an express reference to that agreement. However, the NCC in addition developed what it calls the '*hairdresser on the corner*' standard; it examined the clause's validity in light of the parties' capacities. In particular, the court examined whether the parties were experienced in commercial transactions and versed in the use of English.

2.3. The Increased Focus on Choice of Court Agreements as a Forum Selling Technique

First, this Part focuses on the SICC rules and case law pertaining to choice of court agreements. It illustrates that in the presence of a SICC clause, the SICC rules dispense with the leave of court for service out of jurisdiction. In addition, the rules significantly restrict the court's discretion to decline the exercise of jurisdiction based on a *forum non conveniens* analysis. Moreover, the court's case law considers the SICC and its features, such as the international bench, factors militating in favour of the SICC as a convenient forum. Consequently, the SICC rules and case law break with the traditional approach towards extra-territorial jurisdiction, and abandon the conventional link between jurisdiction and territory.

Various arguments have been adduced to justify the SICC rules of jurisdiction and their clash with traditional common law principles of jurisdiction. Adeline Chong and Man Yip claim that the SICC rules are similar to those of the Hague Choice of Court Convention requiring courts of the Contracting States to respect the parties' choice of court agreement and to refrain from applying discretionary rules such as the *forum non conveniens* doctrine. Therefore, the SICC rules resemble the Convention, and extend it even to disputes not covered by it.[49] The SICC rules also resemble those of the Brussels Ibis Regulation and the Lugano Convention, which have equally prohibited common law courts from applying the *forum non conveniens* doctrine in the cases they cover.[50] The authors add that concerns involving international comity are appeased by the parties' agreement and by the fact that other common law jurisdictions, such as Australia, apply more lenient standards in the exercise of extra-territorial jurisdiction.[51]

[49] Chong and Yip (n 4) 109.
[50] Ibid., 103.
[51] Ibid., 112.

However, among the various arguments, the parties' agreement in favour of the SICC is prevalent; it ensures their willing submission to the court. Indeed, party autonomy has provided the doctrinal background against which the SICC rules and their departure from ordinary rules of jurisdiction have evolved. According to another view, the parties' intention to litigate before the SICC, as recorded in a SICC clause, also creates a right to substantive justice; satellite litigation of where to litigate are to be set aside so that international commercial courts can focus on the merits of the dispute.[52]

Next, this Part turns to the NCC and the requirement for an explicit and written NCC clause. It demonstrates that the explicitness requirement stands in the way of various forms of NCC clauses such as those in general terms and conditions or the statute of a company, and additionally hinders the involvement of third parties who did not expressly consent to the NCC's jurisdiction. Furthermore, the NCC formal requirements are stricter in comparison to other international commercial courts such as the SICC. While the SICC requires a written agreement, the parties' explicit agreement is not necessary. Moreover, an agreement in favour of the Singapore High Court is deemed to include the SICC.[53] Conversely, an agreement in favour of the Amsterdam District Court does not suffice to establish the NCC's jurisdiction.

The NCC relaxed the strict formal requirements in *McCourt Global Sports.* Although the NCC clause was part of an agreement the parties had never signed, the court upheld the clause as long as another agreement signed by the parties made reference to the agreement containing the NCC clause. In addition, although Article 30r DCCP has imposed a general formal requirement of explicitness on all NCC clauses, the NCC used a more case-by-case approach in which the parties' and their capacities validated or invalidated the clause. However, the '*hairdresser on the corner*' standard could swing both ways. It could add a validity requirement to the already provided requirements by calling upon the court to examine the parties' capacities and in effect their ability to predict the prospect of litigating before the NCC in English and at a higher cost. Conversely, it could relax the validity requirements of NCC clauses if – despite their absence – the court were nevertheless to treat NCC clauses as valid on the basis of the parties' experience in commercial relationships. Although it remains to be seen how the NCC will further interpret NCC clauses, in *McCourt Global Sports* the NCC

[52] Yeo (n 8) para. 51.
[53] SICC Rules, Rule 1 (2) (ca).

loosened formal requirements, and, in consequence, facilitated the establishment of its own jurisdiction.

It becomes apparent that the SICC and the NCC place considerable weight on choice of court agreements, these being their primary source of jurisdiction. In order to acquire a caseload and showcase their first judgments the courts prioritise the parties' will to litigate before them over the rest of their jurisdictional requirements. In addition, both courts are forging a right to substantive justice; they plead in favour of a justice on the merits, and refuse to sacrifice prospective cases on the altar of procedural law.

3. The Transfer Jurisdiction

During the first years after their creation, international commercial courts dealt with a small number of cases. The lack of awareness regarding the courts' recent establishment combined with the fact that some parties may hesitate bringing their case before an untested forum offer some explanation for the slow start of international commercial courts. A court employee offered an explanation why it takes time for an international commercial court to acquire a caseload:

'*Number 1, you need time to build before people put the [name of international commercial court] jurisdiction into their contracts. Number 2, you need those contracts to enter into a dispute. Even after the dispute is entered you know there is a very long period where there are a lot of discussions. Look at the DIFC Courts; during the first years they had 0 matters. If you leave it to natural development, that is the nature of every new adjudication forum*'.[54]

Despite 'nature's' slow pace, some courts acquired their first cases through a transfer from the ordinary courts. This Part turns to the transfer jurisdiction as the second technique facilitating international commercial courts in building a caseload. Although most international commercial courts find themselves in jurisdictions that allow cases to be transferred from an ordinary court to an international commercial court, this transfer jurisdiction is mostly used in the SICC, the CICC and the Paris International Chambers. One might wonder therefore, why these international commercial courts availed themselves of the transfer jurisdiction more than other international commercial courts? The answer lies in national provisions allowing the ordinary courts to transfer cases without the consent of both parties. Thus, although choice of

[54] Interview with court personnel (18 February 2020).

court agreements are allegedly the jurisdictional foundation of international commercial courts, in practice the real jurisdictional foundation of some of these courts is the transfer of cases from ordinary courts.[55]

3.1. The SICC

The SICC features among the international commercial courts whose caseload depends predominantly on a transfer of cases from the Singapore High Court. It all started when two cases were transferred from the High Court to the SICC in 2015, six in 2016, and nine in 2017. In 2018, ten cases were transferred, and one case was filed directly at the SICC based on a choice of court agreement in its favour. It took three years for a case in which parties directly chose the SICC to reach the court.[56] Despite this fresh filing, the SICC's caseload remains dependent on a transfer of cases from the High Court. In 2019, eight cases were transferred to the court, while four cases concerned fresh filings. In 2020, fifteen cases were transferred to the SICC, and there was one fresh filing.[57]

As mentioned above, national provisions allowing the courts to transfer cases without all parties' consent explain why the majority of cases landing before the SICC were transferred from the Singapore High Court. According to the previous Rules of Court, the High Court could transfer proceedings to the SICC as long as the court's subject-matter jurisdiction requirements were fulfilled; namely, if the action was of an international and commercial nature and the parties were not seeking any form of prerogative relief. Additionally, in order to transfer proceedings to the SICC, the High Court had to examine whether the SICC would assume jurisdiction, and whether it would be more appropriate for the case to be heard in the SICC.[58] More important for present purposes is that the High Court could transfer a case to the SICC with the parties' consent or of its own motion after hearing the parties. The ability to transfer cases after hearing the parties but without their consent allowed the Singapore High Court to feed the SICC with cases and give it a kickstart.

[55] Similarly, Yip (n 8) 461.
[56] SICC News, 'A Landmark First Case filed in the Singapore International Commercial Court', Issue no. 11/April 2018 <https://www.sicc.gov.sg/docs/default-source/modules-document/media-resources/sicc-newsletter-issue-no-11_8239f5c5-8e7f-42bf-81b0-cb581c33a349.pdf> accessed January 2022.
[57] The number of cases is based on a presentation by Laurence Wong, Senior Director of Business Development of the SICC, during the webinar 'An Alternative Forum for Dispute Resolution – SICC Five Years On', 21 September 2020 and the SICC's Official Website, available at <https://www.sicc.gov.sg/> accessed January 2022.
[58] SICC Rules, Rule 12 (4) (a).

In 2016, Singapore ratified the Hague Choice of Court Convention, and implemented it in its domestic legal order with the adoption of the Choice of Court Agreements Act 2016. The aim was to improve the recognition and enforcement of Singaporean judgments and, in particular, SICC judgments abroad.[59] Although the adoption of the Hague Choice of Court Convention in Singapore might improve the recognisability and enforceability of court judgments abroad, at the same time it could put a halt to the transfer of cases from the High Court to the SICC. This is so because according to Article 8 (5) Hague Choice of Court Convention, where the chosen court had discretion as to whether to transfer the case to another court, recognition and enforcement of the judgment may be refused against a party who objected to the transfer in a timely manner in the state of origin.[60] So as to comply with the Convention's consensual requirements and thereby ensure the recognition and enforcement of judgments in transfer cases, the Rules of Court were revised. They now distinguish between disputes falling under the Choice of Court Agreements Act 2016 and disputes not covered by it. In the case of the former, the parties' consent to a transfer to the SICC is always required.[61] As for cases not falling under the Choice of Court Agreements Act 2016, the High Court may order a transfer without all parties' consent.[62] A transfer is binding on the SICC, and the court may not re-examine its jurisdiction.[63]

Requiring the parties' consent to a transfer constrains, and may therefore slow down the transfer of cases from the High Court to the SICC. However, in the Rules of Court, the Choice of Court Agreements Act 2016 inserted a set of additional provisions that counter the apparent consensual constraints on transfer jurisdiction. Under the previous Rules of Court, an agreement in favour of the High Court did not of itself constitute an agreement in favour of the SICC.[64] While discussing SICC choice of court agreements, Yip underlined the provision's strategic value. The requirement for an express agreement in favour of the SICC treated and in effect established the SICC as a distinctive dispute resolution institution. In addition, it allayed any concerns about an overly liberal interpretation of the scope of jurisdiction agreements by Singapore courts.[65] By contrast, under the revised Rules of Court, agreements in favour of the

[59] Second Reading Speech by Senior Minister of State for Law, Indranee Rajah, on the Choice of Court Agreements Bill, 14 April 2016, para. 18, available at <https://www.mlaw.gov.sg/news/parliamentary-speeches/second-reading-speech-by-senior-minister-of-state-for-law--indra0> accessed January 2022.
[60] See also Art. 5 (3) (b) Hague Choice of Court Convention.
[61] SICC Rules, Rule 12 (3B) (b).
[62] SICC Rules, Rule 12 (4) (b) (ii).
[63] SICC Rules, Rule 12 (5) (a).
[64] Previous SICC Rules, Rule 1 (2) (c).
[65] Yip (n 8) 450-451.

High Court, concluded after 1 October 2016 – the date the Choice of Court Agreements Act 2016 came into force – are to be understood as including an agreement to submit to the jurisdiction of the SICC, unless a contrary intention appears.[66] Consequently, the Rules of Court relaxed the SICC's jurisdictional requirements[67] and with some procedural engineering dispensed with the need for an express agreement in its favour.

The fact that the Rules of Court treat choice of court agreements in favour of the High Court as agreements in favour of the SICC has a twofold effect. First, parties that have agreed on the High Court's jurisdiction may directly commence proceedings at the SICC. Second, if parties commence proceedings at the High Court, the High Court may transfer the case to the SICC without the parties' explicit consent, since a choice in favour of the High Court is treated as a choice in favour of the SICC as well. It therefore becomes apparent that the Rules of Court offer the High Court some leeway in the transfer of cases, as long as the parties have already chosen the High Court in an exclusive choice of court agreement. However, such a provision does not come without concerns regarding recognition and enforcement. In particular, it remains questionable whether a foreign court in which the SICC judgment is sought to be recognised and enforced will treat it as a case of transfer with the parties' consent according to Article 8 (5) Hague Choice of Court Convention.

3.2. The CICC

As in the case of the SICC, the transfer jurisdiction has provided the CICC with its first cases despite the absence of an agreement in its favour.[68] Because of the small number of judgments published, it is hard to identify whether and how many cases have been directly filed at the CICC based on a choice of court agreement in its favour.[69] From the limited data available, and

[66] SICC Rules, Rule 1 (2) (ca).
[67] See also Chng (n 17) 655.
[68] Matthew Errie, 'Update on the China International Commercial Court', *OpinioJuris*, 13 May 2019, available at <http://opiniojuris.org/2019/05/13/update-on-the-china-international-commercial-court%EF%BB%BF/>; Yu Chen, 'CICC Case Tracking Series – 01: China's First International Commercial Court (As of 20190821)', *China Justice Observer*, 29 September 2019, available at <https://www.chinajusticeobserver.com/a/cicc-case-tracking-series-01>; Guodong Du and Yu Chen, 'CICC Case Tracking Series – 02: On Jurisdiction with Asia Optical as an Example', *China Justice Observer*, 12 October 2019, available at <https://www.chinajusticeobserver.com/a/cicc-case-tracking-series-02>; Yu Chen, 'CICC Case Tracking Series – 03: China's Second International Commercial Court (As of 20190821)', *China Justice Observer*, 27 October 2019, available at <https://www.chinajusticeobserver.com/a/cicc-case-tracking-series-03> all accessed January 2022; Julien Chaisse and Xu Qian, 'Conservative Innovation: The Ambiguities of the China International Commercial Court' Symposium on Global Labs of International Commercial Dispute Resolution (2021) 115 American Journal of International Law 18.
[69] CICC Official Website, Judgements, available at <http://cicc.court.gov.cn/html/1/219/211/223/index.html> accessed January 2022.

at the time of writing, it could be deduced that the First and Second China International Commercial Courts had received ten cases, three of which were filed directly at the court, based on a choice of court agreement in their favour.[70]

The CICC founds its jurisdiction both on choice of court agreements and a transfer from the ordinary courts. First, the CICC has jurisdiction over international commercial disputes in which the parties have chosen the jurisdiction of the Supreme People's Court according to Article 34 Civil Procedure Law, and in which the amount in dispute exceeds RMB300 million.[71] Being a division of the Supreme People's Court[72] explains why parties cannot choose the CICC directly but only the court of which it forms a part. Second, cases may be transferred to the CICC either directly from the Supreme People's Court or from the lower courts with the permission of the Supreme People's Court.[73] In particular, Article 2 (3) and (5) CICC Provisions allow the Supreme People's Court to transfer to the CICC those first instance international commercial cases that have a significant nationwide impact in China or every case it considers appropriate. The unclear standard of a nationwide impact lends China's highest court broad discretion to transfer cases to the CICC. Similarly, the ability of the Supreme People's Court to transfer to the CICC every case it considers appropriate grants the court broad transfer power and functions as a catch-all clause.[74]

The importance of Article 2 (5) CICC Provisions in granting the Supreme People's Court broad discretionary powers to transfer cases to the CICC becomes especially evident in a series of CICC cases concerning the validity of arbitration agreements in foreign-related disputes. According to the relevant judicial interpretations of the Supreme People's Court, if the Intermediate People's Court deems a foreign-related arbitration clause invalid, it should report and request approval by the High People's Court. If the High People's Court agrees with the Intermediate People's Court on the clause's invalidity, it should in turn report and request approval by the Supreme People's Court.[75] However, in three interrelated cases concerning the

[70] That the CICC's jurisdiction was founded on a choice of court agreement in three cases, Yu Chen, 'CICC Case Tracking Series – 03: China's Second International Commercial Court (As of 20190821)', *China Justice Observer*, 27 October 2019.
[71] Art. 2 (1) CICC Provisions.
[72] Art. 1 CICC Provisions.
[73] Art. 2 (2) and 2 (5) CICC Provisions.
[74] Zhengxin Huo and Man Yip, 'Comparing the International Commercial Courts of China with the Singapore International Commercial Court' (2019) 68 International and Comparative Law Quarterly 903, 916.
[75] Art. 1 (1) and 2 Provisions of the Supreme People's Court on Issues Concerning the Reporting and Approval in the Judicial Review of Arbitration Cases.

invalidity of foreign-related arbitration clauses the Supreme People's Court transferred directly the cases to the CICC.[76] Although according to Article 2 (4) CICC Provisions the CICC has jurisdiction over cases involving applications for preservation measures in arbitration and for the setting aside or enforcement of international commercial arbitration awards within the CICC one stop-shop, Article 2 (4) does not explicitly grant the CICC jurisdiction over disputes concerning the validity of arbitration agreements. Nevertheless, the Supreme People's Court made use of the catch-all clause in Article 2 (5), allowing the court to transfer cases when it considers it appropriate, so as to transfer the case to the CICC and thereby expand the court's jurisdiction. Guodong Du and Yu Chen, who reported on the cases, claimed that the direct transfer to the CICC accelerated the resolution of the dispute and provided an opportunity for the CICC to set a uniform judicial decision for courts across the country with regard to foreign-related arbitration disputes.[77] Nevertheless, disputes concerning the validity of foreign-related arbitration agreements are anything but rare among Chinese courts. This calls into question the complexity of the case and in turn the necessity for a transfer to the CICC. The Supreme People's Court has transferred first instance cases directly to the CICC on other occasions as well.[78] At this point, it should be noted that a transfer of cases to the CICC places the disputes in the hands of Supreme Court judges who are more experienced in international commercial disputes. At the same time, however, the transfer of first instance cases to the CICC deprives parties of the right to appeal, as the CICC is a division of the highest adjudicative body in China, the Supreme People's Court.

In 2017, China signed the Hague Choice of Court Convention. Its anticipated ratification will improve the recognition and enforcement of Chinese judgments in the Member States' jurisdictions as well as ease the recognition and enforcement of the latter's judgments in China. However, the Convention's consensual restrictions upon the transfer of cases will put an end

[76] Yu Chen, 'CICC Case Tracking Series – 01: China's First International Commercial Court (as of 20190821)', *China Justice Observer*, 29 September 2019; Guodong Du and Yu Chen, 'CICC Case Tracking Series – 04: On CICC's Jurisdiction over the Judicial Review of Arbitration with Luck Treat Ltd. Case as an Example', *China Justice Observer*, 3 November 2019, available at <https://www.chinajusticeobserver.com/a/cicc-case-tracking-series-04> all accessed January 2022.

[77] Guodong Du and Yu Chen, 'CICC Case Tracking Series – 04: On CICC's Jurisdiction over the Judicial Review of Arbitration with Luck Treat Ltd. Case as an Example', *China Justice Observer*, 3 November 2019.

[78] Liu Tingmei, 'The China International Commercial Court (CICC) in 2018', 22 July 2019, available at <http://cicc.court.gov.cn/html/1/219/208/209/1316.html> accessed January 2022; Yu Chen, 'CICC Case Tracking Series – 03: China's Second International Commercial Court (As of 20190821)', *China Justice Observer*, 27 October 2019.

to the transfer of cases to the CICC despite the parties' opposing will, and may therefore decrease the use of the transfer jurisdiction for cases falling under the Convention.[79]

3.3. The Paris International Chambers

Turning to the European international commercial courts, these are actually chambers within courts and not self-standing courts. Although a transfer of cases from one chamber to another within a court is common practice, in the case of the NCC and the German Chambers for International Commercial Disputes such a transfer is excluded without the consent of both parties.[80] For instance, the NCC requires the parties' consent both for cases transferred from other Dutch courts as well as for cases transferred from a chamber of the Amsterdam District Court.[81] The exclusion of the possibility of a transfer forecasts a lower number of cases for the European international commercial courts, especially during their initial years of operation.

However, there is one European international commercial court that may accept transferred cases even if the parties did not consent to the transfer: the Paris International Chambers. In particular, the Paris Commercial Court and the Paris Court of Appeal may assign a case to the International Chambers on their own initiative. The parties will not be asked whether they agree with the assignment or not, but have the possibility to refuse the application of the Protocols; namely, the procedural rules specifically devised for the International Chambers.[82] In such a scenario, the case will remain before the chambers, but the regular rules will apply.

The *ex officio* assignment of cases explains why at the time of writing the Paris International Chambers have dealt with more cases than the NCC and the German Chambers for International Commercial Disputes.[83] Furthermore, one should draw into consideration that the Paris Court of Appeal has jurisdiction over arbitration related disputes. The transfer mechanism in combination with the fact that numerous arbitration proceedings are seated in Paris explain

[79] Huo and Yip (n 74) 924.

[80] Explanatory Notes to Art. 1.3.1. (c) NCC Rules; Regional Court (*Landgericht*) Frankfurt am Main Official Website, Chamber for International Commercial Disputes, Which proceedings are eligible?, available at <https://ordentliche-gerichtsbarkeit.hessen.de/ordentliche-gerichte/lgb-frankfurt-am-main/lg-frankfurt-am-main/chamber-international> accessed January 2022.

[81] Explanatory Notes to Article 1.3.1. (c) NCC Rules.

[82] Protocol on Procedural Rules Applicable to the International Chamber of the Paris Commercial Court, available at <https://www.avocatparis.org/system/files/editos/protocole_barreau_de_paris_-_tribunal_de_commerce_de_paris_version_anglaise.pdf> (hereafter: Protocol – International Chamber of the Paris Commercial Court); Protocol Relating to the Procedure Before the International Chamber of the Paris Court of Appeal, available at <Traduction en anglais du protocole CCIP-CA - V4 (justice.fr)> (hereafter: Protocol – International Chamber of the Paris Court of Appeal) all accessed January 2022.

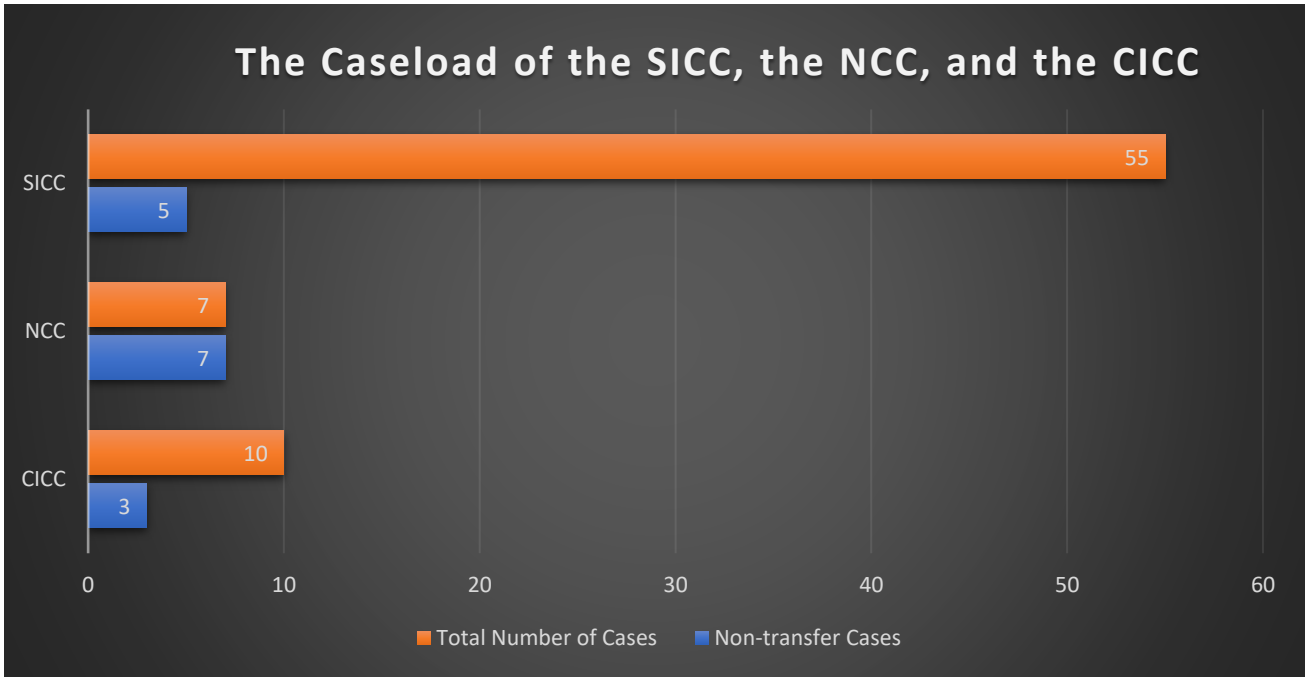
[83] Informal communication with stakeholders. However, at the time of writing there are no published judgements on the courts' website. Therefore, no accurate number of incoming cases is available, see <https://www.tribunal-de-commerce-de-paris.fr/en/prevention-des-difficultes-des-entreprises> accessed January 2022.

why the Paris International Chambers have so far outnumbered other European international commercial courts in terms of caseload.

3.4. The Transfer Jurisdiction as a Forum Selling Technique

This Part demonstrates the transfer jurisdiction is a powerful tool that increases the number of cases heard by some international commercial courts, and in particular the SICC, the CICC and the Paris International Chambers. National provisions dispensing with the parties' consent to a transfer explain the repeated use of the transfer jurisdiction in Singapore, China and France. Taking into consideration that the SICC, the Paris International Chambers, and to a lesser extent, the CICC champion themselves as the future fora of choice in international commercial disputes,[84] it would be accurate to say that at least for the moment these courts lack a significant number of 'real' cases.

The following chart illustrates how the transfer jurisdiction may inflate the caseload of some international commercial courts. It provides a comparative overview of the number of cases the SICC, the NCC and the CICC have dealt with up to December 2020. The chart omits the Paris International Chambers and the German Chambers for International Commercial Disputes due to a lack of published case law and therefore the lack of a publicly available number of incoming cases. The orange bar depicts the total number of cases, while the blue bar shows the total number of non-transfer cases.



[84] Inter alia Chong and Yip (n 4) 97.

As the chart shows, the SICC has so far dealt with fifty-five disputes, the NCC has dealt with seven, and the CICC has dealt with ten. A comparison between the SICC on the one hand and the NCC or the CICC on the other hand reveals that the SICC has by far outnumbered the NCC or the CICC in terms of caseload.[85]

However, the chart delivers a very different picture if we disregard the cases transferred to the international commercial courts by the ordinary courts and compare the caseload of the courts exclusively on the basis of non-transfer cases. The caseload of the SICC then drops from fifty-five cases to five, while the CICC caseload drops from ten to three. In addition, a focus on non-transfer cases reveals that the NCC has dealt with more non-transfer cases than the SICC. Similarly, although the CICC has dealt with more cases in total that the NCC, it has dealt with fewer non-transfer cases than the NCC.

The distinction between transfer and non-transfer cases permits us to better assess the caseload of international commercial courts. In particular, a focus on non-transfer cases allows us to assess how many cases ended up before the courts based on a choice of court agreement in their favour, and to measure their popularity among litigants.

Part 2 demonstrates that the differences in caseload between the selected international commercial courts finds their explanation in the transfer jurisdiction. Therefore, the transfer jurisdiction is a useful tool that channels cases to some international commercial courts, enabling them to gain an edge over others.

4. The International Character of the Dispute

As their name suggests, international commercial courts deal with cross-border disputes that have an international element. The internationality of the dispute is therefore a central jurisdictional requirement that distinguishes the selected international commercial from ordinary courts. Most of the internationality criteria of international commercial courts – namely, the elements that turn a dispute into an international one – are classic, textbook examples. The dispute is for instance considered international if the parties are resident in different states or if the place of performance of the contractual obligation is abroad. However,

[85] For the number of judgments published by the other international commercial courts in 2020, see Pamela Bookman, 'The London Commercial Court in Global Context' in Portland, *Commercial Courts Report 2021*, available at <https://portland-communications.com/publications/commercial-courts-report-2021/> accessed January 2022. However, note that in the case of some courts the number of published judgments is higher than the number of incoming cases. This is due to the practice of some international commercial courts to issue separate judgments on the jurisdiction and the merits of the dispute, such as the NCC, or to issue separate judgments on different issues, such as the SICC.

some international commercial courts allow parties to turn a domestic dispute into an international one by simply agreeing to do so and thereby place their dispute within the court's jurisdictional reach despite the absence of objective cross-border elements.

First, this Part focuses on the SICC and singles out an internationality criterion: namely, the parties' agreement on the international character of the dispute. It argues that while such an internationality criterion bears the power of vesting the SICC with a greater number of disputes, it arguably overly stretches the definition of an international dispute and opens the door to forum shopping. Then this Part turns to the NCC, the German Chambers for International Commercial Disputes, and the Paris International Chambers. It demonstrates that although these courts define international disputes on the basis of objective criteria, some criteria nevertheless leave room for the parties to agree on the dispute's international character.

4.1. The SICC

The SICC deals exclusively with disputes that are international and commercial in nature.[86] The Rules of Court clarify that a claim is international if the parties to the claim have their place of business in different states; none of the parties have their place of business in Singapore; at least one of the parties to the claim has its place of business in a state different from the state in which a substantial part of the obligations of the commercial relationship between the parties is to be performed, or the state to which the subject matter is most closely connected. Lastly, a dispute is international if the parties have expressly agreed that the subject matter of the claim relates to more than one state.[87] In a similar vein, in 2016 the Rules of Court were amended so as to include that a claim is commercial in nature if *inter alia* the parties have expressly agreed that it is.[88]

The ability of the parties to turn an otherwise domestic dispute into an international one on the basis of a mutual agreement is the SICC's most striking internationality criterion. It allows parties to agree on the international character of the dispute, and places their dispute within the court's jurisdiction.[89] It is claimed that this is one more illustration of the weight the SICC accords to the parties' agreements and to party autonomy in general.[90] Conversely, parties may not agree that an international dispute is domestic and withdraw it from the court's

[86] SICC Rules, Rule 7 (1) (a).
[87] SICC Rules, Rule 1 (2) (a) (i) – (iv). See also Art. 1 (3) UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006 (hereafter: UNCITRAL Model Law).
[88] SICC Rules, Rule 1 (2) (b) (iii).
[89] Yip (n 8) 450.
[90] Ibid.

jurisdiction.[91] The parties' inability to turn an international dispute into a domestic one preserves the court's caseload and shields it from the very doctrine it vows to promote: namely, party autonomy.

4.2. The NCC, the German International Commercial Courts, and the Paris International Chambers

Just as the rest of the selected international commercial courts, the NCC hears disputes with a cross-border element. However, when the Dutch Council for the Judiciary first published its plan for the establishment of the NCC it envisioned a court with broad jurisdiction, competent for both domestic and international disputes. It expressly stated that Dutch parties could also opt for the NCC in cases without an international character. Thus, it expanded the competence of the NCC over domestic disputes and justified this expansion stating that a choice for the NCC is not solely driven by the wish to litigate in English but also for other reasons, such as the expertise of the NCC judges and the suitability of the NCC procedural rules.[92] However, the Council's plan stumbled upon the Dutch judiciary's negative reactions. Fearing that expanding the court's jurisdiction over domestic disputes would gradually decrease the number of commercial disputes litigated before ordinary courts,[93] the NCC legislative proposal inserted the dispute's international character as one of the court's main jurisdictional requirements.[94] In line with the proposal, the Explanatory Notes to the NCC Rules clarify that the NCC proceedings are available for international disputes, so that it would be inappropriate for the court to deal with a dispute that is solely national.[95]

The NCC internationality criteria, can be found in the Explanatory Notes, which provide a long list of broadly formulated and alternative criteria.[96] In addition, the notes' wording that such criteria would 'typically' qualify a dispute as international suggests the criteria's indicative

[91] Yeo (n 8) para. 14.

[92] Council for the Judiciary (*Raad voor de Rechtspraak*), Plan for the Establishment of the Netherlands Commercial Court (*Plan tot oprichting van de Netherlands Commercial Court*), November 2015, 5, 10, available at <www.rechtspraak.nl/SiteCollectionDocuments/plan-netherlands-commercial-court.pdf> accessed January 2022.

[93] Parliamentary Papers II 2016/2017 (*Kamerstukken II*), 34 761, no. 3; NCC Law, Explanatory Statement, 11-12. See also D. J. Oranje, 'The Coming into Being of the Netherlands Commercial Court' (2016) Tijdschrift voor Civiele Rechtspleging 122, 124; Kuijpers (n 42) 9.

[94] Art. 30r (1) DCCP; Art. 1.3.1. (b) NCC Rules.

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

[96] That the NCC criteria are broad also Marta Requejo Isidro, 'International Commercial Courts in the Litigation Market' (2019) 9 International Journal of Procedural Law 1, 28; Kuijpers (n 42) 9; Harriët Schelhaas, 'The Brand New Netherlands Commercial Court: A Positive Development?' in Xandra Kramer and John Sorabji (eds), *International Business Courts* (Eleven International Publishing 2019).

character. According to the Explanatory Notes, a matter would typically concern an international dispute if at least one of the parties to the proceedings is resident abroad or is a company established abroad or incorporated under foreign law or is a subsidiary of such a company. If a treaty or foreign law is applicable to the dispute or the dispute arises from an agreement prepared in a language other than Dutch, then the dispute is an international dispute.[97] In addition, a dispute has an international aspect when at least one of the parties to the proceedings is a company or belongs to a group of companies, of which the majority of its worldwide employees work outside the Netherlands, of which more than one-half of the consolidated turnover is realised abroad or the securities of which are traded on a regulated market abroad. Additional elements that lend to the dispute the required internationality are the involvement of legal facts or legal acts abroad. Lastly, the Explanatory Notes add a catch-all clause that qualifies a dispute as international if it involves any relevant cross-border interest.[98] According to Article 1.3.4. NCC Rules, the NCC tests the fulfilment of its jurisdictional requirements including the dispute's international character of its own initiative.[99] This *ex officio* examination of the dispute's international character safeguards that parties will not submit to the court a purely domestic dispute.[100] It becomes therefore apparent that contrary to the SICC, in the case of the NCC the parties' agreement on the international character of the dispute does not suffice to turn a domestic dispute into an international one.

Contrary to the NCC Rules, which entail an inventory of internationality criteria, the websites of the Frankfurt or Hamburg Chambers for International Commercial Disputes omits a definition of an international dispute. Examples of disputes regarded as international, can only be found in the pending proposals for the establishment of Chambers for International Commercial Disputes and Commercial Courts. In particular, the proposals regards as cross-border elements the English language of the contract, a company's foreign seat and the application of foreign law.[101]

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[97] See also *Elavon Financial Services DAC* v. *IPS Holding B.V.* [2019] NCC 19/003 ECLI:NL:RBAMS:2019:1637, 6.3 (b).
[98] Explanatory Notes to Art. 1.3.1. (b) NCC Rules.
[99] Explanatory Notes to Art. 1.3.4. See also 1.3.5. NCC Rules referring to the NCCA.
[100] Oranje (n 93) 124.
[101] German Parliament (*Deutscher Bundestag*), Legislative Proposal for the Establishment of Chambers for International Commercial Disputes (*Entwurf eines Gesetzes zur Einführung von Kammern für internationale Handelssachen*), Drucksache 19/1717 of 18 April 2018, Explanatory Statement (*Begründung*), 14 available at <http://dipbt.bundestag.de/dip21/btd/19/017/1901717.pdf> accessed January 2022; German Chambers Legislative Proposal 2021, Explanatory Statement (*Begründung*), 16.

The International Chambers of the Paris Commercial Court and Court of Appeal do not provide for a definition of an international dispute in their protocols. According to the preamble of the Protocol on the Procedural Rules of the International Chamber of the Paris Commercial Court, the chamber deals with disputes related to international contracts and, in particular, those to which European or foreign law is applicable, as well as those where a defendant is a foreign party.[102] In a similar vein, the Protocol on the Procedural Rules of the International Chamber of the Paris Court of Appeal introduces the chamber and states that it specialises in disputes relating to international commercial contracts, whether they are governed by French or foreign law.[103] It becomes therefore apparent, that although the protocols on the procedural rules of the Paris International Chambers lack a definition of internationality, they nevertheless regard the application of foreign law as a cross-border element adequate to turn a dispute into an international.[104]

4.3. Party-Controlled Jurisdictional Requirements as a Forum Selling Technique

The selected international commercial courts deal exclusively with international, cross-border disputes. Therefore, the international character of the dispute is a central jurisdictional requirement. However, the definition of an international dispute and as a result the jurisdiction of these international commercial courts differs.

Among the SICC's internationality criteria, one stands out; namely, the parties' agreement on the dispute's international character. The SICC is not the only court that allows parties to turn a dispute into an international by their mere agreement. According to the preliminary draft law for the establishment of the Brussel International Business Court (BIBC), the BIBC would found its jurisdiction on the parties' agreement, and would deal with international disputes between companies that do not fall under the exclusive jurisdiction of another Belgian court.[105] The proposal adopted a series of objective criteria that would qualify a dispute as international and thereby place it under the courts' jurisdiction. In addition, a dispute would be considered international if the parties had expressly agreed that the subject matter of the dispute is

[102] Protocol – International Chamber of the Paris Commercial Court, Preamble. See also Emmanuel Jeuland, 'The International Chambers of Paris: A Gaul Village' 71, in Kramer and Sorabji (n 96).
[103] Protocol – International Chamber of the Paris Court of Appeal, Preamble. See also Jeuland (n 102) 71.
[104] See also Requejo Isidro (n 96) 24.
[105] BIBC Preliminary Draft Law 2018, Art. 15.

connected to more than one country.[106] Like many of the BIBC rules, the definition of an international dispute was based on the UNCITRAL Model Law.[107]

Unlike the SICC, the parties' agreement on the international character of the dispute met criticism in Belgium. The Belgian Council of State underlined that the parties' agreement on the dispute's international agreement did not objectively define an international dispute. The Council stated '*Only if the dispute is genuinely connected with more than one country, and not only because the parties so agree, can it be an international commercial dispute*'.[108] Like the Council of State, the High Council of Justice and the Court of Cassation raised their concerns with regard to the parties' agreement as an internationality criterion. They warned that such a criterion opened the door to forum shopping. Merely by agreeing that their dispute is international, parties could establish the BIBC's jurisdiction and circumvent the jurisdiction of the ordinary courts.[109] The subsequent proposals took into account these forum shopping considerations and followed the Council of State's opinion. The parties' agreement that a dispute is connected to more than one country was scrapped from the list of internationality criteria.[110]

The SICC and the BIBC are examples of two courts with different views on the parties' agreement with regard to jurisdictional requirements such as the international character of the dispute. While in Singapore the parties' agreement on the international character of the dispute

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[106] Ibid.

[107] See Art. 1 (3) UNCITRAL Model Law.

[108] Council of State (*Conseil d' État/Raad van State*), Legislation Section *(Section de Législation/Afdeling Wetgeving*), *Opinion 62.411/2/AG of 2 March 2018 on a Preliminary Draft Law 'Establishing the Brussels International Business Court'* (*Avis 62.411/2/AG du 2 mars 2018 sur un avant-projet de loi 'instaurant la Brussels International Business Court/Advies 62.411/2/AG van 2 Maart 2018 over een voorontwerp van wet houdende oprichting van het Brussels International Business Court*), paras. 24-25.

[109] High Council of Justice (*Hoge Raad voor de Justitie/Conceil Superieur de la Justice*), *Opinion on BIBC Preliminary Draft Law* (*Avis d' office Avant Projet de loi instaurant la Brussels International Business Court*), March 2018, 9; Henkes, *Ceremonial Opening Session of the Belgian Court of Cassation* (*Plechtige openingszitting van het Hof van Cassatie van België*), II. Incidental Considerations on the Brussels International Business Court and Crypto-currencies (*II. Considérations Incidentes Sur La Brussels International Business Court et sur les Crypto-monnaies*), 3 September 2018, nr. 8.

[110] Report on the First Reading on Behalf of the Justice Committee (*Verslag van de eerste lezing namens de Commissie voor de Justitie/Rapport de la première lecture fait au nom de la commission de la Justice*), Parliamentary Documents (*Parl. St./Doc. parl.*) 54, 3072/007, 63, available at <https://www.dekamer.be/FLWB/PDF/54/3072/54K3072007.pdf>; Text adopted at the Second Reading (*Tekst aangenomen in de tweede lezing/ Texte adopte en deuxième lecture*), Parliamentary Documents (*Parl. St./Doc. parl.*): Belgian House of Representatives (*Belgische Kamer van Volksvertegenwoordigers/ Chambre de représentants de Belgique*), 54, 3072/011, Art. 20 (previous Art. 18), available at <https://www.dekamer.be/FLWB/PDF/54/3072/54K3072011.pdf>. See also Geert van Calster, 'The Brussels International Business Court – My Notes for the Parliamentary Hearing' (*gavclaw.com*, 6 August 2018) <https://gavclaw.com/2018/07/11/the-brussels-international-business-court-my-notes-for-the-parliamentary-hearing/> all accessed January 2022.

was welcomed as promoting party autonomy, in Belgium it was criticised as pushing the boundaries of party autonomy, and was consequently deleted from the final version of the proposal. The SICC rules allow parties to agree on the dispute's international or commercial character, and thereby subjectivise otherwise objective jurisdictional requirements. By contrast, other international commercial courts regard jurisdictional requirements such as the dispute's international or commercial character as objective criteria excluded from the parties' agreement. This divide reveals not only the courts' opposing understandings of internationality, but also the opposing rationales underlying the creation of the courts. While in Europe the establishment of international commercial courts was justified upon the need for specialised fora suitable for complex international commercial disputes, in Singapore the SICC was established to further the country's broader vision to become Asia's dispute resolution hub. The fulfilment of such a vision requires lenient jurisdiction rules and interpretations.

Unlike the SICC and BIBC proposal, the European international commercial courts stick to objective internationality criteria and the parties' agreement does not suffice to turn a domestic dispute into an international one. However, the European international commercial courts have in common the application of foreign law or the foreign language of the contract as an internationality criterion. By agreeing on the application of a foreign law in a choice of law clause or the use of a foreign language parties may indirectly 'create' an international dispute despite the absence of objective elements. It becomes therefore apparent that although the internationality criteria adopted by the European courts are in principle immune to the parties' will, some of these criteria leave room for the parties to manipulate and – as a result – expand the court's jurisdiction. Such criteria run counter to the rationale that underlay the adoption of the courts' internationality requirement: namely, the establishment of specialised courts desirable in view of the international and therefore complex character of the dispute. By characterising domestic disputes as international, these international commercial courts trigger the application of international instruments that permit choice of court and choice of law and thereby facilitate litigants to forum shop.[111] Although it might be unlikely that forum shopping and consequently domestic competition between the European international commercial courts and the ordinary courts would emerge, the considerations discussed previously have shown that the national legislatures were nevertheless mindful of such a possibility when drafting the respective jurisdictional provisions.

[111] See also Jens Dammann and Henry Hansmann, 'Globalizing Commercial Litigation' (2008) 94 Cornell Law Review 1, 47-48, 54-55.

Forum shopping considerations aside, internationality criteria such as the parties' agreement, the application of foreign law and the language of the contract come at odds with the definition of an international dispute under the Hague Choice of Court Convention or the Brussels Ibis Regulation.[112] This misalignment between these internationality criteria on one hand and the Hague Choice of Court Convention or the Brussels Ibis Regulation on the other hand creates recognition and enforcement difficulties. International parties should be cautious that not all agreements in favour of an international commercial court are recognisable and enforceable under these instruments. In other words, not every international commercial court case is a Hague Choice of Court Convention or Brussels Ibis Regulation case. The fact that international instruments such as the Hague Choice of Court Convention or the Brussels Ibis Regulation do not regard the parties' agreement, the application of foreign law, or the foreign language of the contract as cross-border elements further substantiates the argument this chapter makes; that such internationality criteria lack objectiveness, are susceptible to the parties' subjective intentions and may therefore facilitate the international commercial courts, discussed above, in forum selling.

5. The DIFC Courts: A Forum Selling Court

In the previous parts, I explored how different jurisdiction rules and their interpretation may facilitate various international commercial courts in acquiring a caseload, and may therefore function as forum selling techniques. These are the increased emphasis on choice of court agreements, the transfer jurisdiction, and party-controlled jurisdictional requirements. By contrast, this Part focuses on a single international commercial court: the DIFC Courts. It illustrates how the DIFC Courts have adopted a broad array of jurisdiction rules that facilitate the courts' establishment of jurisdiction, and that the courts have in addition pursued an overly expansive interpretation of these rules. First, part 5 identifies the jurisdiction rules and case law that expand the jurisdiction of the DIFC Courts and promote forum selling. It then shows how forum selling may undermine parties' procedural rights and result in a domestic competition between international commercial and ordinary courts.

[112] Art. 1 (2) Hague Choice of Court Convention. See also Yeo (n 8) para. 53; Georgia Antonopoulou, 'Defining International Disputes – Reflections on the Netherlands Commercial Court Proposal' (2018) Nederlands Internationaal Privaatrecht 740, 748; Chong and Yip (n 4) 121.

5.1.The DIFC Courts' Jurisdiction

In contrast to the rest of the examined courts, the DIFC Courts' jurisdiction does not derive exclusively from choice of court agreements. During their first years of functioning, the courts were vested with compulsory jurisdiction over disputes linked to the DIFC zone. However, 2011 marked the beginning of a 'second era'.[113] Dubai Law No. 16 expanded the courts' jurisdiction over disputes lacking a connection to the DIFC as long as parties have expressly chosen the DIFC Courts in a choice of court agreement.[114] This opt-in jurisdiction opened up the courts to international disputes lacking a connection to the zone. However, their compulsory jurisdiction is not the only difference between the DIFC Courts and the international commercial courts examined in the previous parts of this chapter. In addition, the jurisdiction of the DIFC Courts is exclusive, and therefore does not overlap with the jurisdiction of the ordinary Dubai courts.[115] This means that disputes falling under the jurisdiction of the DIFC Courts are excluded from the jurisdiction of the ordinary Dubai courts. The DIFC Courts' compulsory and exclusive jurisdiction sets them apart from other international commercial courts, and ensures a steady stream of cases. Therefore, the reasons that the DIFC Courts engage in forum selling do not fully square with the reasons behind the forum selling of the previously examined international commercial courts. What mainly explains the DIFC Courts' expansive approach towards jurisdiction could be the fact that during their first years of functioning, few companies had been established or licensed in the DIFC, as well as the fact that the DIFC Courts' territorial jurisdiction is confined to the 272 acres of the DIFC special economic zone, and is therefore limited by virtue of geography.

According to Article 5 (A) (1) Judicial Authority Law[116] (JAL), the DIFC Court of First Instance shall have exclusive jurisdiction over: a) civil or commercial claims and actions to which the DIFC or any DIFC body, establishment, or licensed establishment is a party; b) civil or commercial claims and actions arising out of or relating to a contract or promised contract, whether partly or wholly concluded, finalised or performed within the DIFC or will be

[113] Jayanth Krishnan, *The Story of the Dubai International Financial Center Courts: A Retrospective*, DIFC Academy of Law 2018, 43, available at <https://issuu.com/difccourts/docs/difc_courts_10_years> accessed January 2022.
[114] Art. 5 (A) (2) Law No. (16) of 2011 Amending Certain Provisions of Law No. (12) of 2004 concerning Dubai International Financial Centre Courts, available at <https://www.difc.ae/files/8414/5510/4278/Dubai_Law_No.16_of_2011_English.pdf> accessed January 2022.
[115] Dubai Law No. 12/2004 in Respect of the Judicial Authority at Dubai International Financial Centre as amended, available at <https://www.difc.ae/files/7014/5510/4276/Dubai_Law_No._12_of_2004_as_amended_English.pdf> accessed January 2022.
[116] Ibid.

performed or is supposed to be performed within the DIFC pursuant to express or implied contractual terms; c) civil or commercial claims and actions arising out of or relating to any incident or transaction that has been wholly or partly performed within the DIFC and is related to DIFC activities; d) appeals against decisions or procedures made by the DIFC bodies; and e) any claim or action over which the Courts have jurisdiction in accordance with DIFC laws and regulations.

Starting with Article 5 (A) (1) (a) JAL, the Court of First Instance shall have jurisdiction over civil or commercial claims to which the DIFC or any DIFC body, establishment, or licensed establishment is a party. In *Corinth Pipeworks SA* v *Barclays Bank Plc*,[117] former Chief Justice Michael Hwang, ruled that the DIFC Courts have exclusive jurisdiction over any claim brought against an entity with a branch in the DIFC, even if the cause of action is unrelated to the DIFC branch. As a consequence, Article 5 (A) (1) JAL establishes the DIFC Courts' jurisdiction as long as a DIFC branch is a party to the proceedings without requiring any additional dispute related links to the DIFC. During trial, the defendant objected that such an interpretation of Article 5 (A) (1) (a) JAL was exorbitant, and would encroach on the jurisdiction of the Dubai courts.[118] It would allow corporations in Dubai to bring their claims to the DIFC Courts as long as they have a branch in the DIFC, even in cases concerning transactions or incidents that took place in Dubai. In the defendant's opinion, this would open the floodgates, and would allow Dubai-related claims in the DIFC Courts from or against Dubai corporations solely on the basis of their having a branch in the DIFC.[119] By the same token, the DIFC Courts could acquire universal jurisdiction over any corporation with a branch in the DIFC. Justice Hwang rejected these objections on the basis that the defendant could invoke the *forum non conveniens* doctrine as a rectifying mechanism against any exorbitant exercise of jurisdiction.[120] Against the floodgates argument, Justice Hwang ruled that if companies would like to exclude the DIFC jurisdiction, they could do so by choosing another court in a choice of court agreement. He added that nevertheless corporations have good reasons for choosing the DIFC Courts, taking into consideration that the courts conduct trials in English and have international judges sitting on their bench, and who are better suited to applying non-UAE law if necessary.[121]

[117] *Corinth Pipeworks SA* v *Barclays Bank Plc* [2011] DIFC CA 002 (22 January 2012). See also *Barclays Bank plc* v *Afras Ltd* [2013] DIFC CFI 008 (11 August 2013).
[118] Ibid., para. 53.
[119] Ibid., para. 54.
[120] Ibid., para. 67.
[121] Ibid., para. 68.

The DIFC Courts' judgment in *Corinth Pipeworks SA* v *Barclays Bank Plc* was later affirmed in *Tavira Securities Limited v Re Point Ventures FZCO*.[122] In this case, the courts went one step further, and ruled that the DIFC Courts have jurisdiction even if the events giving rise to the dispute took place before the claimant had obtained the status of a DIFC establishment. The defendant objected that such an interpretation of Article 5 (A) (1) (a) would give rise to extreme forum shopping. A party could establish a DIFC branch for the sole purpose of establishing the 'after the facts' jurisdiction of the DIFC Courts.[123] In addition, such a jurisdiction would be highly unpredictable for the defendant.[124] The defendant went on to claim that Article 5 (A) (1) (a) establishes the jurisdiction of the DIFC Courts when one of the parties is a DIFC establishment, being either the claimant or the defendant. Although this claimant-related jurisdiction, also known as *forum actoris*, is rare in civil procedure laws, it could be explained by the aim of the DIFC Courts to exercise the supervision of companies regulated to do business in the DIFC, and to offer the service of the DIFC Courts to businesses in the DIFC.[125] By contrast, the DIFC Courts had no legitimate interest in providing jurisdiction over claims brought by a DIFC entity over facts arising before issuing of the license.[126] The DIFC Courts dismissed the defendants' objections, and ruled that there was no risk of an extreme forum shopping. Where a claimant establishes a branch simply to bring a claim to the DIFC Courts, the claimant will not come within the definition of a DIFC establishment, because the activity of bringing claims is not an activity capable of being licensed.[127] According to the courts, the *forum non conveniens* doctrine could once again rectify an exorbitant exercise of jurisdiction.[128]

Turning to Article 5 (A) (1) (b) JAL, this provision grants the DIFC Courts jurisdiction over contracts concluded, finalised or performed within the DIFC. While the place of the performance of the contract is a common jurisdictional ground found in many jurisdictions, the place of the conclusion of the contract is regarded as a weak link and lacking a close connection to the dispute. Parties may simply by concluding the contract in a state trigger the application of its laws or the jurisdiction of its courts. Nevertheless, the place where the contract was

[122] *Tavira Securities Limited* v *Re Point Ventures FZCO* [2017] DIFC CFI 026 (17 December 2017).
[123] Ibid., para. 15 (4).
[124] Ibid. paras. 15 (3) and (4).
[125] Ibid., para. 16 (a).
[126] Ibid., para. 16 (b).
[127] Ibid., para. 42.
[128] Ibid., para. 41.

concluded survives in some national laws and in the JAL. In *Gavin v Gaynor*[129] the Court ruled that it had jurisdiction on the basis of a letter that referred to a meeting in the DIFC to discuss a possible addendum to the contract. The letter post-dated the contract and the addendum was in the end not concluded. The main contract was not concluded in the DIFC, and did not specify the place of performance. Nevertheless, the Court of First Instance decided that a single meeting was enough to establish its jurisdiction.[130]

One of the DIFC Courts' most commonly invoked grounds for jurisdiction is Article 5 (A) (1) (e) JAL, according to which the courts shall have jurisdiction over any claim or action over which the courts have jurisdiction in accordance with DIFC laws and regulations. This ground for jurisdiction has functioned as a catch-all clause and has triggered the DIFC Courts' jurisdiction over third parties as necessary and proper parties to the proceedings, as well as over the recognition and enforcement of foreign arbitral awards and judgments.

In contrast to other international commercial courts that can join third parties to proceedings, Article 5 (A) (1) JAL does not grant the DIFC Courts jurisdiction over third parties. However, the ability to join third parties is important, especially in multi-party disputes, and is often presented as one of the advantages of international commercial courts over arbitration.[131] In *Nest Investments Holding Lebanon S.A.L.* v *Deloitte and Touch (M.E.),*[132] the Court of Appeal ruled that Article 20.7 DIFC Court Rules[133] providing for the addition of new parties to existing proceedings constitutes a DIFC Regulation, and therefore establishes the DIFC Courts' jurisdiction under Article 5 (A) (1) (e) JAL despite the absence of an explicit relevant jurisdictional ground.

Article 5 (A) (1) JAL has been also used as the jurisdictional gateway for the recognition and enforcement of foreign arbitral awards and judgments. In particular, Article 42 DIFC

[129] *Gavin* v *Gaynor* [2015] DIFC CFI 017. Contra *Ishtar Advocates* v *Iniko* [2018] DIFC SCT 197; *Idan* v *Ilaria* [2018] DIFC SCT 223.
[130] See also *Commercial Bank of Dubai PSC* v *M/S Totora Restaurant and Lounge LLC* [2017] DIFC CFI 047; *National Bonds Corporation PJSC* v *Taaleem PJSC* [2011] DIFC CA 001 (5 May 2011); *Allianz Risk Transfer AG Dubai Branch* v *Al Ain Ahlia Insurance Company PJSC* [2012] DIFC CFI 012 (30 April 2013).
[131] Sundaresh Menon, 'International Commercial Courts: Towards a Transnational System of Dispute Resolution', Opening Lecture for the DIFC Courts Lecture Series 2015.
[132] *Nest Investments Holding Lebanon S.A.L.* v *Deloitte and Touch (M.E.) & Joseph El Fadl* [2018] DIFC CA 011 (13 March 2019). See also *Orion Holdings Overseas Limited (in liquidation)* v *Privatbank IHAG* [2015] DIFC CFI 033 (8 April 2018).
[133] DIFC Court Rules, available at <https://www.difccourts.ae/rules-decisions/rules/part-20> accessed January 2022.

Arbitration Law regulates the recognition and enforcement of foreign arbitral awards, and therefore grants the DIFC Courts jurisdiction, being a DIFC Law according to Article 5 (A) (1) (e) JAL. In *A* v *B*, the DIFC Courts asserted jurisdiction over an application for the recognition and enforcement of a foreign arbitral award despite the fact that the defendant lacked any assets within DIFC and that the dispute was unrelated to it.[134] In *Meydan Group* v *Banyan Tree*, the Court of Appeal went as far as to accept jurisdiction over the recognition and enforcement of an arbitral award issued in Dubai.[135] Parties may therefore resort to the DIFC Courts as a 'conduit' jurisdiction for the recognition and enforcement of arbitral awards, and then seek execution in the Dubai Courts, thereby taking advantage of the reciprocal enforcement mechanisms provided by the JAL.[136] In particular, according to Article 7 (2) JAL, the Dubai Courts shall enforce DIFC Courts judgments, including foreign judgments recognised and enforced or arbitral awards ratified by these. The DIFC Courts have rejected any constitutionality or public policy objections raised against this conduit jurisdiction.[137]

In a similar vein, in *DNB Bank ASA* v *Gulf Eyadah Corporation*, the DIFC Courts asserted jurisdiction to recognise and enforce a foreign judgment, although the defendant had no assets within the DIFC, and there was no other connection to the zone.[138] The courts' jurisdiction was based on Article 24 DIFC Court Law[139] in combination with Article 5 (A) (1) (e) JAL. At this point, it should be noted that parties prefer to apply for the recognition and enforcement of a foreign judgment in the DIFC and then seek enforcement in Dubai owing to the DIFC Courts' friendlier stance with regard to recognition and enforcement.

[134] *A* v *B* [2013] DIFC ARB 002 (29 November 2014).
[135] *Meydan Group* v *Banyan Tree* [2014] DIFC CA 004 (3 November 2014).
[136] DIFC Courts, Enforcement Guide 2018, 13, available at <https://www.difccourts.ae/wp-content/uploads/2019/08/Enforcement_Guide_2019.pdf> accessed January 2022.
[137] *Fiske* v *Firuzeh* [2014] DIFC ARB 001 (5 January 2015); *Banyan Tree* v *Meydan* [2013] DIFC ARB 003 (2 April 2015); *Fiske* v *Firuzeh* [ARB-001-2014] (12 July 2015); *Egan* v *Eava* [2013] DIFC ARB 002 (29 July 2015).
[138] *DNB Bank ASA* v *Gulf Eyadah Corporation & Gulf Navigation Holding PJSC* [2015] DIFC CA 007; *Bocimar International N.V.* v *Emirates Trading Agency LLC* [2015] DIFC CFI 008 (28 January 2016); *Barclays Bank PLC* v *Essar Global Fund Ltd* [2016] DIFC CFI 036 (13 April 2017).
[139] DIFC Court Law, DIFC Law No. 10 of 2004 available at <https://www.difc.ae/files/7015/9602/1158/Court_Law_DIFC_Law_No.10_of_2004.pdf> accessed January 2022.

Lastly, and regarding the opt-in jurisdiction, the DIFC Courts do no not require an express agreement in their favour. Choosing the Dubai or UAE courts is treated as choosing the DIFC Courts, as these are an integral part of Dubai's judicial system.[140]

Turning to the exercise of jurisdiction, in *Corinth Pipeworks SA* v *Barclays Bank Plc*, the DIFC Courts ruled that the *forum non conveniens* doctrine could rectify the exorbitant reach of the DIFC Courts' jurisdiction, especially as regards the jurisdictional grounds of Article 5 (A) (1) (a) JAL.[141] In respect of the standard used to determine whether a foreign court is a more appropriate forum, the courts apply the *Spiliada* ruling.[142] However, a review of the case law illustrates that the DIFC Courts have given up the strict standards formulated in the *Spiliada* ruling, and instead apply a more lenient standard on the model of the Australian, 'clearly inappropriate' forum.[143] Moreover, the DIFC Courts have ruled that the *forum non conveniens* doctrine does not apply when the competing jurisdiction is in the UAE.[144] As a result, the DIFC Courts refuse to apply the doctrine when the dispute could fall under the jurisdiction of the Dubai courts.

All in all, the DIFC Courts have employed a variety of jurisdiction rules and interpretations in order to facilitate their establishment of jurisdiction and to engage in forum selling. More specifically, the JAL and the case law of the DIFC Courts:

- establish jurisdiction not only when the defendant is a DIFC body or establishment but also when the claimant is a DIFC body or establishment, and have thereby adopted a *forum actoris*;
- establish an *ad hominem* jurisdiction over DIFC entities even if the dispute otherwise lacks links to the DIFC;

[140] *IGPL* v *Standard Chartered Bank* [2015] DIFC CA 004 (19 November 2015), paras. 123-154; *Sunteck Lifestyles Limited* v *Al Tamimi and Co Ltd* [2017] DIFC CFI 048 (15 November 2017), para. 24. Contra *Harold PJSC* v *Hava* [2017] DIFC SCT 127 (22 June 2017); *Ishtar Advocates & Legal Consultants* v *Iniko* [2018] DIFC SCT 197 (8 July 2018); *Commercial Bank of Dubai PSC* v *Ms/S Totora Restaurant and Lounge LLC* [2017] DIFC CFI 047 (23 January 2019).
[141] *Corinth Pipeworks* SA v *Barclays Bank plc*, para. 67.
[142] *Protiviti Member Firm (Middle East) Limited* v *Al Mojil* [2016] DIFC CA 003 (23 August 2016), paras. 32-33.
[143] *Al-Mojil* v *Protiviti Member Firm (Middle East) Ltd* [2015] DIFC CFI 020 (3 January 2016); *Tavira Securities Ltd* v *Re Point Ventures* [2017] CFI 026 (17 December 2017).
[144] *Allianz* v *Al Ain Insurance Company PJSC* [2012] DIFC CFI 012 (30 April 2013); *Banyan Tree Corporate Pte Ltd* v *Meydan Group* [2013] DIFC ARB 003 (27 May 2014); *IGPL* v *Standard Chartered Bank* [2015] DIFC CA 004 (19 November 2015).

- establish jurisdiction over DIFC entities even if the events giving rise to the dispute took place before the DIFC entity acquired its status, and thereby accept an 'after the facts' jurisdiction;
- establish jurisdiction if the place where the contract was concluded is in the DIFC, and have adopted a lenient interpretation of the place where the contract was concluded;
- extend jurisdiction over third parties despite the absence of an explicit statutory provision;
- establish jurisdiction over applications for the recognition and enforcement of foreign arbitral awards and judgments even if the defendant lacks assets in the DIFC and the dispute is otherwise unrelated to the DIFC;
- dispense with the requirement of an express choice of court agreement, and regard agreements in favour of the Dubai or UAE courts as including an agreement in favour of the DIFC Courts;
- relax the *forum non conveniens* doctrine by adhering to the more lenient 'clearly inappropriate' standard, and lastly;
- refuse to apply the *forum non conveniens* doctrine when the competing jurisdictions are the Dubai or other UAE courts.

5.2. Exorbitant Jurisdiction Rules

The tally of the DIFC Courts' exorbitant jurisdiction rules and their expansive interpretation is long. Such rules and interpretations reveal that the DIFC Courts are an international commercial court geared towards attracting cases and forum selling. Although, unlike other international commercial courts, the DIFC Courts are additionally vested with compulsory and exclusive jurisdiction over disputes arising within the respective special economic zone, an explanation regarding this expansive approach towards jurisdiction could be that the courts aspire to exceed the DIFC's narrow personal and territorial reach.

Exorbitant jurisdiction rules and their expansive interpretation render a court's jurisdiction highly unpredictable. Especially in non-contractual disputes, where the claimant bears the initiative as to where to file his claim, exorbitant rules favour the claimant over the defendant. Furthermore, this expansive approach may give rise to domestic forum shopping, and result in a domestic competition between international commercial and ordinary courts. In June 2016, the jurisdictional overreach of the DIFC Courts resulted in tensions between them and the ordinary courts, and culminated in the establishment of the Judicial Tribunal. The Tribunal was

created with the aim of resolving conflicts of jurisdiction between the DIFC and the Dubai courts, and of drawing a clear jurisdictional line.[145] During its first years, it attempted to curb the jurisdiction of the DIFC Courts by resolving jurisdictional disputes in favour of the ordinary Dubai courts.[146] The DIFC Courts' exorbitant jurisdiction rules illustrate how forum selling may deprive not only foreign courts of cases but also domestic courts, and therefore create tensions within a single justice system.

6. The Implications of Forum Selling

An evaluation of the forum selling of international commercial courts requires a distinction between those courts predominantly vested with voluntary jurisdiction and those courts vested with compulsory jurisdiction. The voluntary or compulsory jurisdiction and the associated contractual or non-contractual nature of the disputes resolved by the courts have an influence not only on the reasons behind forum selling but also on its implications. Therefore, this part first examines the implications of forum selling in the context of international commercial courts that are primarily vested with voluntary jurisdiction, such as the SICC, the NCC, the CICC, the Paris International Chambers, and the German Chambers for International Commercial Disputes. It then turns to the implications of forum selling in the context of courts vested with compulsory jurisdiction and in particular the DIFC Courts.

Three techniques facilitate mainly the SICC, the NCC, the CICC, the Paris International Chambers, and the German Chambers for International Commercial Disputes in establishing jurisdiction, and may therefore function as forum selling techniques. First, the SICC and the NCC place considerable weight on choice of court agreements, these being their main source of jurisdiction. The courts underline the existence of a choice of court agreement in their favour, and are reluctant to decline jurisdiction despite the dispute's links to other jurisdictions or the agreement's formal irregularities. Second, the caseload of the SICC, the CICC, and the Paris International Chambers depends heavily on a transfer of cases from the ordinary courts. The transfer of cases, even despite the parties' opposing will, explains why these courts have dealt with more cases than other courts. Third, the SICC allows parties to turn a domestic dispute into an international one on the basis of their agreement. Although the European international

[145] Dubai Decree No. 19 of 2016 concerning the Establishment of a Judicial Tribunal for the Dubai Courts and DIFC Courts. See also Michael Black and Tom Montagu-Smith, 'A Curb on the Jurisdiction of the DIFC Courts'?, 4 August 2016, XXIV Barristers' Chambers, available at <https://xxiv.co.uk/a-curb-on-the-jurisdiction-of-the-difc-courts/> accessed January 2022.

[146] Harris Bor, 'The Joint Judicial Tribunal' in Rupert Reed and Tom Montagu-Smith (eds), *DIFC Courts Practice* (Edward Elgar Publishing 2020).

commercial courts adopt objective internationality criteria, some criteria are nevertheless susceptible to the parties' agreement. By subjectivising otherwise objective jurisdictional requirements, these international commercial courts allow parties to expand the courts' jurisdiction.

Considered together, the increased emphasis on the parties' will to litigate before an international commercial court as expressed in a choice of court agreement, the transfer jurisdiction, and party-controlled jurisdictional requirements may facilitate the selected international commercial courts in building a caseload and casting a wide jurisdiction net. Therefore, all three identified techniques can potentially promote the aim of international commercial courts to attract cases as well as further the corresponding aim of the states hosting these courts to attract litigation. This is understandable if we take into consideration that, unlike ordinary courts, international commercial courts are part of broader policy agendas to attract and boost dispute resolution.

Case law and the academic literature have justified the jurisdiction rules of international commercial courts on the basis of party autonomy and the right of the parties to substantive justice. However, party autonomy and the right to substantive justice do not fully explain the facilitative approach of international commercial courts towards their own jurisdiction. For instance, party autonomy does not explain why some international commercial courts accept cases transferred from the ordinary courts even when a party objects to such a transfer. Likewise, it is not explained by the parties' right to substantive justice. By contrast, however, the aim of international commercial courts to build a caseload does provide an explanation. Consequently, the consideration of forum selling deserves a place among the considerations motivating the jurisdiction rules of international commercial courts.

At the same time, this facilitative approach reshapes jurisdiction rules, and has a broader impact on the way we think of jurisdiction. This impact is evident in pending legislative initiatives that are contemplating the amendment of the jurisdiction rules of ordinary courts on the model of the jurisdiction rules of international commercial courts.[147]

International commercial courts reshape jurisdiction rules by highlighting party autonomy and forging a right to access justice on the merits. The emphasis on the parties' will signals the

[147] Ministry of Law – Legal Policy Division, *Public Consultation on Proposed Reforms to the Civil Justice System*, available at <https://www.reach.gov.sg/participate/public-consultation/ministry-of-law/legal-policy-division/public-consultation-on-proposed-reforms-to-the-civil-justice-system> accessed January 2022.

decline of territorial links or other objective factors in determining a court's jurisdiction. However, the increasing importance of party autonomy in international jurisdiction is nothing new.[148] The Brussels Ibis Regulation and the Hague Choice of Court Convention permit parties to establish a court's international jurisdiction solely on the basis of a choice of court agreement, despite the lack of territorial connections between the dispute and the chosen forum.[149] In addition, these international instruments take a more civil law approach to jurisdiction. In order to establish a predictable set of international jurisdiction rules, they prevent national courts from declining to exercise international jurisdiction on the basis of a discretionary *forum non conveniens* analysis.[150] However, what might be more interesting is that similar national rules on international jurisdiction in other countries, such as Singapore, were not exclusively propelled by the wish to align national provisions with international instruments on international jurisdiction. Such rules were also driven by the goal of facilitating international commercial courts in building a caseload and promoting the broader policy objective of litigation attraction. Therefore, this chapter illustrates that the forces of harmonisation may be more selfish and inward looking.

Furthermore, international commercial courts forge a right to substantive justice. As long as parties have expressed their will to litigate before an international commercial court, procedural technicalities should not stand in the way of resolving the dispute. Such an approach is again nothing new. English courts have long adopted a justice on the merits approach. In particular, with the Judicature Act 1875, English judges started considering procedural irregularities as technicalities getting in the way of the real merits of the case.[151] As Shelton characteristically notes, in the course of time, procedural rules '*like fallen trees, became impediments*'.[152] However, it is important to recognise that while simplifying procedural rules may accelerate trials and offer parties a judgment on the merits, the access to justice approach at the same time glosses over the intent of forum selling. It conceals the fact that what drives this approach is not only the right of the parties to access justice and the corresponding obligation of courts to

[148] See also Alex Mills, 'Rethinking Jurisdiction in International Law' (2014) 84 The British Yearbook of International Law 187.
[149] Art. 25 (1) Brussels Ibis Regulation; Art. 5 (1) Hague Choice of Court Convention.
[150] For the Brussel I*bis* Regulation, see CJEU Case-281/02 *Andrew Owusu* v *N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas"*. For the Hague Choice of Court Convention, see Art. 5 (2); Masato Dogauchi and Trevor C. Hartley, *Preliminary Draft Convention on Exclusive Choice of Court Agreements, Explanatory Report*, 26 December 2004, Article 5.
[151] Adrian Zuckerman, *Zuckerman on Civil Procedure* (Sweet & Maxwell 2013) 26-28.
[152] Thomas W. Shelton, 'The Drama of English Procedure' (1931) 12 Virginia Law Review 215, 251.

satisfy this right; it is also driven by the goal of international commercial courts to create a demand for their services.

In addition, the right to substantive justice downplays the significance of rules on international jurisdiction. First, these rules delineate the jurisdiction of national courts in international disputes thereby respecting state sovereignty. Second, international jurisdiction rules protect the defendant's right to a fair trial. Expansive jurisdiction rules that attract cases deprive other states of these cases, and may disfavour the defendant and their procedural rights. This is especially so if we take into consideration that international commercial courts in some states are more expensive than the ordinary courts in that same state. One may still object that the defendant's right to a fair trial is protected as long as he has consented to the jurisdiction of the court in a choice of court agreement. It is true that such an agreement is unlikely to disfavour the defendant, who has already agreed on the court's jurisdiction. However, such an approach rests on the oversimplified assumption that parties in commercial disputes enjoy equal bargaining power. The recent proliferation of substantive laws that protect small- and medium-sized enterprises indicates that some parties do not always freely negotiate commercial contracts. Similarly, formal requirements on choice of court agreements aim to ensure the agreement of the parties and to take into consideration inequalities between them.

Expansive jurisdiction rules and their interpretation may undermine the right to a fair trial. This becomes especially evident in the case of international commercial courts, such as the DIFC Courts, that not only depend their jurisdiction on the parties' choice but are also vested with compulsory jurisdiction over both contractual and non-contractual disputes.

Just like other forum selling techniques identified in the relevant literature, exorbitant jurisdiction rules and case law in non-contractual settings may result in pro-claimant approaches. Rules that establish a court's jurisdiction based on weak territorial links favour the claimant by granting them a greater choice of courts and a variety of forum shopping options. At the same time, exorbitant jurisdiction rules disfavour the defendant. Being highly unpredictable, expansive grounds of jurisdiction oblige the defendant to appear before a court they could not possibly foresee, and the grounds consequently undermine the right to a fair trial. The DIFC Courts' case law has justified such an approach by underlining that parties could exclude the DIFC Courts' jurisdiction by choosing a different court, and that in any case the courts' innovative features serve the parties' interests. This case law turns the DIFC Courts' jurisdiction from an opt in to an opt out, default jurisdiction, and endorses a self-serving

argumentation that facilitates the courts' establishment of jurisdiction despite the parties' opposing will. The fact that the DIFC Courts regard their innovative features, such as the use of English in court or the international judges, as factors militating in favour of their own jurisdiction strongly reminds us of the SICC and its case law on the *forum non conveniens* doctrine. Lastly, the jurisdictional rivalry between the DIFC and the ordinary Dubai courts illustrate vividly how forum selling may not only deprive foreign courts of cases but also the ordinary courts within a country, and thereby result in a domestic competition between national courts. Rules on international jurisdiction must therefore strike a balance between international comity, the parties' right to a fair trial, and the state's interest in promoting and attracting dispute resolution.

7. Conclusion

This chapter argues that jurisdiction rules and their interpretation may facilitate certain international commercial courts in attracting cases, and may therefore function as forum selling techniques. In order to examine these forum selling techniques and their implications, a distinction is drawn between the courts that derive their jurisdiction primarily from choice of court agreements and those that are additionally vested with compulsory jurisdiction. The international commercial courts that derive their jurisdiction mainly from choice of court agreements utilise three forum selling techniques. First, the SICC and the NCC prioritise choice of court agreements in their favour over other procedural requirements. As long as there is a choice of court agreement in their favour, these courts will more likely accept jurisdiction, even if the dispute lacks territorial links to the forum or if the agreement fails to meet formal requirements. Second, the SICC, the CICC, and the Paris International Chambers accept cases transferred by the ordinary courts regardless of the parties' opposing will. The transfer jurisdiction explains why these international commercial courts have dealt with more cases than others. Lastly, the SICC allows parties to agree that their dispute is international, thereby placing it under the court's jurisdiction. Although the European international commercial courts use objective, dispute-related internationality criteria, some criteria similarly allow parties to indirectly agree that their dispute is international, and establish the courts' jurisdiction. Although different international commercial courts opt for different rules and interpretations, what all these have in common is that they facilitate the courts in expanding their jurisdiction and casting a wide jurisdiction net. The chapter then turns to international commercial courts that are additionally vested with compulsory jurisdiction. It is shown in particular that the DIFC Courts have adopted a long list of rules and interpretations that

facilitate the expansion of their jurisdictional reach. The DIFC Courts are therefore an extreme illustration of a forum selling court.

Thus far, party autonomy and the right to substantive justice have provided the doctrinal justifications that enable international commercial courts to cast a wide jurisdiction net. It is claimed especially that by prioritising choice of court agreements over other jurisdictional requirements, international commercial courts respect the parties' will and promote party autonomy. At the same time, by doing away with procedural irregularities, international commercial courts claim to facilitate parties in obtaining a judgment on the merits. However, this chapter argues that the aim of international commercial courts to attract cases adds one more consideration to the study of these courts and their jurisdiction rules: namely, that of forum selling. Forum selling turns party autonomy into the guiding principle in the rules and case law of international commercial courts. By contrast, forum selling pushes aside territoriality or formal requirements on choice of court agreements, as these would stand in the way of the courts' attempt to attract cases and build a caseload. In addition, forum selling encourages international commercial courts to develop a right to substantive justice. This right trivialises the role of procedural rules, and turns international jurisdiction from a state discretion into a state obligation. Under certain circumstances, forum selling may also have negative implications with regard to access to justice. By downplaying the significance of formal requirements on choice of court agreements, forum selling downplays bargaining inequalities between parties. The negative implications of forum selling regarding access to justice are more evident in the context of international commercial courts that are additionally vested with compulsory jurisdiction. The DIFC Courts' exorbitant jurisdiction rules and interpretations favour the claimant by granting them more forum shopping options, while they disfavour the defendant by rendering jurisdiction highly unpredictable. Thus, forum selling reshapes civil procedure by prioritising party autonomy over other doctrines, and under certain circumstances it may undermine the parties' procedural rights.

CHAPTER 5: 'ARBITRALISING' THE COURTS

1. Introduction

In the opening pages of the literature on international commercial arbitration, the standard account is that in international commercial disputes most parties prefer arbitration.[1] Surveys indeed confirm that arbitration is by far the preferred dispute resolution method.[2] Although devised as a method to resolve disputes in an informal and flexible manner, it has been claimed that arbitration over time has lost its flexibility by becoming increasingly formal, and by incorporating litigation practices that extend the length of proceedings and raise costs. This increasing court-like formality has been termed the 'judicialisation' of international commercial arbitration.[3]

However, while international commercial arbitration is becoming progressively judicialised, international commercial courts evidence an opposite trend: namely, the 'arbitralisation' of public courts and justice.[4] In order to attract parties with a preference for arbitration, some international commercial courts adopt arbitration-like features. Although in the case of some

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[1] Emmanuel Gaillard and John Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 1; Julian David Mathew Lew, Loukas A. Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 5; Gary Born, *International Commercial Arbitration: Law and Practice* (Second Edition, Kluwer Law International 2015) 1; Blackaby Nigel, Constantine Partasides et al., *Redfern and Hunter on International Arbitration* (Sixth Edition, Kluwer Law International; Oxford University Press 2015) 1.

[2] According to White & Case and Queen Mary University of London, 2018 International Arbitration Survey: The Evolution of International Arbitration, Charts 1 & 2, available at <https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-19.pdf> accessed January 2022 (hereafter: White & Case and Queen Mary University of London, 2018 International Arbitration Survey), 97% of respondents indicate that international arbitration is their preferred method of dispute resolution, either on a stand-alone basis (48%) or in conjunction with ADR (49%); Singapore Management University, School of Law, Singapore International Dispute Resolution Academy (SIDRA), SIDRA International Dispute Resolution Survey: 2020 Final Report, Exhibit 4.1., available at <https://sidra.smu.edu.sg/sidra-international-dispute-resolution-survey-final-report-2020> accessed January 2022 (hereafter: SIDRA International Dispute Resolution Survey: 2020 Final Report), international commercial arbitration remains the mechanism most-used for international dispute resolution, and was used by 74% of respondents between 2016 and 2018. However, see also the older studies Ya-Wei Lit, 'Dispute Resolution Clauses in International Contracts: An Empirical Study' (2006) 39 Cornell International Law Journal 789, 798-800; Theodore Eisenberg and Geoffrey Miller, 'The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies' (2007) 56 DePaul Law Review 335, 350-352.

[3] Charles Brower, 'W(h)ither International Commercial Arbitration?' (The Goff Lecture 2007) 2008 (27) Arbitration International 181; Thomas J. Stipanowich, 'Arbitration: The New "Litigation"' (2010) University of Illinois Law Review 1; Leon Trakman and Hugh Montgomery, 'The "Judicialization" of International Commercial Arbitration: Pitfall or Virtue?' (2017) 30 Leiden Journal of International Law 405.

[4] See also Michael Hwang, 'Commercial Courts and International Arbitration – Competitors or Partners?' (2015) 31 Arbitration International 193, 201 referring to the Singapore International Commercial Court (SICC) as a hybrid court; Pamela Bookman, 'The Arbitration-Litigation Paradox' (2019) 72 Vanderbilt Law Review 1119; Pamela Bookman, 'The Adjudication Business' (2020) 45 Yale Journal of International Law 227; Pamela Bookman, 'Arbitral Courts' (2021) 61 Virginia Journal of International Law 161. See also Alyssa King, 'Global Civil Procedure' (2021) 62 Harvard International Law Journal 223.

courts these features are simply 'buzz' words aimed at sending signals of quality and familiarity to prospective litigants,[5] international commercial arbitration has considerably influenced the institutional design and the procedural rules of some international commercial courts.

While chapters 3 and 4 identified the marketing of international commercial courts and their lenient jurisdiction rules as forum selling techniques, the present chapter focuses on the arbitration features of these courts as their third and last forum selling technique. In order to compete effectively with international commercial arbitration, international commercial courts emulate some of arbitration's most valued features. Part 2 begins by examining the role of arbitration in the emergence of international commercial courts. It confronts European perspectives with those of Asia, and juxtaposes 'competing with arbitration' with 'partnering with arbitration' approaches. Part 3 focuses on the arbitration features of the Singapore International Commercial Court (SICC), the Dubai International Financial Centre (DIFC) Courts, and the Netherlands Commercial Court (NCC), these being the courts most inspired by arbitration. It sets out their arbitration features, and examines how they resemble international commercial arbitration proceedings. Part 4 identifies party autonomy as the common thread among the features. It notes that while party autonomy permits parties to design proceedings by way of their agreement, and may therefore increase the flexibility of international commercial courts' proceedings, it could also be time consuming and expensive. In addition, this part examines how some arbitration features may undermine access to justice, and may therefore hit the limits of 'arbitralisation'. The last part concludes that some features of public court proceedings are so inherent to access to justice and to the role of courts as public institutions that they must not be set aside by the parties' agreement.

2. The Role of Arbitration in the Emergence of International Commercial Courts

International commercial courts and international commercial arbitration aim at attracting the same types of disputes, and therefore a certain degree of competition between them is apparent. The overlapping caseload and the prominence of international commercial arbitration in parties' preferences suggests that arbitration is international commercial courts' main rival.

Among the incentives that prompted the creation of international commercial courts, international commercial arbitration is indeed prevalent. However, different international commercial courts position themselves differently toward international commercial arbitration.

[5] See Chapter 3.

On the one hand, European international commercial courts are presented mainly as a response to the increasing number of cases resolved by common law courts and arbitration, and to the corresponding decline in the caseload of public courts. On the other hand, Asian international commercial courts are presented as a response to the shortcomings of arbitration, and therefore as simply a complementary dispute resolution method.

This part explores the standpoints of different international commercial courts. It illustrates that, despite differences, international commercial arbitration has had a significant role to play in the establishment of international commercial courts.

2.1. European Perspectives: International Commercial Courts as a Competitor of Arbitration

An examination of the studies that explored the viability of international commercial courts as well as the laws that brought the courts into being reveals international commercial arbitration as one of the reasons behind their creation. In Europe, the idea of international commercial courts was launched as a way to increase the attractiveness of these jurisdictions to litigants, and to reverse the trend of resolving disputes in common law courts and by arbitration. The establishment of international commercial courts in Europe was therefore presented as a response to the 'vanishing trial',[6] a term employed to describe the preference of parties for alternative dispute resolution methods, as well as the resulting decrease in the caseload of federal and state courts in the United States.[7]

Starting with the NCC, the Council for the Judiciary's plan for establishing the court, the NCC Plan, stressed that high-value and complex international commercial disputes are increasingly

[6] Council for the Judiciary (*Raad voor de Rechtspraak*), Plan for the Establishment of the Netherlands Commercial Court (*Plan tot oprichting van de Netherlands Commercial Court*), November 2015, 3, available at <https://www.rechtspraak.nl/SiteCollectionDocuments/plan-netherlands-commercial-court.pdf> (hereinafter: Dutch Council for the Judiciary, NCC Plan 2015); German Parliament (*Deutscher Bundestag*), Legislative Proposal for the Establishment of Chambers for International Commercial Disputes (*Entwurf eines Gesetzes zur Einführung von Kammern für internationale Handelssachen*) Drucksache 19/1717, 18 April 2018, 1 available at <http://dipbt.bundestag.de/dip21/btd/19/017/1901717.pdf> (hereafter: German Chambers Legislative Proposal 2018); Legislative Proposal Establishing the Brussels International Business Court (*Wetsontwerp houdende oprichting van het Brussels International Business Court/ Project de loi instaurant la Brussels International Business Court*), Parliamentary Documents (*Parl. St./Doc. parl.*): Chamber of Representatives (*Belgische Kamer van Volksvertegenwoordigers/ Chambre de représentants de Belgique*), Explanatory Statement (*Memorie van Toelichting/Expose de motifs*) *(doc 54 3072/001)*, 15 May 2018, 5, available at <http://www.dekamer.be/FLWB/PDF/54/3072/54K3072001.pdf> (hereafter: BIBC Preliminary Draft Law) all accessed January 2022.

[7] Marc Galanter, 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts', (2004) 1 Journal of Empirical Legal Studies 459; Thomas Stipanowich, 'ADR and the 'Vanishing Trial'', (2004) 1 Journal of Empirical Legal Studies 843.

resolved by foreign courts such as the London Commercial Court (LCC) or by arbitration.[8] As a result of the outflow of cases to English courts or arbitration, national courts deal less and less with commercial disputes having an international element, and this has a negative impact on their expertise and their ability to produce and shape the law.[9] According to the NCC Plan, the phenomenon of the 'vanishing trial' has a self-reinforcing effect, as Dutch lawyers opt more and more often for foreign courts or arbitration.[10] In addition, the NCC Plan delved into the economic gains that the establishment of the NCC would bring with it. As well as creating a business-friendly environment, the NCC could create business for the local bar and other service providers. The plan mentions the high legal fees charged in arbitration proceedings for high-value disputes as an indication of the court's high turnover potential.[11] As such, the increasing popularity of arbitration was a central consideration in establishing the NCC.

Likeminded considerations underlie the pending legislative proposal for establishing Chambers for International Commercial Disputes and Commercial Courts in Germany and the draft proposal for the establishment of the BIBC. The German proposal stresses that despite the international recognition of the German justice system parties prefer foreign courts or arbitration.[12] It is expected that the use of English would make German courts more accessible to foreign litigants, draw significant international commercial disputes, and boost the attractiveness of the German justice system as a whole.[13] In a similar vein, the BIBC proposal

[8] Dutch Council for the Judiciary, NCC Plan 2015, 3. See also The Boston Consulting Group, 'Market Survey Netherlands Commercial Court (*Marktverkenning Netherlands Commercial Court*)', 1, 9 noting that the NCC will attract disputes usually resolved in arbitration, available at <https://docplayer.nl/111900001-Raad-voor-de-rechtspraak-marktverkenning-netherlands-commercial-court.html> accessed January 2022 (hereafter: Boston Consulting Group, Market Survey NCC).

[9] Ibid. See also Speech by Chairman Frits Bakker of the Dutch Council for the Judiciary, 11 September 2014, available at <https://www.taxlive.nl/media/1647/speech-frits-bakker-dag-van-de-rechtspraak-11-9-2014.pdf> accessed January 2022.

[10] Ibid., 5.

[11] Ibid., 8.

[12] Federal Council (*Bundesrat*), Drucksache 219/21, Draft Proposal submitted by the Federal States of North Rhine-Westphalia and Hamburg (*Gesetzesantrag der Länder Nordrhein-Westfalen und Hamburg*), Legislative Proposal for Strengthening the Courts in Commercial Disputes (*Entwurf eines Gesetzes zur Stärkung der Gerichte in Wirtschaftsstreitigkeiten*), 17 March 2021, Begründung (Explanatory Statement), 11 (hareafter: German Chambers Legislative Proposal 2021). See also German Chambers Legislative Proposal 2018, 1. However, see Discussion Paper (*Diskussionspapier*), Justice Location Germany – Strengthening the Courts in Commercial Disputes (*Justizstandort Deutschland – Stärkung der Gerichte in Wirtschaftsstreitigkeiten*) (Symposium, 3 September 2018) Representation of the State North Rhine-Westphalia at the Federation (*in der Vertretung des Landes Nordrhein Westfallen beim Bund*), 8; Gerhard Wagner and Arvid Arntz, 'Commercial Courts in Germany', 11-14 in: Lei Chen and André Janssen (eds), *Dispute Resolution in China, Europe and World* (Ius Gentium: Comparative Perspectives on Law and Justice, Springer 2020), noting that the impact of arbitration appears to be strongest in the category of high-profile disputes. Similarly for the USA, Christopher R. Drahozal, 'Chapter 27 – Empirical Findings on International Arbitration: An Overview' 650, 651 in Thomas Schultz and Federico Ortino (eds), *The Oxford Handbook of International Arbitration* (Oxford University Press 2020).

[13] Ibid., 1-2.

underlined that international companies headquartered in Brussels lack the choice of a suitable state court as an alternative to arbitration. Establishing the BIBC would reverse the trend of cross-border trade disputes that increasingly bypass the Belgian courts.[14]

The NCC plan, the proposals for the establishment of Chambers for International Commercial Disputes and Commercial Courts in Germany, and the draft proposal for the establishment of the BIBC reveal the outflow of cases to arbitration and the 'vanishing trial' as one of the reasons behind the creation of the courts. By establishing specialised courts attractive to parties undertaking international business activities, the Netherlands, Germany, and Belgium made explicit their aim of modernising the public court system, attracting disputes frequently resolved in arbitration, and ultimately, wiping the dust off state court case law.

2.2. Asian Perspectives: International Commercial Courts as a Partner of Arbitration

Whereas the reasons behind the establishment of international commercial courts in Asia vary, the Asian courts show a different relationship to arbitration. They present themselves as a complementary dispute resolution method that aims to attract disputes better suited for public court proceedings.

While the Emirate of Dubai established the DIFC Courts in 2005 with the aim of offering prospective investors a reliable dispute resolution venue,[15] Singapore established the SICC in 2015 with the intention of further promoting Singapore as Asia's dispute resolution hub.[16] China followed in 2019, and established the China International Commercial Courts (CICC).[17] According to commentators, the CICC, being a division of the Supreme People's Court,[18] is

[14] BIBC Preliminary Draft Law 2018, 5. See also Erik Peetermans and Philippe Lambrecht, 'The Brussels International Business Court: Initial Overview and Analysis' (2019) 12 Erasmus Law Review 42, 43-44.

[15] Jayanth Krishnan and Priya Purohit, 'A Common Law Court in an Uncommon Environment: The DIFC Judiciary and Global Commercial Dispute Resolution' (2014) 25 The American Review of International Arbitration 497, 499-500; Zain Al Abdin Sharar and Mohammed Al Khulaifi, 'The Courts in Qatar Financial Centre and Dubai International Financial Centre: A Comparative Analysis' (2016) 46 Hong Kong Law Journal 529, 539; Harold Koster and Mark Beer, 'The Dubai International Financial Centre (DIFC) Courts: A Specialised Commercial Court in the Middle East' 195, 195-197 in Eddy Bauw, Harold Koster and Sonja Kruisinga (eds), *De Kansen voor een Netherlands Commercial Court* (Boom juridisch 2018).

[16] Report of the Singapore International Commercial Court Committee, November 2013, para. 4 (a), available at <https://www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/-report-of-the-singapore-international-commercial-court-committee-_90a41701-a5fc-4a2e-82db-cc33db8b6603-1.pdf> accessed January 2022 (hereafter: SICC Committee Report 2013).

[17] Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court, available at <http://cicc.court.gov.cn/html/1/219/199/201/1574.html> accessed January 2022 (hereafter: CICC Provisions).

[18] Ibid., Art. 1.

intended to concentrate high-value commercial disputes at China's highest court, and thereby facilitate state control over high-stake disputes involving Chinese companies and a state interest.[19] Although the reasons behind the establishment of these courts are widely different, these jurisdictions share the aim of attracting dispute resolution; and there seems to be little interest in whether this will be in the form of litigation, arbitration, or mediation. The Qatar International Court and Dispute Resolution Centre hosts the court as well as arbitration and mediation services.[20] Similarly, Singapore hosts the Singapore International Arbitration Centre (SIAC) with its rapidly developing caseload, and promotes mediation through the Singapore Mediation Centre (SMC).[21] Lastly, the CICC hosts Chinese arbitration institutions under its roof, providing parties with a 'one-stop' dispute resolution platform, and has assigned its Expert Committee the additional task of mediating disputes.[22] China indeed views litigation as the last resort in what it calls the 'Pluralistic Dispute Resolution': namely, a dispute resolution system that links alternative dispute resolution, administrative review, and litigation.[23] By establishing international commercial courts as one of many options in a diversified dispute resolution portfolio, these countries promote, respectively, the broader goals of investment attraction, the creation of a dispute resolution market, and enhanced state control.

This might explain why the SICC invoked the shortcomings of arbitration in order to justify its establishment, and to present itself as being simply complementary to arbitration. This section turns to the SICC, and illustrates how the court positions itself as an additional dispute resolution venue that rectifies arbitration's shortcomings in a complementary way.

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[19] Jacob Mardell, 'Dispute Settlement on China's Terms: Beijing's New Belt and Road Courts', Mercator Institute for China Studies (14 February 2018), available at <https://merics.org/en/analysis/dispute-settlement-chinas-terms-beijings-new-belt-and-road-courts>; Zhengxin Huo and Man Yip, 'Comparing the International Commercial Courts of China with the Singapore International Commercial Court' (2019) 68 International and Comparative Law Quarterly 903, 922-923. See also Zhou Qiang, the President of the Supreme People's Court, Speech on the 1st Session of the Thirteenth Plenary Session of the Eighteenth National People's Congress (9 March 2018), available at <http://cicc.court.gov.cn/html/1/219/208/210/777.html>, where the CICC is described as a part of the measures for providing '*solid judicial protection for overseas trade and investment of Chinese enterprises*'.

[20] QICDRC Official Website, available at <https://www.qicdrc.gov.qa/> accessed January 2022.

[21] SIAC Official Website, available at <https://www.siac.org.sg/>; SMC Official Website, available at <https://www.mediation.com.sg/> all accessed January 2022.

[22] For the 'one-stop' dispute resolution platform, see Notice of the Supreme People's Court on Inclusion of the First Group of International Commercial Arbitration and Mediation Institutions in the "One-stop" Diversified International Commercial Dispute Resolution Mechanism, 5 December 2018, available at <http://cicc.court.gov.cn/html/1/219/208/210/1144.html>. For the Expert Committee, see The Decision on the Establishment of International Commercial Expert Committee of the Supreme People's Court, 24 August 2018, available at <http://cicc.court.gov.cn/html/1/219/235/243/index.html> all accessed January 2022.

[23] Zhiqiong June Wang and Jianfu Chen, *Dispute Resolution in the People's Republic of China, The Evolving Institutions and Mechanisms* (Koninklijke Brill 2019) 3, 10.

A glance at the official website of the SICC reveals how the court targets arbitration's weak spots. According to the website, although parties may be able to pursue their claims in international commercial arbitration, they may nevertheless wish to resolve their dispute in the SICC in order to avoid some of the problems encountered in arbitration, such as:

1. *over-formalisation of, delay in, and rising costs of arbitration;*
2. *concerns about the legitimacy of and ethical issues in arbitration;*
3. *the lack of consistency of decisions and absence of developed jurisprudence;*
4. *the absence of appeals; and*
5. *the inability to join third parties to the arbitration*'.[24]

As **first** among the difficulties relating to arbitration, the SICC website lists over-formalisation, also known as the 'judicialisation' of international commercial arbitration.[25] The increasing court-like formality of arbitration proceedings has resulted in delays and rising costs. The rising costs of arbitration have indeed attracted the attention of most international commercial courts that claim to offer parties a dispute resolution forum sensitive to the needs of the business community, albeit at a lower price.[26]

The SICC website mentions legitimacy and ethical issues as the **second** problem with respect to international commercial arbitration.[27] The SICC thereby targets the widely discussed issue of conflicts of interests in arbitration that may call arbitrators' independence and impartiality into question, and could in turn undermine its overall legitimacy.

Lengthy proceedings, rising costs, and ethical issues are not the only flaws targeted by the SICC. The court claims to enjoy a **third** advantage over arbitration. In contrast to arbitration,

[24] SICC Official Website, available at <https://www.sicc.gov.sg/about-the-sicc> accessed January 2022. See also Hwang (n 4) 196-197; Sundaresh Menon, 'International Commercial Courts: Towards a Transnational System of Dispute Resolution', Opening Lecture for the DIFC Courts Lecture Series 2015, paras. 40-55; Lucy Reed, 'International Dispute Resolution Courts: Retreat or Advance?', John E. C. Brierley Memorial Lecture, 11 September 2017, 4.

[25] Similarly, Sundaresh Menon, 'The Rule of Law and the SICC', Singapore International Chamber of Commerce Distinguished Speaker Series, 10 January 2018, para. 26, available at <https://www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/b_58692c78-fc83-48e0-8da9-258928974ffc.pdf> accessed January 2022.

[26] Menon (n 24) paras. 45-49; Parliamentary Papers II 2016/17 (*Kamerstukken II*), 34 761, no. 3, Amendments to the Code of Civil Procedure and the Civil Court Fees Act With Regard to the Introduction of English-language Case Law at the International Commercial Chambers of the Amsterdam District Court and the Amsterdam Court of Appeal (*Wijziging van het Wetboek van Burgerlijke Rechtsvordering en de Wet griffierechten burgerlijke zaken in verband met het mogelijk maken van Engelstalige rechtspraak bij de internationale handelskamers van de rechtbank Amsterdam en het gerechtshof Amsterdam*), Explanatory Statement (*Memorie van Toelichting*), 2 (hereafter: NCC Law, Explanatory Statement). See also Discussion Paper, *Justice Location Germany – Strengthening the Courts in Commercial Disputes* (n 12) 11.

[27] See also Menon (n 24) para. 51.

which lacks appellate proceedings and is a 'one-shot' procedure, most international commercial courts allow parties to appeal first instance judgments, and thereby rectify any mistakes in law or facts committed at first instance. Due to this appellate review of judgments combined with the publicity of case law, the SICC claims to be in a better position than arbitration to produce a coherent and predictable body of case law.[28]

Last among arbitration's problems, the SICC website lists the inability to join third parties in arbitration. In particular, since arbitration proceedings rely on the parties' agreement, arbitral tribunals can hardly join third parties that did not consent to the arbitration agreement, or consolidate related proceedings not covered by it. By contrast, international commercial courts claim to enjoy the coercive powers of state courts, and may therefore join third parties as well as consolidate proceedings despite the lack of an agreement.[29] In this way, international commercial courts claim to be in a better position than arbitration to counter the risk of parallel proceedings and contradicting judgments.

Although the SICC targets arbitration's shortcomings, various stakeholders underline that the court does not intend to detract from arbitration's caseload. Instead, the SICC aims at attracting disputes that would have bypassed Singapore, and thereby expand its dispute resolution market.[30] Sundaresh Menon, Chief Justice of Singapore, pointed out that just as the LCC exists alongside a vibrant arbitration market, the SICC would coexist in harmony with Singapore's growing arbitration market.[31] As observed in chapter 2, this rhetoric could be attributed to Singapore's efforts to appease the concerns of the local arbitration community and to reassure its vested market share.[32]

The above illustrate how the SICC distinguishes itself from arbitration in order to underline its advantages as a public court and, consequently, its unique features. The disadvantages of

[28] Menon (n 25) para. 28 (c).
[29] Menon (n 24) para. 42; Menon (n 25) para. 28 (a); Sundaresh Menon, 'International Commercial Courts in the Post-Pandemic Era', Singapore International Commercial Court Symposium 2021, 10 March 2021, para. 8 available at <https://file.go.gov.sg/opening-address-cj-sicc-symposium.pdf> accessed January 2022.
[30] Speech by Senior Minister of State for Law, Indranee Rajah at the Litigation Conference 2015, 16 March 2015, para. 25, available at <https://www.mlaw.gov.sg/news/speeches/speech-by-senior-minister-of-state-for-law--indranee-rajah--at-t> accessed January 2022; Hwang (n 4) 200, citing Quentin Loh: '*Arbitrators should not think of the SICC cannibalizing their work. Instead they should look upon it as an integral part of a vibrant dispute resolution hub. Just as mediation or adjudication or other forms of ADR complement arbitration, the SICC will do likewise for disputes that do not sit well with the private consensual dispute resolution process. If Singapore succeeds in becoming the premier dispute resolution hub of Asia, the pie will grow, hopefully enormously, your [i.e. arbitration practitioner's] share will also grow, hopefully enormously too, even though it forms a smaller percentage of the whole*'.
[31] Menon (n 24) para. 10.
[32] Chapter 2.

arbitration translate into the advantages of the court. According to the SICC website, these advantages are speedier and cheaper proceedings; the impartiality, independence, and legitimacy of public courts; the consistency of a developed body of jurisprudence; the right to appeal; and the ability to join third parties to proceedings.

Although the SICC is the only international commercial court that explains in detail how it complements arbitration, most Asian international commercial courts similarly position themselves as being partners of arbitration rather than as competitors.[33] However, defining the relationship between international commercial courts and international commercial arbitration in competitive or complementary terms is simply a rhetorical dilemma that actually reflects varying policy objectives and regional particularities. Despite differences in rhetoric, international commercial arbitration has played an important role in the establishment of international commercial courts both in Europe and in Asia. In order to attract parties with a preference for arbitration, international commercial courts emulate international commercial arbitration, which serves to inspire some of the courts' most innovative institutional and procedural features.

3. The Arbitration-Features of International Commercial Courts

The influence of arbitration on the institutional and procedural features of international commercial courts was a recurring theme during many of the interviews conducted for the purpose of this research. In one of them, an interviewee involved in the setting up and current operations of an international commercial court, explained briefly:

'*We basically ask practitioners: What do you like, especially in international arbitration today, that you think we can adopt in this court?*'.[34]

This Section explores how international commercial courts incorporate in their institutional design and procedural rules some of arbitration's most valued features. It shows how the SICC, the DIFC Courts, the NCC, and the legislative proposal for the establishment of the BIBC resemble arbitration by infusing greater flexibility into their proceedings, appointing foreign nationality judges, permitting foreign lawyers to appear before the court, allowing parties to agree on private and confidential proceedings, and expanding the enforceability of their judgments by turning court judgments into arbitral awards.

[33] Hwang (n 4).
[34] Interview with court personnel (18 February 2020).

3.1. Procedural Flexibility in International Commercial Courts

International commercial arbitration is frequently described as a 'creature of contract'.[35] It is the will of the parties, expressed in an arbitration agreement, that submits disputes to arbitration and excludes the jurisdiction of national courts.[36] Arbitration agreements are therefore referred to as the 'foundation stone' of international commercial arbitration.[37] In addition, it is the parties' agreement that regulates and shapes the conduct of proceedings. Despite the application of international arbitration treaties, national arbitration laws and arbitration rules, it is claimed that these provide simply a broad procedural framework, leaving the parties free to agree on the specifics and to tailor proceedings to their preferences and needs.[38] In the arbitration agreement, be it an arbitration clause or a subsequent submission agreement, parties may choose the seat of arbitration, and thereby the law applicable to the arbitration proceedings. Parties may agree on *ad hoc* arbitration or institutional arbitration, administered by an arbitration institution and in accordance with its rules. They may agree on the number and the qualifications of the arbitrators, dispense with the disclosure of documents or the examination of witnesses, and choose the substantive law applicable to their disputes. It is therefore claimed that the light-touch approach of arbitration statutes, the minimal intervention of public courts in the arbitration proceedings, and the freedom of the parties to design proceedings facilitate party autonomy and lend international commercial arbitration flexibility,[39] which is one of its most valued features.[40]

Most of the international commercial courts base their jurisdiction on choice of court agreements. It is therefore claimed – similar in a way to arbitration – that the parties' agreement is the cornerstone of international commercial courts.[41] In addition, similar to arbitration, some international commercial courts allow parties to have a greater say in the design of proceedings by, for instance, allowing parties to opt out of national rules of evidence or the right to appeal.

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[35] Born (n 1) 3.
[36] Art. II United Nations Conference on International Commercial Arbitration, Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (hereafter: New York Convention); Art. 8 United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006 (hereafter: Model Law).
[37] Nigel, Partasides et al. (n 1) 12.
[38] See Art. 18 Model Law which merely provides: '*The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case*'; Born (n 1) 29; Nigel, Partasides, et al. (n 1) 22-23, 65.
[39] Born (n 1) 11-12; Nigel, Partasides, et al. (n 1) 30.
[40] White & Case and Queen Mary University of London, 2018 International Arbitration Survey (n 2) Chart 3; SIDRA International Dispute Resolution Survey: 2020 Final Report (n 2) Exhibit 6.1.1.
[41] Adeline Chong and Man Yip, 'Singapore as a Centre for International Commercial Litigation: Party Autonomy to the Fore' (2019) 15 Journal of Private International Law 97, 102, 106.

This section focuses on party autonomy in international commercial courts, exploring whether and to what extent party autonomy and the agreement of the parties permeates proceedings before an international commercial court. How far do international commercial courts go in reconciling freedom with law?[42]

3.1.1. The Agreement of the Parties on Jurisdiction

Except for international commercial courts established in special economic zones, most courts base their jurisdiction primarily on choice of court agreements, and therefore lack mandatory jurisdiction.[43] The fact that international commercial courts predominantly require the parties' agreement to establish jurisdiction brings them closer to arbitration and its consensual character.

The parties' agreement not only establishes the international jurisdiction of international commercial courts, but also shapes subject matter jurisdiction. International commercial courts deal with international disputes: namely, those that have a cross-border element.[44] In addition, a dispute has to be of a commercial nature in order to fall within the courts' jurisdictional scope.[45] Chapter 4 showed that the definition of an international dispute varies significantly

[42] Jan Paulsson, *The Idea of Arbitration* (Oxford University Press 2013) 1.

[43] For the SICC, Supreme Court of Judicature Act (Chapter 322, 2014 Revised Edition), Rules of Court, Order 110, rule 7 (1) (b), available at <https://sso.agc.gov.sg/SL/SCJA1969-R5?ProvIds=PO110-#PO110-P4_1-pr1-> (hereafter: SICC Rules); for the NCC, Art. 30r (1) Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) (hereafter: DCCP), available in English in Alex Burrough, Stephen Machon, Duco Oranje, Lincoln Frakes and Willem Visser (eds), *Code of Civil Procedure, Selected Sections and the NCC Rules* (Eleven 2018); Art. 1.3.1. (d) Rules of Procedure for the International Commercial Chambers of the Amsterdam District Court (NCC District Court) and the Amsterdam Court of Appeal (NCC Court of Appeal), December 2020, available at <https://www.rechtspraak.nl/SiteCollectionDocuments/NCC-Rules-second-edition.pdf> (hereafter: NCC Rules); for the CICC, see Art. 2 (1) CICC Provisions; for the German Chambers for International Commercial Disputes, German Chambers Legislative Proposal 2018, Draft Article 114b Courts Constitution Act (*Gerichtsverfassungsgesetz*); for the BIBC, BIBC Preliminary Draft Law, Art. 15. Exceptions are the Qatar International Court and Dispute Resolution Centre and the Abu Dhabi Global Market Courts that for the moment lack opt-in jurisdiction, see Art. 8 (3) (c) Qatar Financial Centre Law No (7) of 2005, available at <https://qfcra-en.thomsonreuters.com/sites/default/files/net_file_store/QFC_Law-V3-Oct09.doc.pdf> and Art. 13 (6) Law No. (4) of 2013 concerning Abu Dhabi Global Market, available at <https://en.adgm.thomsonreuters.com/sites/default/files/net_file_store/ADGM1547_3270_VER021913.10.pdf> all accessed January 2022.

[44] Article 30r (1) DCCP; Article 1.3.1. (b) NCC Rules; German Chambers Legislative Proposal 2018, Draft Article 114b Courts Constitution Act (*Gerichtsverfassungsgesetz*); Article 1.1. Protocol on Procedural Rules Applicable to the International Chamber of the Paris Commercial Court (hereafter: Protocol – Paris Commercial Court); BIBC Preliminary Draft Law 2018, Art. 15; SICC Rules, Rule 7 (1) (a); Art. 3 CICC Provisions.

[45] Art. 5 (A) (1) and (2) Law No. (16) of 2011 Amending Certain Provisions of Law No. (12) of 2004 concerning Dubai International Financial Centre Courts; Art. 8 (3) (c) Qatar Financial Centre Law, Law No. (7) of 2005; Art. 13 (6) Law No. (4) of 2013 Concerning Abu Dhabi Global Market; SICC Rules, Order 110, rule 1 (2) (b) (i); Art. 26 AIFC Court Regulations; Art. 1.2. Protocol – International Chamber of the Paris Commercial Court; Art. 1.3.1. (a) NCC Rules; Explanatory Notes to Art. 1.3.1. (a) NCC Rules; Art. 95 Courts Constitution Act. The CICC Provisions omit a definition of 'commercial'. However, see Decision on China Joining the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Court Issuance No 5 of 1987).

among different international commercial courts. Nonetheless, criteria such as the parties' place of business abroad or the place of the performance of the contract abroad may lend to the dispute the required cross-border character.[46]

More interesting for present purposes is that the SICC Rules and the draft proposal for the establishment of the BIBC allow parties to turn a domestic dispute into an international simply by their agreement.[47] The definition of an international dispute in the SICC Rules is modelled after Article 5 (2) International Arbitration Act[48] (IAA), which in turn incorporates Article 1 (3) Model Law.[49] Similarly, the BIBC rules and their definition of an international dispute are based on the Model Law.

Furthermore, the SICC allows parties to agree that their dispute is commercial, thereby placing it under the court's subject matter jurisdiction. According to the SICC Rules, a claim is considered 'commercial' if it arises from any relationship that is commercial in nature, including relationships arising from concession agreements and joint ventures, or from consulting, engineering, licensing, construction, investment, financing, banking, or insurance agreements.[50] This non-exhaustive list of commercial relationships is modelled after Article 1 (1) IAA, which incorporates Article 1(1) Model Law. In 2016, the rules were amended so as to include that a claim is commercial in nature if, *inter alia*, the parties have expressly agreed that the subject matter of the claim is commercial in nature.[51] Therefore, the SICC allows parties to agree on its subject matter jurisdiction, and to turn a domestic dispute into an international one, and likewise to turn a non-commercial dispute into a commercial one simply by way of their agreement.

3.1.3. The Agreement of the Parties on the Design of Proceedings

3.1.3.1. Evidence Proceedings

International commercial courts give parties a greater say than the ordinary courts in the design of proceedings and, more specifically, with regard to evidence proceedings. The Supreme

[46] Explanatory Notes to Article 1.3.1. (b) NCC Rules; German Chambers Legislative Proposal 2018, Explanatory Statement (*Begründung*), 14.
[47] SICC Rules, Rule 1 (2) (a) (i) – (iv).
[48] International Arbitration Act (Chapter 143A, Revised Edition 2002) available at <https://sso.agc.gov.sg/Act/IAA1994> accessed January 2022.
[49] Presentation by Laurence Wong, Senior Director of Business Development of the SICC, during the Webinar 'An Alternative Forum for Dispute Resolution – SICC Five Years On', 21 September 2020.
[50] SICC Rules, Rule 1 (2) (b).
[51] SICC Rules, Rule 1 (2) (b) (iii).

Court of Judicature Act, the primary legislation setting out the constitution and powers of the SICC,[52] provides that the SICC may apply rules of evidence found under any foreign law or otherwise.[53] According to SICC Rules, parties may agree on the rules of evidence that shall not apply and on the rules of evidence that shall apply instead, and submit the relevant application to the court.[54] If the SICC accepts the parties' application, and orders that the agreed rules be applied, it may nevertheless modify or refine the parties' agreement in light of the just, expeditious, and economical disposal of the proceedings.[55]

The ability of the parties to disapply by agreement national rules of evidence and to apply foreign rules instead upsets a basic tenet in civil procedure mandating that the law of the forum governs proceedings.[56] The SICC Rules set aside the axiom *lex fori regit processum* to give way to the parties' agreement. Furthermore, the rules provide that parties may opt out of national rules and instead opt in not only to foreign rules but also to non-state, soft law instruments.[57] According to the SICC User Guides, the parties may disapply all rules of evidence found in Singapore law, and agree instead on applying the International Bar Association Rules on the Taking of Evidence in International Arbitration[58].[59]

[52] SICC Procedural Guide, Sources of Singapore International Commercial Court Procedural Rules, para. 1, available at <https://www.sicc.gov.sg/docs/default-source/legislation-rules-pd/sicc-procedural-guide-(20190724)-(pdf).pdf> accessed January 2022.
[53] Supreme Court of Judicature Act, Section 18K; SICC Rules, Rule 23 (1).
[54] SICC Rules, Rule 23 (2). See also Johannes Landbrecht, 'The Singapore International Commercial Court (SICC) – an Alternative to International Arbitration?' (2016) Swiss Arbitration Association Bulletin 112, 120; Lawrence Teh, 'The Singapore International Commercial Court' (2017) 11 Dispute Resolution International 143, 146; Man Yip, 'The Singapore International Commercial Court: The Future of Litigation?' (2019) 12 Erasmus Law Review 88, 89.
[55] SICC Rules, Rule 23 (3). See also Yip (n 54) 89.
[56] See also Dalma R. Demeter and Kayleigh M. Smith, 'The Implications of International Commercial Courts on Arbitration' (2016) 33 Journal of International Arbitration 441, 446.
[57] For the exclusion of such a possibility in European regulations with regard to the choice of law applicable to the substance of the dispute, see Art. 3 (3) and Recital 13 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I); Peter Mankowski, 'Article 3: Freedom of Choice', paras. 248-257 in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law – Rome I Regulation Commentary* (Verlag Dr. Otto Schmidt 2017).
[58] International Bar Association Rules on the Taking of Evidence in International Arbitration, adopted by a resolution of the International Bar Association Council, 29 May 2010, available at <file:///C:/Users/grgan/Downloads/IBA%20Rules%20on%20the%20Taking%20of%20Evidence%20in%20Int%20Arbitration%20201011%20FULL.pdf> accessed January 2022 (hereafter: IBA Rules on the Taking of Evidence).
[59] SICC User Guides Note 4 – Disapplication of Singapore Evidence Law, available at <https://www.sicc.gov.sg/docs/default-source/legislation-rules-pd/sicc-user-guides-31jan19.pdf> accessed January 2022.

Turning to the discovery of documents, the SICC does not apply the general discovery regime.[60] Unlike High Court proceedings,[61] in SICC proceedings the discovery of documents is limited to those on which the parties rely.[62] Just like other provisions modelled after arbitration, the SICC discovery regime has its origins in the IBA Rules on the Taking of Evidence.[63] In addition, the SICC Rules provide that the court may dispense completely with the discovery of documents upon the parties' consent.[64]

Taken together, the SICC Rules allow parties to disapply by agreement national rules of evidence, and to agree instead on the application of foreign or arbitration rules. Moreover, although the SICC applies a more limited discovery regime based on the IBA Rules, the parties may agree and completely do away with the discovery of documents. Consequently, the parties' agreement plays a central role in the design of proceedings at the SICC, and lends the court greater procedural flexibility.[65] This procedural flexibility was modelled explicitly after arbitration rules and practices.

The NCC Rules also offer parties greater flexibility. They provide that parties may enter into an agreement to depart from statutory rules of evidence, and shall submit their agreement with the first written submissions.[66] However, it is unclear whether the NCC Rules allow parties to choose non-state law, such as the IBA Rules, to govern evidence proceedings.[67] Similarly, the latest proposal for the establishment of Chambers for International Commercial Disputes and Commercial Courts in Germany explicitly permits parties to reach agreements with regard to evidence proceedings.[68] Finally, on the model of common law courts and arbitration, the Paris International Chambers permit extended evidence proceedings, are more lenient regarding the discovery of documents, and allow for the cross-examination of witnesses.[69]

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[60] SICC Rules, Rule 21.
[61] For the discovery rules of the Singapore High Court, Rules of Court, Order 24.
[62] SICC Rules, Rule 14 (1).
[63] Menon (n 24) para. 34 (c); Teh Hwee Hwee, Justin Yeo and Colin Seow, 'The Singapore International Commercial Court in Action – Illustrations from the First Case' (2016) 28 Singapore Academy of Law Journal 692, 701. See also *B2C2 Ltd* v *Quoine Pte Ltd* [2018] SGHC(I) 04, [2018] 4 SLR 67, paras. 22-31.
[64] SICC Rules, Rule 21(A) (1).
[65] Teh (n 54) 146; Chong and Yip (n 41) 101.
[66] Art. 8.3 NCC Rules.
[67] See also Annette Scholten, 'An International Netherlands Commercial Court?', *Transnational Notes*, 28 February 2017 available at <https://blogs.law.nyu.edu/transnational/2017/02/an-international-netherlands-commercial-court/> accessed January 2022; Eddy Bauw, 'Commercial Litigation in Europe in Transformation: The Case of the Netherlands Commercial Court' (2019) 12 Erasmus Law Review 15, 18-20.
[68] German Chambers Legislative Proposal 2021, Article 2 – Amending the Code of Civil Procedure (*Änderung der Zivilprozessordnung*), Draft Article 284 (3).
[69] Art. 4.3., 5.1 and 5.4.4 Protocol – Paris Commercial Court; Art. 3 and 4 Protocol – Paris Court of Appeal. See also Alexandre Biard, 'International Commercial Courts in France: Innovation without Revolution? (2019) 12

3.1.3.2. Proof of foreign law

In addition, the SICC's evidentiary flexibility becomes evident with regard to the proof of foreign law. In common law jurisdictions, such as Singapore, foreign law is regarded as an issue of fact, whereas in civil law jurisdictions foreign law is regarded as an issue of law. The factual or legal treatment of foreign law influences its procedural treatment. If foreign law is treated as a fact, then the parties should plead and subsequently prove its content. If they fail to do so, the national courts will then apply domestic law. If, however, foreign law is treated as law, the court should then, and according to the principle *iura novit curia*, apply it on its own motion. Furthermore, the treatment of foreign law has an impact on appellate review. If foreign law is treated as a fact, the fact findings on the part of lower courts are then binding upon the higher courts. If foreign law is treated as law, the higher courts are then allowed to review the application of foreign law by the lower courts. However, the difficulties of applying foreign law in practice reveal that the differentiated treatment of foreign law as a fact or as law is a theoretical dichotomy, and that its practical relevance is limited.[70]

In jurisdictions that consider foreign law an issue of fact, the proof of foreign law is frequently conducted on the basis of expert evidence. In order to avoid the related costs and time expenditure, foreign law at the SICC may be determined on the basis of direct submissions, whether oral, written, or both.[71] The determination of foreign law on the basis of submissions requires a relevant court order upon application of a party, and the court must be satisfied that each party is or will be represented by a counsel, by a restricted registration foreign lawyer, or by a registered law expert who is suitable and competent to submit on the relevant questions of foreign law.[72] Hence, foreign lawyers or foreign law experts, such as academics, may appear before the SICC and submit on questions of foreign law, as long as they are registered at the court for this purpose.[73]

Once again, arbitration practices were the source of inspiration.[74] The SICC Committee Report aspired that the possibility of proving foreign law on the basis of submissions would encourage

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Erasmus Law Review 24, 29; Emmanuel Jeuland, 'The International Chambers of Paris: A Gaul Village', 65, 77 in Xandra Kramer and John Sorabji (eds), *International Business Courts* (Eleven International Publishing 2019).

[70] Guillermo Pallao, 'Foreign Law, Application and Ascertainment', 769-772 in Jürgen Basedow, Giesela Rühl, Franco Ferrari and Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017).

[71] Supreme Court of Judicature Act, Section 18L; SICC Rules, Rules 25-29.

[72] SICC Rules, Rule 25 (2). See also Teh Hwee Hwee, Justin Yeo and Colin Seow (n 63) 702-710.

[73] Legal Profession Act (Chapter 161, 2009 Revised Edition), Section 36P (2).

[74] SICC Committee Report 2013, para. 34. See also Yip (n 54) 89.

foreign counsel, accustomed to the treatment of foreign law as a finding of law, to resolve their disputes before the SICC, and would align the SICC procedure with international arbitration practices that involve foreign counsel.[75]

The DIFC Courts have a similar approach. With regard to the evidence rules applicable to questions of foreign law, the DIFC Court of Appeal ruled that the courts should accept legal submissions, as is usually done in international arbitration.[76] Former Chief Justice Michael Hwang, delivering the judgment on behalf of the court, stated that the composition of the DIFC Courts' bench differs from that of the ordinary courts by having international judges hailing from various jurisdictions, and who therefore possess expertise involving various national laws. The justification for expert evidence, namely, the lack of relevant expertise on the part of a judge, does not apply when the foreign law applicable to the claims belongs to a jurisdiction in which one of the international judges hearing the case is qualified.[77] As an example, Justice Hwang used international arbitration, where the arbitral tribunal may well be qualified in the applicable substantive law, and the SICC, where foreign law may also be determined on the basis of submissions.[78]

Despite being common law courts, the SICC and the DIFC Courts take a different evidentiary approach with regard to the proof of foreign law. Influenced by international commercial arbitration, these courts take full advantage of the foreign judges sitting on their bench, and of the foreign lawyers given permission to represent parties before them, and allow parties to prove the applicable foreign law on the basis of submissions. In this manner, the SICC and the DIFC Courts forego the rigid English approach, instil greater flexibility in their proceedings, and aspire to minimise the delays and costs that the evidence of foreign law may entail.

3.1.3.3. Appeal

Note that the SICC website singled out the absence of appeals as one of arbitration's drawbacks. Because arbitration awards are not subject to appeal, parties in international commercial arbitration lack the means to rectify any mistakes in law or in facts. While parties may apply for the setting aside of an arbitration award, or for the refusal of recognition and enforcement, the grounds for such an application are limited to issues of jurisdiction,

[75] SICC Committee Report 2013, para. 34; Menon (n 24) para. 34 (b).
[76] *Fidel* v *Felecia and Faraz* [2015] DIFC CA 002, para. 49.
[77] Ibid., paras. 56-57.
[78] Ibid., paras. 67-70.

procedural fairness, and public policy.[79] The absence of appeals lends arbitration awards instant finality, and saves time and costs.[80] Still, international commercial courts observe that despite the unavailability of appellate review, international commercial arbitration is not necessarily faster and therefore cheaper than court litigation. Since arbitration is a 'one shot' procedure parties tend to protract proceedings by leaving 'no stone unturned'.[81] This ongoing debate, which has also been thoroughly hashed out in the context of investment arbitration,[82] reveals that the 'appeal' of the appeal mechanism is an unsettled matter of perspective.[83]

International commercial courts offer parties the right to appeal. In particular, parties may appeal against judgments of the DIFC Court of First Instance to the DIFC Court of Appeal, SICC judgments to the Singapore Court of Appeal, NCC judgments to the Amsterdam Court of Appeal, judgments of the International Chamber of the Paris Commercial Court to the International Chamber of the Paris Court of Appeal, and judgments of the Frankfurt and Hamburg Chambers for International Commercial Disputes to the Higher Regional Court of the States of Hessen and Hamburg.[84] Being a division of the Supreme People's Court, the highest adjudicative body in China, the CICC is an international commercial court that deprives

[79] Article 5 New York Convention; Art. 34 (1), (2) and Art. 36 (1) Model Law.
[80] Born (1) 7, 11.
[81] Menon (n 24) paras. 48-49. See also Discussion Paper, *Justice Location Germany – Strengthening the Courts in Commercial Disputes* (n 12) 13.
[82] European Commission, Commission Staff Working Document, Report, *Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*, 13 January 2015, SWD(2015) 3 final, available at <https://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf>; European Commission, *Recommendation for a Council Decision Authorising the Opening of Negotiations for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes*, 13 September 2017, COM(2017) 493 final, available at <https://eur-lex.europa.eu/resource.html?uri=cellar:df96826b-985e-11e7-b92d-01aa75ed71a1.0001.02/DOC_1&format=PDF>; Possible Reform of Investor-State Dispute Settlement (ISDS) Appellate Mechanism and Enforcement Issues, Annotated Comments from the European Union and its Member States to the UNCITRAL Secretariat, 19 October 2020, available at <https://trade.ec.europa.eu/doclib/docs/2020/november/tradoc_159043.pdf> all accessed January 2022.
[83] See also White & Case and Queen Mary University of London, 2018 International Arbitration Survey (n 2) Chart 3, finality ranks low (16%) among the most valuable characteristics of international arbitration and Chart 4, the lack of appeal mechanism on the merits ranks low (14%) among the worst characteristics of international arbitration. While opinions were split in the Boston Consulting Group, Market Survey NCC, 13, according to the SIDRA International Dispute Resolution Survey: 2020 Final Report (n 2) Exhibit 6.1.1., 80% of respondents indicated that finality was an absolutely crucial or important factor in their choice of arbitration as a dispute resolution mechanism.
[84] For the SICC, see Supreme Court of Judicature Act, Section 29C (2) in combination with Sixth Schedule, 1 (f); for the NCC, see 1.3.3. (a) NCC Rules; for the International Chamber of the Paris Commercial Court, see Article 1.3. Protocol – Court of Appeal of Paris; for the Frankfurt and Hamburg Chamber for International Commercial Disputes, see the Official Websites, available at <https://ordentliche-gerichtsbarkeit.hessen.de/ordentliche-gerichte/lgb-frankfurt-am-main/lg-frankfurt-am-main/chamber-international> and <https://justiz.hamburg.de/landgericht-hamburg/zustaendigkeit/> all accessed January 2022.

parties of the right to appeal.[85] In a similar vein, the proposed German 'Commercial Courts' lack an appellate review mechanism.[86]

Although the right to appeal is the default rule, some international commercial courts allow parties to waive or limit their right to appeal. For instance, while SICC judgments may be appealed to the Singapore Court of Appeal, where a panel of three or more judges will hear the appeal,[87] the SICC Rules allow parties to agree in writing to waive or limit their right to appeal.[88] The SICC Committee Report, which preceded the establishment of the SICC, clarified that when limiting their right to appeal, parties could restrict review to grounds modelled after international arbitration, such as breaches of natural justice or defects of the validity, and the scope of the SICC jurisdiction agreement based on Article 24 IAA or Article 34 Model Law.[89] So as to further minimise the delay and the costs that appeals may entail, a leave to appeal is required for certain SICC judgments.[90] In addition, just as in the General Division of the High Court, parties may apply for an expedited handling, and the SICC or the Court of Appeal may order it if the appeal is urgent.[91] Although not regulated explicitly in the rules of European international commercial courts, in civil law jurisdictions, such as the Netherlands or Germany, parties may similarly waive or restrict their right to appeal.[92]

At this point, it should be noted that the exclusion of the right to appeal, either upon the parties' agreement or due to the institutional design of some international commercial courts as first and last instance courts, does not necessarily undermine access to justice. It is indicative that the European Court on Human Rights has consistently ruled that excluding parties from the right to appeal, or making the right to appeal contingent on increased court fees and other strict procedural requirements, does not impede access to justice and the right of the parties to be heard.[93]

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[85] Article 1 CICC Provisions.
[86] BIBC Preliminary Draft Law, 9; German Chambers Legislative Proposal 2021, Special Part (*Besonderer Teil*), on Draft Article 119 (4) German Constitutions Act.
[87] Supreme Court of Judicature Act, Section 50 (1); SICC Practice Directions (Effective 2 January 2021), No. 24 (1), available at <https://www.sicc.gov.sg/legislation-rules-pd/practice-directions> accessed January 2022.
[88] SICC Practice Directions, No. 139 (3).
[89] SICC Committee Report 2013, para. 35.
[90] Supreme Court of Judicature Act, Section 29A.
[91] Rules of Court, Order 57, Rule 20. See also Justin Yeo, 'On Appeal from Singapore International Commercial Court' (2017) 29 Singapore Academy of Law Journal paras. 39-41. The first appeal against a SICC judgement was handled in an expedited manner within three weeks, see *Jacob Agam* v *BNP Paribas SA* [2017] SGCA(I) 1.
[92] Art. 515 German Code of Civil Procedure (*Zivilprozessordnung*), available in English at <https://www.gesetze-im-internet.de/zpo/> accessed January 2022. See also Matthijs Kuijpers, *The Netherlands Commercial Court* (Ars Aequi Libri 2019) 69.
[93] European Court of Human Rights, *Luordo* v. *Italy* (Application no. 32190/96), 17 July 2003, para. 85; *Zubac* v. *Croatia (*Application no. 40160/12*)*, 5 April 2018, paras. 107-109.

3.2. The Judges at International Commercial Courts

On the basis of studies that have explored arbitration's most valuable features, it would appear that parties value the ability to participate in the selection of arbitrators.[94] This ability also allows parties to appoint third-country nationals, and thereby enhances the neutrality of the arbitration, which is another valuable feature.[95] However, the ability to select arbitrators may give rise to biases. Parties appointing an arbitrator might pick someone they perceive likely to rule in their favour, commonly referred to as 'selection bias', and party appointment might give the arbitrator an incentive to vote in favour of the appointing party, referred to as 'incentive bias'.[96] According to a different view, favouring one side or the other may damage the reputation of an arbitrator, and the demand for their services will drop. Arbitral decision making is therefore more likely to bear a different type of bias: that of 'splitting the baby'.[97] Since arbitrators are selected and paid by the parties, it is claimed that they tend to render compromise awards and offer each side a partial victory and a partial defeat.[98] And while critics argue for the abolition of party-appointed arbitrators,[99] the proponents claim that the right of the parties to participate in the constitution of the arbitral tribunal enhances procedural justice and the legitimacy of the arbitration process.[100] The European Union's proposal for a Multilateral Investment Court in the place of investment arbitration became the impetus for a revival of the debate on arbitrators' independence and impartiality and conflicts of interest. The proposal aims to safeguard the independence and impartiality of its adjudicators, and to tackle biases and conflicts of interest, by proposing a permanent investment court that has strong rules on ethics and conflicts of interest, and adjudicators who are appointed for a fixed, non-renewable term, and who enjoy the security of tenure.[101]

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[94] White & Case and Queen Mary University of London, 2018 International Arbitration Survey (n 2) Chart 3; International Dispute Resolution Survey: 2020 Final Report (n 2) Exhibit 6.1.1.
[95] Ibid.
[96] Drahozal (n 12) 663-664.
[97] Richard Posner, 'Judicial Behavior and Performance: An Economic Approach' (2005) 32 Florida State University Law Review 1259, 1260-1261.
[98] Ibid. Contra Stephanie Keer and Richard Naimark, 'Arbitrators Do Not 'Split the Baby', Empirical Evidence from International Business Arbitrations' (2001) 18 Journal of International Arbitration 573.
[99] Jan Paulsson, 'Moral Hazard in International Dispute Resolution' ICSID Review – Foreign Investment Law Journal 339, 348-349.
[100] William Park, 'Arbitrator Integrity', in Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung and Claire Balchin (eds), *The Backlash Against Investment Arbitration* (Kluwer 2010); Stavros Brekoulakis, 'Systemic Bias and the Institution of International Arbitration' (2013) 4 Journal of International Dispute Settlement 553, 579.
[101] Council of the European Union, Negotiating Directives for a Convention establishing a Multilateral Investment Court for the Settlement of Investment Disputes (20 March 2018) available at <https://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf> accessed January 2022.

Parties choosing an international commercial court lack the ability to select the judge or judges that will decide their case. Party participation in case assignment, also referred to as 'judge shopping', would jeopardise judicial independence and impartiality. In civil law jurisdictions, judge shopping would in addition contravene constitutional norms such as the principle of the lawful judge, whereby the judge hearing a case must be determined in advance for each case, according to abstract rules and principles.[102] Because they are integrated within national judicial structures, international commercial courts in addition lack the neutrality desired by foreign parties who fear that national courts may favour their own nationals. As a result, international commercial courts face a different type of bias: the 'national bias'.

International commercial courts offset the inability of the parties to participate in the selection of judges by raising the predictability of case assignments, on the basis of criteria such as the nature of the dispute or the foreign law applicable to it. First, most international commercial courts provide ample information on the judges sitting on their bench. The courts list the judges on their websites, offer information on their nationality, and provide a brief description of their professional background and expertise in specific fields of law.[103] Although European international commercial courts share less information online,[104] the small number of judges appointed in combination with case law, publications, or public appearances makes it easy for interested parties to identify the judges and their field of specialisation.[105] The availability of information about the judges increases transparency and raises the predictability of case assignments. According to the 2020 Final Report of the SIDRA Dispute Resolution Survey, 59% of respondents indicated that the availability of information about judges is an 'absolutely

[102] Art. 101 (2) Basic Law for the Federal Republic of Germany; Art. 17 the Constitution of the Kingdom of the Netherlands 2008; Art.13 The Belgian Constitution 2021. Similarly, in France as an unwritten constitutional principle, see also Ulrike Seif, 'Historische Bemerkunden zur Rolle des Richters in Deutschland und England' 535, in Christian Heinrich (ed), *Festschrift für Hans-Joachim Musielak* (C.H. Beck München 2004).

[103] For the DIFC, see DIFC Official Website, About, Court Structure, Judges available at <https://www.difccourts.ae/about/court-structure/judges>; for the SICC, see SICC Official Website, Who We Are, Judges; for the QIC, see QICDRC Official Website, The Court, available at <https://www.qicdrc.gov.qa/courts/court>; for the AIFC Court, see AIFC Court Official Website, Who We Are, Justices, available at <https://court.aifc.kz/who-we-are/justices/>; for the CICC, see CICC Official Website, About the CICC, Judges, available at <http://cicc.court.gov.cn/html/1/219/193/196/index.html> all accessed January 2022.

[104] Exceptions at the time of writing are the Commercial Courts in Stuttgart and Mannheim, see Commercial Court Stuttgart/Mannheim Official Website, Judges, available at <https://www.commercial-court.de/en/judges> accessed January 2022

[105] For instance, the NCC has ten judges in total, six at first instance and four at appellate level, while the Frankfurt Chamber for International Commercial Disputes has only two judges, each of whom sits as the presiding judge along with two lay judges from the relevant business sector. NCC Official Website, Who We are, available at <https://www.rechtspraak.nl/English/NCC/Pages/who-are-we.aspx> accessed January 2022; Burkhard Hess and Timon Boerner, 'Chambers for International Commercial Disputes in Germany: The State of Affairs' (2019) 12 Erasmus Law Review 33, 37.

crucial' or 'important' factor in choosing an international commercial court.[106] Second, one will notice that some judges in some international commercial courts are appointed more frequently than others.[107] Lastly, in international commercial courts with international judges on their bench, the foreign law applicable may give a hint as to the judge who may eventually be assigned to the case, owing to their knowledge of the specific law.[108] Therefore, although parties do not select the judges at an international commercial court, parties in some instances may predict the judge or judges that will decide their case.

Turning to neutrality, as observed, international commercial courts are national courts, and therefore lack the neutrality that international commercial arbitration enjoys. The appointment of judges of a foreign nationality instils some degree of neutrality in the bench of international commercial courts, and may counter the perception of them being national courts, staffed with national judges who are favourably disposed towards their own nationals.

Although no party-appointed judges sit in international commercial courts, and the courts may be perceived as being less neutral than arbitration, parties are reminded that, unlike arbitrators, judges in international commercial courts enjoy a high degree of independence and impartiality, and are free of the conflicts of interest that plague arbitration.[109] In 2018, in a speech given at the Singapore International Chamber of Commerce on the rule of law and the SICC, Chief Justice of Singapore, Sundaresh Menon, highlighted that none of the SICC judges practise as lawyers.[110] Consequently, the SICC does not encounter the difficulties confronted in arbitration, where the same person may be '*adjudicator one day, and counsel the next; or where the adjudicator has a direct pecuniary interest in being appointed*'.[111]

Indeed, international commercial court judges are not selected by the parties, and therefore any related biases are absent. In addition, at the time of writing, most international commercial court judges do not practise as lawyers, and therefore do not create any conflicts of interest in

[106] SIDRA International Dispute Resolution Survey: 2020 Final Report (n 2) Exhibit 8.2.1.
[107] For instance, at the SICC judge Anselmo Reyes has ruled on three out of eight arbitration-related disputes, see *BXS* v *BXT* [2019] SGHC(I) 10; *BYL, BYM* v *BYN* [2020] SGHC(I) 06; *CBX, CBY* v *CBZ, CCA, CCB* [2020] SGHC(I) 17 and Chief Justice Sundaresh Menon has presided over three out of five appeals, see *Lew, Solomon* v *Kaikhushru Shiavax Nargolwala* [2021] SGCA(I) 1; *Qilin World Capital Ltd* v *CPIT Investments Ltd* [2018] SGCA(I) 01; *Yuanta Asset Management International Limited* v *Telemedia Pacific Group Limited* [2018] SGCA(I) 03. At the NCC judges Lincoln Frakes and Dudok van Heel have ruled in all summary proceedings.
[108] Chong and Yip (n 41) 101.
[109] Menon (n 24) para. 51; Menon (n 25) para. 27f; Menon (n 29) para. 8.
[110] Menon (n 25) para. 27f.
[111] Ibid.

that respect.[112] However, the claim that these judges enjoy a high degree of independence and impartiality, and are free of biases, disregards the particularities of the international judges sitting at the DIFC Courts, the SICC, the Qatar International Court (QIC), Abu Dhabi Global Market (ADGM) Courts, and the Astana International Financial Centre (AIFC) Court. These judges are the courts' strong suit. They bring with them expertise in specific fields of law, as well as international reputation, and enhance the neutrality of the courts' bench. However, as part 4 illustrates, in terms of independence and impartiality as well as conflicts of interest, international judges are at the same time the international commercial courts' weak point.

3.3. Foreign Lawyers before International Commercial Courts

The jurisdictional focus on international disputes and the appointment of foreign judges is not the only foreign element in international commercial courts. The DIFC Courts, the SICC, the QIC, the ADGM Courts, and the AIFC Court allow foreign lawyers to appear in court. The inspiration for the possibility of representation by foreign lawyers was once again arbitration. In Singapore, the former Senior Minister of State for Law, Indranee Rajah, stressed that representation by foreign lawyers was aimed at incentivising foreign parties to bring their disputes before the SICC. In the same manner that the number of international commercial arbitration cases boomed once Singapore amended its laws and allowed foreign lawyers to appear in arbitration proceedings, representation by foreign lawyers before the SICC would give the court and its caseload a significant boost.[113]

A party to a case in the SICC or to an appeal from the SICC may be represented by a foreign lawyer who is registered in accordance with the Legal Profession Act.[114] This Act distinguishes between two types of registration: full and restricted. Lawyers granted full registration may appear and plead in the SICC and appellate court proceedings as well as give advice, prepare documents, and provide any other assistance in relation to the proceedings.[115] Lawyers granted restricted registration may appear in SICC and appellate court proceedings as well as give advice and prepare documents only for the purpose of making submissions on foreign law.[116]

[112] At the time of writing, the following international judges are practitioners: Ali Malek QC, Chelva Rajah SC, Helen Mountfield QC, Dr. Rashid Hamad Al-Anezi, Barbara Dohmann QC at the QIC. Andrew Spink QC, Thomas Montagu-Smith QC, Charles Banner QC, and Patricia Edwards at the AIFC Court.
[113] Rajah (n 30).
[114] Supreme Court of Judicature Act, Section 18M.
[115] Legal Profession Act, Section 36P (1).
[116] Legal Profession Act, Section 36P (2).

The SICC User Guides clarify that the main category of cases in which full registration lawyers may represent parties is 'offshore cases'.[117]

An offshore case is an action that has no substantial connection to Singapore. This connection is lacking when Singapore law is not the law applicable to the dispute; where the subject matter of the dispute is not regulated by or otherwise subject to Singapore law; or the only connections between the dispute and Singapore are the parties' choice of Singapore law as the law applicable to the dispute and the parties' submission to the jurisdiction of the court.[118] In other words, 'offshore cases' are the most international of international cases. Due to their tenuous link to the forum, 'offshore cases' enjoy certain procedural privileges. First, while ruling on a confidentiality order, the court will take into consideration whether the case is an offshore case.[119] Second, parties in 'offshore cases' may be represented by a foreign lawyer who is registered for this purpose.[120]

The limitations on representation by foreign lawyers before the SICC are a balancing act.[121] On the one hand, the rules incentivise foreign counsel to choose the SICC by allowing them to appear before the court in offshore disputes. On the other hand, they preserve the workload of Singapore practitioners by excluding representation by foreign lawyers in disputes with local ties. In addition, the SICC awards the costs of solicitors instructing Singapore counsel, even if the first did not appear before the court after being granted full or restricted registration.[122] By allowing foreign lawyers to appear before the SICC, or to recover fees even if they did not appear before the court, the SICC acknowledges the important role of lawyers as the real decision makers in choosing venues and steering disputes.

The role of lawyers becomes evident in a dispute that, despite the existence of an arbitration clause in favour of an arbitration institution abroad, was ultimately litigated in an international commercial court. I asked a lawyer involved in the case which party first proposed the local

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[117] SICC User Guides, Note 3, Foreign Representation.
[118] SICC Rules, Rule 1 (2) (f); SICC Practice Directions, No. 29. See also *Teras Offshore Pte Ltd* v *Teras Cargo Transport (America) LLC*, [2016] 4 SLR 75, para. 8; *BNP Paribas SA* v *Jacob Agam, Ruth Agam* [2018] SGHC(I) 03; *Perry, Tamar* v *Esculier, Bonnet Servane Michele Thais* [2020] SGHC(I) 22.
[119] SICC Rules, Rule 30 (2) (a); Landbrecht (n 54) 121; Man Yip, 'Singapore International Commercial Court: A New Model for Transnational Commercial Litigation' in Ying-jeou Ma (ed), *Chinese (Taiwan) Yearbook of International Law and Affairs* (Martinus Nijhoff 2014) 155, 161.
[120] Supreme Court of Judicature Act, Section 18M; Legal Profession Act, Section 36P; Legal Profession (Representation in SICC) Rules 2014, rule 4 (1); SICC Practice Directions, No. 26 (1) (a). See also SICC Official Website, Register of Foreign Lawyers, Registration of Foreign Lawyers before the SICC, available at <https://www.sicc.gov.sg/registration-of-foreign-lawyers/foreign-lawyers> accessed January 2022.
[121] Landbrecht (n 54) 123; Yip (n 54) 89.
[122] *Sheila Kazzaz, Ahmed Kazzaz* v *Standard Chartered Bank, Laurence Black, Harish Phoolwani, Naushid Mithani* [2020] SGHC(I) 19, paras. 9-12.

international commercial court, and why the arbitration agreement was waived in the end. He replied:

'*No, it was their idea. It was their proposal. They phoned us, [name of lawyer] was handling it at the time, I was not. And they asked: 'Would you prefer to go to the [name of international commercial court] instead of [name of arbitration institution] in London?'. [name of the same lawyer]and I have much experience in London, we both know that you get screwed very hard in London. So of course, we would be interested in that. And why the opponent, proposes to go to the international commercial court, because it was their initiative, I don't know. Maybe it was the simple fact that the lawyers wanted to do it here, and did not want to give the case to their colleagues in London. It could be as simple as that*'.

Foreign lawyers may represent clients in legal proceedings before European international commercial courts in conjunction with locally qualified lawyers.[123] As such, however, legal representation exclusively by foreign lawyers before these courts is not yet possible. Nevertheless, even in international commercial courts that allow representation by foreign lawyers, such as the SICC, it is unlikely that parties will appear in court without also hiring a local lawyer familiar with national court proceedings.

3.4. Privacy and Confidentiality in International Commercial Courts

In addition to the flexibility of its proceedings, and the ability to select arbitrators, parties hold the privacy and confidentiality of arbitration in high regard.[124] Companies prefer to keep trade secrets, competitive practices, or their internal decision making away from the public eye. The privacy and confidentiality of international commercial arbitration does not only speak to parties' preferences. It also reveals a conceptual difference between arbitration and litigation.[125] Empowered by private agreement and funded by the parties, arbitration proceedings are governed by the parties' choice and preferences. By contrast, state courts are an expression of state power, and are funded by taxpayers. State courts therefore serve the public, and are guided by broader policy considerations. Despite divergences, especially with regard to the parties' duty of confidentiality in the absence of an express legal or contractual basis and the publication

[123] Art. 3.1.2. NCC Rules. See also Council Directive 77/249/EEC of 22 March 1977 to Facilitate the Effective Exercise by Lawyers of Freedom to Provide Services; Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to Facilitate Practice of the Profession of Lawyer on a Permanent Basis in a Member State Other Than That In Which the Qualification Was Obtained.

[124] White & Case and Queen Mary University of London, 2018 International Arbitration Survey (n 2) Chart 3; SIDRA International Dispute Resolution Survey: 2020 Final Report (n 2) Exhibit 6.1.1.

[125] Elza Reymond-Eniaeva, *Towards a Uniform Approach to Confidentiality of International Commercial Arbitration* (Springer 2019), 133.

of awards,[126] privacy and confidentiality are considered an inherent, almost axiomatic, feature of arbitration.[127] However, the expansion of arbitration to disputes that involve public interests or weaker parties has gradually eroded the axiom that arbitration proceedings are private and confidential. While privacy and confidentiality features strongly in international commercial arbitration, developments in the adjacent fields of investment and sports arbitration have opened the doors of arbitration proceedings to the public so as to increase transparency, and to safeguard public interests and the right to a fair trial of athletes, respectively.[128]

Public courts and the publicity of trials and judgments are at opposite ends of the spectrum of international commercial arbitration and the privacy and confidentiality of its proceedings and awards. Just as privacy and confidentiality is an inherent feature of arbitration, publicity is a hallmark of litigation. It is '*the very soul of justice*'.[129] The right to a public trial and the public pronouncement of judgments is protected in national constitutions, and is enshrined in the right to a fair trial in international treaties, such as the United Nations Covenant on Civil and Political Rights and the European Convention on Human Rights.[130] Apart from contributing to a fair hearing for the involved parties, the publicity of court trials has a broader public function. The access of the public to courts enables public scrutiny of the judiciary and stimulates debate about legal rules. Nevertheless, mounting pressure to improve the efficiency of court proceedings has led to an increase in written court proceedings or court settlements and therefore gives substance to the claim that just as privacy and confidentiality in arbitration are gradually fading, publicity in court is declining.

International commercial courts underline the merits of open justice, and translate these into an advantage *vis a vis* arbitration. With regard to the SICC, various stakeholders underline that open court proceedings and the publication of SICC judgments create a body of jurisprudence

[126] Ibid., 7.
[127] Ibid., 7; Deborah R. Hensler and Damira Khatam, 'Re-Inventing Arbitration: How Expanding the Scope of Arbitration Is Reshaping its Form and Blurring the Line Between Private and Public Adjudication' (2018) 18 Nevada Law Journal 381, 388, 407; Hiro N. Aragaki, 'The Metaphysics of Arbitration: A Reply to Hensler and Khatam' (2018) 18 Nevada Law Journal 541, 558.
[128] United Nations Convention on Transparency in Treaty-based Investor State-Arbitration (the 'Mauritius Convention on Transparency'), 10 December 2014, available at <https://uncitral.un.org/en/texts/arbitration/conventions/transparency> accessed January 2022; European Court of Human Rights, *Mutu and Pechstein* v *Switzerland* (Applications nos. 40575/10 and 67474/10), 2 October 2018.
[129] Jeremy Bentham, 'Bentham's Draught For The Organization of Judicial Establishments, Compared with That of the National Assembly, with a Commentary on the Same' in John Bowring (ed), *The Works of Jeremy Bentham*, Volume 4 (Edinburgh, Scot.; William Tait, 1843) 316.
[130] Art. 14 (1) 1966 United Nations Covenant on Civil and Political Rights; Art. 6 European Convention on Human Rights. See also Chapter 1.

and predictability for interested parties.[131] However, the SICC has a unique feature. It is the only international commercial court that offers parties the option to exclude publicity under specific conditions. According to the SICC Rules, there are three kinds of confidentiality orders: parties may apply for an order that the case be heard in camera; an order that no person may reveal or publish any information or document relating to the case; and an order that the court file be sealed.[132] While ruling on such an order, the court will take into consideration whether the case is an 'offshore case', and whether both parties agree.[133]

It is asserted that in 'offshore cases' – namely cases lacking a substantial connection to Singapore – the public interest in maintaining open court proceedings is less critical than in other cases bearing stronger connections to Singapore.[134] 'Offshore cases' and their weak link to the forum weaken in turn the potential of a clash with national public policy, and therefore justify a departure from the principle of open justice. Part 4 explores the soundness of these arguments and the limits of private and confidential court proceedings.

3.5. Converting Judgments into Arbitral Awards

The most valuable characteristic of international commercial arbitration is the enforceability of arbitral awards.[135] Despite variations in its interpretation by national courts, the New York Convention has acquired more than 150 contracting states to date, and arbitral awards as a result enjoy almost worldwide recognition and enforcement.[136]

Unlike arbitral awards, court judgments lack an equally territorially extensive international treaty that would lend them nearly worldwide recognition and enforcement. The Hague Choice of Court Convention regulates the recognition and enforcement of exclusive choice of court agreements and the resulting court judgments. Up until now, it has attracted a significant number of contracting states: namely, Mexico, the European Union and its Member States, Singapore, Denmark, Montenegro and the Republic of North Macedonia.[137] With effect from 1 November 2019, the United Kingdom acceded to the convention so as to safeguard the recognition and enforcement of its judgments post-Brexit. Other important jurisdictions, such

[131] Rajah (n 30) para. 40. See also Yip (n 54) 89.
[132] SICC Rules, Rule 30 (1).
[133] *Ibid.*, rule 30 (2); SICC User Guides, Note 3 Foreign Representation, para. 8.
[134] Yip (n 119) 160.
[135] White & Case and Queen Mary University of London, 2018 International Arbitration Survey (n 2) Chart 3; SIDRA International Dispute Resolution Survey: 2020 Final Report (n 2) Exhibit 6.1.1.
[136] New York Convention, Contracting States, available at <https://www.newyorkconvention.org/list+of+contracting+states> accessed January 2022.
[137] Convention of 30 June 2005 on Choice of Court Agreements, Status Table, available at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> accessed January 2022.

as the USA and China, have signed but not yet ratified the convention.[138] Moreover, the 2019 Hague Judgments Convention aims at facilitating the recognition and enforcement of foreign judgments relating to civil or commercial matters.[139] The difference regarding the 2005 Hague Choice of Court Convention is that it applies to court judgments issued by courts whose jurisdiction was established on the basis of various grounds, and not only on the basis of exclusive choice of court agreements. At the time of writing, the Hague Judgments Convention has not yet entered in force.[140] The recognition and enforcement of court judgments is especially significant in the context of cross-border commercial disputes involving parties and assets scattered in various jurisdictions. Moreover, most international commercial courts base their jurisdiction on the parties' agreement, and therefore establish jurisdiction over disputes that may lack a territorial connection to the forum. The lack of territorial links increases the odds that the creditor of an international commercial court judgment will have to seek enforcement abroad.

Although the Hague Choice of Court Convention and the Hague Judgments Convention have promising potential, at present they are lagging far behind the New York Convention. Despite the lack of a multilateral treaty ensuring wide-reaching enforceability, various regional instruments facilitate the recognition and enforcement of foreign court judgments. In Europe, the Brussels Ibis Regulation or the Lugano Convention[141] have narrowed the grounds for refusing recognition and enforcement, and have simplified procedures. By contrast, the enforceability of Asian court judgments appears more challenging, due to the lack of a multilateral treaty and the small number of bilateral treaties.[142] So as to enhance the enforceability of SICC court judgments, Singapore joined the Hague Choice of Court Convention and is promoting its adoption by other Asian states.[143] Regional initiatives aim at

[138] Ibid.
[139] See also Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgements in Civil and Commercial Matters, available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=78> accessed January 2022.
[140] Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgements in Civil or Commercial Matters, Status Table, available at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=137> accessed January 2022.
[141] Convention on Recognition and Enforcement of Judgements in Civil and Commercial Matters, 21 December 2007 OJ L339/3, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22007A1221(03)&from=EN> accessed January 2022.
[142] For China, see Meng Yu, 'List of China's Bilateral Treaties on Judicial Assistance in Civil and Commercial Matters (Enforcement of Foreign Judgments Included)', *China Justice Observer*, 21 May 2020, available at <https://www.chinajusticeobserver.com/a/list-of-chinas-bilateral-treaties-on-judicial-assistance-in-civil-and-commercial-matters> accessed January 2022.
[143] Indranee Rajah, Second Reading Speech by Senior Minister of State for Law on the Choice of Court Agreements Bill, 14 April 2016, available at <https://www.mlaw.gov.sg/news/parliamentary-speeches/second-reading-speech-by-senior-minister-of-state-for-law--indra0>; Parliament of Singapore, Singapore Parliamentary

loosening the criteria for recognising and enforcing foreign court judgments and fostering greater judicial cooperation.[144] In the absence of treaties, some international commercial courts have had to search for alternatives in order to improve the recognition and enforcement prospects of their judgments.

In this regard, the DIFC Courts came up with an innovative experiment to enhance the enforceability of their judgments. Just like those of the Dubai Courts, DIFC Court judgments may be enforced outside the United Arab Emirates. In particular, the UAE have entered into treaties with foreign jurisdictions providing for the reciprocal recognition and enforcement of court judgments. These treaties are the Gulf Cooperation Council Convention (1996); the Riyad Convention (1983); and bilateral treaties with Tunisia (1975), France (1992), India (2000), Egypt (2000), China (2004), and Kazakhstan (2009). Moreover, the DIFC Courts have signed Memoranda of Guidance with various jurisdictions. Although lacking a binding legal effect, these Memoranda set out a 'mutual understanding' of the applicable laws and judicial processes governing the enforcement of final money judgments.[145]

Nevertheless, in order to enhance the enforceability of DIFC Courts judgments, especially in offshore disputes, the DIFC Courts experimented in 2015 with the 'conversion' of their judgments into arbitral awards. According to Practice Direction No. 2, parties could agree that any dispute arising out of or in connection with the non-payment of any money judgment given by the DIFC Courts could, at the option of the judgment creditor, be referred to arbitration under the Arbitration Rules of the DIFC-LCIA Arbitration Centre.[146] In this way, the DIFC Courts aimed to profit from the extensive territorial reach of the New York Convention, and lend to their judgments nearly worldwide enforceability. The Practice Direction further clarified that such an arbitration agreement provides the creditor with an additional option to

Debates: Official Report, *Update on Singapore Convention on Mediation and Plans to Promote Singapore as an International Dispute Resolution Hub*, 16 February 2021, available at <https://sprs.parl.gov.sg/search/sprs3topic?reportid=written-answer-7269> all accessed January 2022.

[144] See The Nanning Statement, available in Chinese at <http://www.court.gov.cn/zixun-xiangqing-47372.html> accessed January 2022; Yujun Guo, 'Country Report: The People's Republic of China', 49, 58 in Adeline Chong (ed), *Recognition and Enforcement of Foreign Judgements in Asia* (Asian Business Law Institute 2017); Adeline Chong, 'Moving Towards Harmonization in the Recognition and Enforcement of Foreign Judgement Rules in Asia' (2020) 16 Journal of Private International Law 31, 55; Anselmo Reyes and Kevin Tan, 'Recognition and Enforcement of International Commercial Court Judgments', 37, 44 in Lei Chen and André Janssen (eds), *Dispute Resolution in China, Europe and World, Ius Gentium: Comparative Perspectives on Law and Justice* (Springer 2020).

[145] DIFC Courts, Protocols and Memoranda, available at <https://www.difccourts.ae/about/protocols-memoranda> accessed January 2022.

[146] Amended DIFC Courts Practice Direction No. 2 of 2015 – Referral of Judgment Payment Disputes to Arbitration.

enforce the judgment, and does not preclude their right to seek execution before any national court. Accordingly, the judgment debtor may not invoke this arbitration agreement against execution before a national court.[147]

Enforcement through arbitration was presented as the last resort for a creditor seeking enforcement of a judgment. Especially if the debtor's assets were located in Dubai, the creditor should then resort to the Dubai Courts. If the debtor's assets were in a common law jurisdiction, the creditor was then advised to sue on the judgment of the DIFC Courts as being a foreign judgment in this jurisdiction. Lastly, if the debtor had assets in a country with which the UAE has a treaty providing for the mutual recognition and enforcement of judgments, priority should be given to enforcement under the treaty provisions. Therefore, a creditor should refer to arbitration only if none of the above options were available.[148] Although there was no reported case of parties applying for the conversion of a DIFC Courts judgment into an arbitral award, this possibility was a highly innovative feature. However, doubts have been expressed as to whether the non-payment of a court judgment constitutes a dispute under the New York Convention.[149] International commercial court stakeholders defended the conversion of judgments into arbitral awards, and in addition employed a more conceptual argument that conceives arbitration as a delegated rather than a parallel justice. They remarked that just as public courts have facilitated the recognition and enforcement of arbitral awards, the time has come for arbitration to pay back the favour.[150]

4. The Limits of 'Arbitralisation'

In an attempt to become more attractive to prospective litigants, and to engage in forum selling, international commercial courts emulate some of arbitration's most valued features. These features blur the distinction between litigation and arbitration, and signal the 'arbitralisation' of courts. The common thread among the arbitration features is the increased emphasis on party autonomy and, in particular, the ability of the parties to design proceedings by way of their

[147] DIFC Courts, Enforcement Guide 2018, 14.
[148] Amended DIFC Courts Practice Direction No. 2 of 2015 n (146).
[149] Michael Hwang, 'The DIFC Courts Judgment – Arbitration Protocol, Referral of Judgment Payment Disputes to Arbitration', DIFC Courts Lecture, 19 November 2014 1, 5-7, available at <https://www.difccourts.ae/rules-decisions/practice-directions/difc-courts-chief-justices-explanatory-lecture-notes-referral-judgment-payment-disputes-arbitration-november-2014> accessed January 2022; Anselmo Reyes, 'Recognition and Enforcement of Interlocutory and Final Judgments of the Singapore International Commercial Court' (2015) 2 Journal of International and Comparative Law 337, 345-348; Dalma R. Demeter and Kayleigh M. Smith, 'The Implications of International Commercial Courts on Arbitration' (2016) 33 Journal of International Arbitration 441, 457-461; David Isidore Tan, 'Enforcing National Court Judgments as Arbitration Awards under the New York Convention' (2018) 34 Arbitration International 415, 428-429.
[150] Unrecorded discussion with stakeholder.

agreement. Parties before an international commercial court have a variety of options. They may agree to disapply national rules of evidence, to prove the foreign law on the basis of submissions, to be represented by a foreign lawyer, to conduct proceedings in private and confidentially, and to convert a court judgment into an arbitral award. This procedural flexibility tailors proceedings to the dispute, and therefore may enhance efficiency. However, placing procedure in the hands of the parties and their lawyers may at the same time leave room for practices that protract the length of trials and increase litigation costs. Representation by foreign lawyers, for instance, may increase the number of lawyers representing parties in court, even if the complexity of the case does not require it. Therefore, although party autonomy may increase flexibility and tailor proceedings to parties' preferences, it could at the same time be time consuming and expensive. The 'judicialisation' of international commercial arbitration offers some merit to this argument, and illustrates how party autonomy may go wrong.

Moreover, some of the arbitration features of international commercial courts may undermine access to justice and the role of courts as public institutions. Arbitration features that violate procedural rights could in turn offend the national public policy of the enforcing state and be a ground to refuse the recognition and enforcement of international commercial court judgments abroad. Access to justice therefore imposes a limit on the 'arbitralisation' of courts, and determines which specific institutional and procedural features can and cannot be borrowed from arbitration. This part identifies those arbitration features of international commercial courts that undermine access to justice and hit the limits of 'arbitralisation'.

4.1. The Agreement of the Parties as a Jurisdictional Basis and Third Parties

The fact that European international commercial courts base their jurisdiction exclusively on choice of court agreements, and therefore lack compulsory jurisdiction, does not clash with access to justice. However, it may question their identity as courts in the meaning of Article 267 Treaty on the Functioning of the European Union (TFEU)[151].[152] Whether European international commercial courts are 'courts or tribunals' in the sense of Art. 267 TFEU does not only affect their power to submit preliminary references to the Court of Justice of the European Union (CJEU), but is also a precondition for the applicability of the Brussels Ibis

[151] Treaty on the Functioning of the European Union, Official Journal C 326/1, 26 October 2012 available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN> accessed January 2022.

[152] Pietro Ortolani and Bas van Zelst, 'The Establishment of a 'Commercial Court' – According to Current Plans is not a Good Idea' (*Oprichting van 'Commercial Court' volgens huidige plannen geen goed idee*), Het Financieele Dagblad (2 October 2017) available at <https://fd.nl/opinie/1220879/oprichting-van-commercial-court-volgens-huidige-plannen-geen-goed-idee> accessed January 2022.

Regulation and its provisions on the recognition and enforcement of choice of court agreements as well as the recognition and enforcement of court judgments. When determining whether the referring authority is a 'court or tribunal' under Art. 267 TFEU, the CJEU considers whether the body is established by law, it is permanent, its jurisdiction is compulsory, its procedure is adversarial, it applies rules of law and, finally, it is independent.[153] Pietro Ortolani and Bas van Zelst called into question whether the NCC is a 'tribunal or court', since it lacks compulsory jurisdiction, and its jurisdiction is rooted exclusively in the parties' consent. In response, Xandra Kramer and Eddy Bauw observed that the NCC is merely a chamber of the Amsterdam District Court, and therefore the compulsory jurisdiction of the District Court guarantees qualification of the NCC as a 'court or tribunal'.[154]

Consequently, while their voluntary jurisdiction brings international commercial courts closer to arbitration, whose jurisdiction relies equally on the parties' agreement, it may at the same time call into question the identity of European international commercial courts as courts. However, the existence of multiple specialised courts established as chambers within courts whose jurisdiction in addition depends on the parties' initiative suggests that the compulsory jurisdiction of the 'umbrella' court may indeed successfully lend its chambers the title of a 'court or tribunal'.

The voluntary jurisdiction of international commercial courts may, however, give rise to another, more significant issue that is relevant not only to these European courts. It may violate the right to a fair trial of third parties that were joined to pending proceedings against their will. If this is so, commercial courts – similar to arbitral tribunals – may not freely join non-consenting third parties to proceedings. While European international commercial courts provide for a series of detailed provisions that regulate the joinder of non-consenting third

[153] Court of Justice of the European Union Case C-54/96 *Dorsch Consult Ingenieurgesellschaft mbH* v *Bundesbaugesellschaft Berlin mbH*, ECLI:EU:C:1997:413; Joined Cases C-9 and C-118/97 *Raija-Liisa Jokela and Laura Pitkäranta*, ECLI:EU:C:1998:497; Case C-407/98 *Katarina Abrahamsson and Leif Anderson* v *Elisabet Fogelqvist*, ECLI:EU:C:2000:367; Case C-195/98 *Österreichischer Gewerkschaftsbund, Gewerkschaft öffentlicher Dienst* v *Republik Österreich*, ECLI:EU:C:2000:655; Case C-178/99 *Doris Salzmann*, ECLI:EU:C:2001:331; Case C-53/03 *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait)* v *GlaxoSmithKline plc and GlaxoSmithKline AEVE*, ECLI:EU:C:2005:333; Case C-506/04 *Graham J. Wilson* v *Ordre des avocats du barreau de Luxembourg*, ECLI:EU:C:2006:587; Case C-394/11 *Valeri Hariev Belov* v *CHEZ Elektro Balgaria AD*, ECLI:EU:C:2013:48.

[154] Xandra Kramer and Eddy Bauw, 'A 'Commercial Court' is the Solution for Complex International Commercial Disputes' (*'Commercial Court' is uitkomst voor complexe internationale handelszaken*), *Het Financieele Dagblad*, 10 October 2017, available at <https://fd.nl/opinie/1221646/commercial-court-is-uitkomst-voor-complexe-internationale-handelszaken> accessed January 2022.

parties, Asian international commercial courts appear more willing to join third parties despite the lack of consent.

In particular, the NCC Rules provide that if a third party is added in a pending action as a claimant or a defendant upon their request, the third party is bound by the agreement of the initial parties to litigate in English and to bear the higher NCC court fees.[155] However, in cases of involuntary joinder – namely, if a third party is forced to join proceedings as is the case with contribution proceedings – the third party has to consent explicitly to litigating in English and to paying the NCC fees. If they do not, the NCC Rules provide either for separate contribution proceedings in Dutch and at the regular court fee, or for a continuation of the NCC trial in Dutch, provided the initial parties agree.[156] The treatment of third parties in the NCC Rules reveals a tension between the courts' voluntary jurisdiction and the joinder of non-consenting parties. Based on fair trial considerations, the court's innovative features require consent irrespective of whether these parties are the initial or the subsequently joining third parties. Similarly, legislative proposals for the establishment of Chambers for International Commercial Disputes and 'Commercial Courts' in Germany entail detailed provisions with regard to third parties who may object to litigating before the chambers.[157]

In contrast to the NCC and the German chambers, the SICC permits the joinder of third parties against their will.[158] However, this may deprive SICC third-party judgments from being recognised and enforced abroad since the court's jurisdiction is not based on consent, and is therefore not covered by the Hague Choice of Court Convention.[159] More significantly, the fact that the SICC rules and fees differ significantly from the ones applicable to trials at the General Division of the High Court could undermine the procedural rights of third parties added to proceedings against their will, and could therefore offend the public policy of the state in which recognition and enforcement is sought.

[155] Art. 2.2.2. NCC Rules.
[156] Ibid; Explanatory Notes to Article 2.2. See also Kuijpers (n 92) 58-59.

[157] German Chambers Legislative Proposal 2018, Article 1 – Amending the Courts Constitution Act (*Änderung des Gerichtsverfassungsgesetzes*), Draft Article 184 (2) and Article 2 – Amending the Code of Civil Procedure (*Änderung der Zivilprozessordnung*), Draft Article 73 (2); German Chambers Legislative Proposal 2021, Article 1 – Amending the Courts Constitution Act (*Änderung des Gerichtsverfassungsgesetzes*), Draft Article 184 (3) and Article 2 – Amending the Code of Civil Procedure (*Änderung der Zivilprozessordnung*), Draft Article 73 (2).
[158] Rules of Court, Order 16, Rule 3; Order 15, Rule 4; SICC Rules, Rules 7 (1) (b) and 9 (1).
[159] Drossos Stamboulakis and Blake Crook, 'Joinder of Non-Consenting Parties: The Singapore International Commercial Court Approach Meets Transnational Recognition and Enforcement' (2019) 12 Erasmus Law Review 97, 98-104.

The above has revealed that international commercial courts may not borrow arbitration's appealing features, and, in particular, a consent-based procedural lay out without at the same time having to pay the price of consent: namely, its relative nature.[160] Therefore, the joinder of third parties against their consent presents the first limit with regard to 'arbitralisation'.

4.2. International Judges

Asian international commercial courts have appointed foreign nationality judges to their bench. Along with an international reputation, these judges bring with them expertise in foreign and commercial laws. However, their independence and impartiality may be called into question, owing to their appointment and remuneration conditions as well as their parallel practice as lawyers or arbitrators.

The SICC is one of the international commercial courts that has appointed to its bench international judges hailing from various jurisdiction. These judges, however, lack tenure, and are appointed on the basis of a private contract. The appointment of judges on a contract basis is common in Singapore. The Singapore Constitution guarantees tenure for Supreme Court judges until the age of sixty-five.[161] However, Article 95 (4) Singapore Constitution provides for the appointment of temporary judges so as to facilitate the disposal of business in the Supreme Court. The President may appoint persons qualified to be Supreme Court judges as Judicial Commissioners; appoint retired Supreme Court judges as Senior Judges; or appoint as an International Judge at the SICC a person, who in the opinion of the Chief Justice, possesses the necessary qualifications, experience, and professional standing. A Judicial Commissioner, a Senior Judge, or an International Judge may be appointed to hear a specific case or for a specific period and has the same powers and immunities as if they were a Judge of the High Court.[162] The President determines the term of appointment and may renew it as they see fit. The appointment of temporary judges, who lack the security of tenure, has raised concerns. The lack of tenure may expose judges to pressures from the executive, and could undermine the constitutional separation of powers.[163]

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[160] Bookman (n 4) 40-41.
[161] Art. 98 (1) and (1A) Singapore Constitution.
[162] Art. 95 (5) and (11) Singapore Constitution.
[163] Li-ann Thio, 'Lex Rex or Rex Lex – Competing Conceptions of the Rule of Law in Singapore' (2002) 20 Pacific Basin Law Journal 1, 21; Gordon Silverstein, 'Singapore: The Exception That Proves Rules Matter', 83-86 in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law, The Politics of Courts in Authoritarian Regimes* (Cambridge University Press 2008); The Workers' Party, 'Constitution of the Republic of Singapore (Amendment Bill)', Speech by Sylvia Lim (Delivered in Parliament on 5 November 2019), available at <https://www2.wp.sg/constitution-of-the-republic-of-singapore-amendment-bill-speech-by-sylvia-lim/> accessed January 2022. Contra Chan Sek Keong, 'Securing and Maintaining the Independence of the Court in Judicial Proceedings' (2010) 22 Singapore Academy of Law Journal 229, 246-247.

Although contracts between the SICC and international judges are exempted from public preview, according to unrecorded discussions with stakeholders, international judges receive remuneration calculated on the basis of an hourly fee for the time spent on each assigned case.

The appointment and renewal procedure involving SICC International Judges and their case-dependent remuneration suggests that these judges rely on the government, and have a direct pecuniary interest in being appointed and assigned to cases. Consequently, the appointment and remuneration regime relating to international judges makes them vulnerable to executive pressures, and may cast doubts on their independence and impartiality. This is especially true if we take into consideration that international commercial courts in Asia and the Middle East are politically charged courts, significant for the achievement of broader policy objectives.[164] One could of course object that governmental policies are hardly involved in private disputes involving purely commercial interests. However, chapter 4 went to considerable length to show how the policy aim of attracting cases has resulted in expansive interpretations of jurisdiction rules that could undermine parties' procedural rights.

The appointment conditions of international judges and, relatedly, their independence and impartiality became an issue before the Privy Council of the United Kingdom, hearing appeals from the Cayman Islands.[165] The appeal concerned a challenge to the independence of Judge Sir Peter Creswell, former Judge of the High Court of England and Wales, who after retirement in 2009 became an additional judge in the Financial Services Division of the Grand Court of the Cayman Islands. In 2011, Sir Creswell also became a Supplementary Judge of the Civil and Commercial Court of the Qatar Financial Centre.[166] At the Grand Court of the Cayman Islands, he was assigned to wind up a company named BTU Power Company. BTU's preference shareholders, who held the effective economic interest in the company, were mainly Qatari, including the Minister of Finance of Qatar. The appellant had challenged the independence of Judge Creswell, claiming an apparent bias due to his position as a judge in Qatar and the involvement of the Minister of Finance, who was responsible for judicial appointments in the Qatar Civil and Commercial Court.[167]

The Board decided that the fair-minded and informed observer would see a real possibility that Judge Creswell's judgment would be influenced, albeit sub-consciously, by his concurrent

[164] See also Bookman (n 4) 46-48.
[165] *Almazeedi* v *Penner* [2018] UKPC 3.
[166] Full judges are salaried or retained, while supplementary judges are employed only as required, and are paid on an ad hoc basis for work actually done, see *Almazeedi* v *Penner* [2018] UKPC 3, para. 39.
[167] See Art. 4 Schedule No. 6, The Civil and Commercial Court, Qatar Financial Centre Law No (7) of 2005.

appointment. The fair-minded and informed observer was defined by the Board as being a person aware of the Qatari background, including the personalities involved in the dispute, as well as the opacity of the position relating to the appointment and renewal of members of the Civil and Commercial Court.[168] Various passages in the judgment refer to the previous decisions of the Cayman Islands Court of Appeal, according to which the provisions of Qatari law governing the appointment and renewal procedure regarding judges of the Civil and Commercial Court are more opaque and less protective of judges than in the case of common law jurisdictions such as the Cayman Islands and England.[169] This case demonstrates that the appointment and renewal procedures regarding international judges in some jurisdictions are obscure, and therefore lend themselves to impartiality and independence concerns.

Furthermore, at the time of writing, some international judges are simultaneously arbitrators, included in the lists of arbitration institutes, or practise as lawyers.[170] The dual practice of international judges as arbitrators or lawyers could give rise to conflicts of interest.[171]

The above has disclosed that international judges are not regular judges enjoying the same degree of independence and impartiality, and whose judgments are untainted by the biases common in arbitration. International judges are a new 'species' of judges whose appointment, renewal, and remuneration conditions, and parallel practice as arbitrators or lawyers may call into question their independence and impartiality and give rise to conflicts of interest. But even if international judges in some countries are subject to a similar regime as the rest of the judges, one should be aware of the institutional context and the overall independence of the judiciary in each country that has an international commercial court. The appointment of international judges therefore gives rise to independence and impartiality concerns and is the second limit with respect to 'arbitralisation'.

4.3. Private and Confidential Court Proceedings

As mentioned previously, the SICC is the only international commercial court that allows for private and confidential proceedings in offshore disputes. However, privacy and confidentiality

[168] *Almazeedi* v *Penner* [2018] UKPC 3, paras. 32-33.
[169] Ibid., para. 17.
[170] SICC International Judges Alnselmo Reyes and Douglas Samuel Jones are members of the SIAC Panel, see SIAC Official Website, SIAC Panel, available at <https://www.siac.org.sg/our-arbitrators/siac-panel> accessed January 2022.
[171] Singapore International Arbitration Centre (SIAC), Highlights from the SIAC Virtual Congress 2021, 'Plenary Session – How International Arbitration and International Commercial Courts play Unique, Important and Complementary Roles in International Dispute Resolution?', 6-7, available at <file:///C:/Users/grgan/Downloads/SIAC%20Virtual%20Congress%202021%20Newsletter.pdf>. See also Thomas J. Stipanowich, 'In Quest of the Arbitration Trifecta, or Closed Door Litigation: The Delaware Arbitration Programme' Journal of Business, (2013) 6 Entrepreneurship and the Law 349, 366-367.

is not unprecedented in the history of commercial litigation. The first recorded experiment involving private and confidential court proceedings was the Delaware Arbitration Programme. In 2009, a new state law gave the Delaware Court of Chancery the power to arbitrate business disputes if the parties request a member of the Court of Chancery to arbitrate a dispute.[172] In addition to giving their consent, at least one party had to be a business entity, and at least one party had to be a Delaware business entity, although the same party could satisfy both requirements.[173] The fees were higher than the regular court fees and included $12,000 for filing the petition and $6,000 for each day of the arbitration hearing, and were divided equally between the parties. The final award was to be automatically transformed into a judgment of the Court of Chancery.[174] The most notable feature of the Delaware Arbitration Programme was its confidentiality. Proceedings were confidential and not of public record unless appealed.[175] The rationale of the Delaware Arbitration Programme was to preserve Delaware's pre-eminence in offering cost-effective options for resolving disputes, particularly those involving commercial, corporate, and technology matters.[176]

Almost two years after enactment, the Delaware Coalition for Open Government, a non-profit corporation with the stated aim of promoting and defending the people's right to transparency and accountability in government, brought the Delaware Court of Chancery Judges, the court itself, and the state of Delaware to court.[177] By depriving the public of access to trials, the Delaware Arbitration Programme violated the constitution, in particular the First Amendment. In addition, the coalition claimed that although the procedure was labelled arbitration, it was in essence litigation under another name.[178]

The United States Court of Appeals for the Third Circuit examined upon appeal whether the proceedings were a form of arbitration or a civil trial. The court took into account that the parties had submitted their dispute to a sitting judge acting according to state authority, paid by the state, and using state personnel and facilities. The judge found facts, applied the relevant

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[172] The Delaware Code, Title 10, § 349 (a) available at <https://delcode.delaware.gov/title10/c003/sc03/index.html> accessed January 2022.
[173] The Delaware Code, Title 10, § 347 (a).
[174] Delaware Court of Chancery Rules 98 (f) (3).
[175] The Delaware Code, Title 10, § 347 (b). See also Stipanowich (n 171) 368-369.
[176] Stipanowich (n 171) 350. See also Myron T. Steele, Thomas J. Stipanowich, Robert Anderson, James R. Griffin, Katherine Blair, and Monica Shilling, 'Delaware's Closed Door Arbitration: What the Future Holds for Large Business Disputes and How it Will Affect M&A Deals' (2013) 6 Journal of Business, Entrepreneurship and the Law 375, 376.
[177] *Delaware Coalition for Open Government, Inc.* v *The Honorable Leo E. Strine, Jr.* No. CIV.A. 1:11–1015, 2012 WL 3744718.
[178] Ibid., paras. 19-20.

law, determined the obligations of the parties, and then issued an enforceable order. As a result, the proceedings were sufficiently like civil trials that had historically been open to the press and general public. Subsequently, the court examined whether openness served a significant societal function. According to the court, allowing public access to state-sponsored arbitrations would give stockholders and the public a better understanding of how Delaware resolves major business disputes. Opening the proceedings would also allay the public's concerns about a process only accessible to litigants in business disputes, and who are able to afford the expense of arbitration. In addition, public access would subject litigants, lawyers, and the Chancery Court judges alike to scrutiny from peers and the press. Finally, public access would discourage perjury, and ensure that companies could not misrepresent their activities to competitors and the public.[179] Consequently, the Court of Appeals struck down the Delaware Arbitration Programme for violating the public's right to access the court.

The offshore corporate and tax law havens of Bermuda, the Cayman Islands and the British Virgin Islands offer the second, more contemporary, example of commercial courts that shield litigants from the public. The Bermuda Commercial Court, the Commercial Division of the High Court in the British Virgin Islands, and the Financial Services Division of the Cayman Islands Grand Court were established to resolve complex commercial disputes arising from foreign firms incorporated locally. A study of the practices reveals that the courts frequently adjudicate cases confidentially, restrict access to court documents, or publish only a few judgments online.[180] For example, 55% of cases litigated at the Financial Services Division of the Cayman Islands were sealed over a period of 68 days, while access to unsealed opinions is only available on websites that require registration and payment of an annual fee.[181] According to Moon, despite the claim that the steady production of case law that reduces legal uncertainty is one of the main attractions of the Delaware judicial system, these foreign nations have accomplished being able to compete effectively with Delaware and its judicial system by being, unlike Delaware, highly secretive.[182]

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[179] United States Court of Appeals for the Third Circuit, No. 12-3859 *Delaware Coalition for Open Government, Inc.* v *The Honorable Leo E. Strine*. See also Jores Kharatian, 'Secret Arbitration or Civil Litigation?: An Analysis of the Delaware Arbitration Program' (2013) 6 Journal of Business, Entrepreneurship and the Law 411, 415.
[180] William J. Moon, 'Delaware's New Competition' (2020) 114 Northwestern University Law Review 1403, 1438-1441.
[181] David Marchant, 'Cayman Court Secrecy on the Rise: 55% of Recent Financial Cases Are Sealed', *Offshore Alert*, 6 August 2018, available at <https://www.offshorealert.com/secrecy-at-financial-services-division-grand-court-of-cayman-islands.aspx> accessed January 2022; Moon (n 180) 1440-1441.
[182] Moon (n 180) 1437-1443.

The above has revealed that the SICC is not the only commercial court that has attempted to offer parties privacy and confidentiality. The SICC, the Delaware Arbitration Programme, the Bermuda Commercial Court, the Commercial Division of the High Court in the British Virgin Islands, and the Financial Services Division of the Cayman Islands all offer private and confidential proceedings. The SICC and the Delaware Arbitration Programme offer parties privacy and confidentiality on the basis of explicit legal rules and upon the parties' consent. The Bermuda Commercial Court, the Commercial Division in the British Virgin Islands, and the Financial Services Division of the Cayman Islands have through their practices infused court proceedings with greater privacy and confidentiality.

However, there is a difference. All courts, except for the SICC, provide the option of private and confidential proceedings to companies registered in their jurisdiction. By contrast, the SICC offers this option mainly to 'offshore cases' that are only loosely linked to Singapore. What explains this difference? Former Chief Justice Myron Steele explained how the Delaware State Legislature was convinced to adopt the Delaware Arbitration Programme. The programme's selling point was not the state income that would derive from the higher court fees. It was the prospect of making Delaware more attractive for companies to incorporate in, as well as of the income that the state would eventually derive from the incorporation fees, which amounted to $150,000 per year.[183] Hence, the ultimate aim of the Delaware Arbitration Programme was to attract more corporations by additionally offering arbitration-like court proceedings with privacy and confidentiality. Similarly, the fact that the Bermuda Commercial Court, the Commercial Division in the British Virgin Islands, and the Financial Services Division of the Cayman Islands have jurisdiction over locally incorporated companies, in combination with the fact that incorporation fees account for a substantial part of the total government revenue,[184] reveal that these states view their commercial courts as a corollary service that promotes the primary goal of attracting the incorporation of companies. In this respect, Singapore differs. Although Singapore has not relinquished the aim of investment attraction, it nevertheless views the legal services sector and the judicial system as a self-standing source of revenue. This is in line with Singapore's policy objective to become Asia's dispute resolution hub. So as to incentivise parties, who would otherwise not have done so, to

[183] '*Interestingly, the way it was sold to the General Assembly was that the benefit to Delaware doesn't come from a $15,000 user fee. The benefit to Delaware comes from this is genuinely attractive and the limitation on being able to have access to this alternative is you charter in Delaware. The charter fee could be $150,000 per year. So, that's where the money comes in*', see Steele, Stipanowich, Anderson, Griffin, Blair, and Shilling (n 176) 392.
[184] Moon (n 180) 1430-1431.

choose the SICC as their dispute resolution forum, Singapore offers the option to exclude the privacy and confidentiality of court proceedings and to appear before court with a foreign lawyer.[185]

Various SICC Rules allow parties to shape proceedings by way of their agreement, and therefore resemble arbitration. Just as parties may enhance confidentiality in arbitration proceedings by entering into agreements for confidentiality, the SICC introduces a form of court-supervised confidentiality agreements. However, the exclusion of publicity upon the parties' agreement reaches the limits of 'arbitralisation', because it undermines the SICC's public role and the public benefits of openness.[186] Private and confidential court proceedings call into question the identity of the SICC as a state court that derives its power and legitimacy from the state.

Despite arguments that offshore cases and their weak link to Singapore may help lessen the possibility of a clash with Singaporean public policy, one might still object that apart from a national public policy there is a transnational public policy mandating that court proceedings be held in public.[187] But even if private and confidential proceedings at the SICC could escape the restraints of a transnational public policy, they would still stumble over the national public policy of the state of recognition and enforcement. Consequently, SICC judgments delivered in private and confidential proceedings could be refused recognition and enforcement abroad. Therefore, the publicity of proceedings constitutes a part of access to justice, and is a public policy element that is excluded from the parties' agreement. The exclusion of publicity and the conduct of proceedings privately and confidentially at the SICC constitute the third and final limit with respect to the 'arbitralisation' of international commercial courts.

5. Conclusion

While international commercial courts in Europe were presented as a way to recapture disputes that were slipping out of public justice and into arbitration, international commercial courts in Asia were presented as being a complementary to arbitration and its shortcomings. Despite these differences in rhetoric, international commercial arbitration has played a significant role in the courts' establishment, and has found its expression in the institutional and procedural

[185] Rajah (n 30) para. 25.
[186] Bookman (2021) (n 4) 209-212. See also Henry S. Noyes, 'If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image' (2007) 30 Harvard Journal of Law and Public Policy 579, 633-635.
[187] Above (n 130).

features of international commercial courts. Both international commercial courts and international commercial arbitration deal with international commercial disputes. If we take further into consideration that international commercial arbitration is the most preferred dispute resolution method, it becomes apparent that international commercial arbitration is the main rival of international commercial courts. In order to compete effectively with it and to engage in forum selling, international commercial courts are emulating some of arbitration's most valued features. These arbitration features give away the growing convergence between public and private dispute resolution methods, and signal the 'arbitralisation' of public courts and justice.

Common among the arbitration features of international commercial courts is party autonomy. Parties may agree on various procedural aspects ranging from jurisdiction and evidence to the recognition and enforcement of judgments made by an international commercial court, and thereby design proceedings by way of their agreement. Consequently, international commercial courts treat procedure as a contract that the parties' agreement may modify or waive. The increased emphasis on party autonomy allows parties to tailor proceedings and increases flexibility. However, under certain circumstances, party autonomy may also delay proceedings and increase costs. More important is that some of the arbitration features of international commercial courts may undermine access to justice, and therefore reach the limits of 'arbitralisation'. The present chapter identifies three such features: namely, the joinder of third parties against their will; the appointment and renumeration regime regarding some international judges; and the conduct of private and confidential proceedings. Safeguarding third parties' right to a fair trial, ensuring the independence and impartiality of the judiciary, and preserving the public character of court proceedings are an indispensable part of a transnational public policy on access to justice that overrides the parties' agreement. Therefore, although the competition with international commercial arbitration and forum selling encourages international commercial courts to borrow some of arbitration's most valued features, and may therefore improve public court proceedings, some of these features may undermine access to justice and the role of courts as public institutions.

CHAPTER 6: CONCLUSIONS

1. International Commercial Courts as Forum Selling Courts

The present research examines international commercial courts from a novel perspective: that of forum selling. Although the literature identifies that, unlike ordinary courts, international commercial courts aim at attracting cases, little is known on how this aim is actually shaping the courts' rules, case law, and practices. The study explores how international commercial courts make themselves more attractive to prospective litigants by engaging in forum selling, and considers the implications of forum selling with regard to access to justice. On the basis of this analysis, theories existing in the literature on forum selling are re-examined and recast in the context of international commercial courts.

The research answers the main question:

How are international commercial courts forum selling and what are the implications of forum selling with regard to civil procedure and access to justice?

The research question is broken down into the following sub-questions:

1. *Why are international commercial courts forum selling?*
2. *How are international commercial courts forum selling?*
3. *What are the implications of forum selling with regard to civil procedure and access to justice?*

The present chapter marks the end of the research, drawing the previous chapters together and answering the research questions. Part 2 explains why international commercial courts engage in forum selling. On the basis of this analysis, part 3 identifies the 'forum sellers'. Part 4 then turns to the forum selling techniques employed by international commercial courts, and illustrates how these courts make themselves more attractive to prospective litigants by engaging in forum marketing, casting a wide jurisdiction net, and emulating the most valuable features of international commercial arbitration. Parts 5 and 6 examine the implications of forum selling with regard to civil procedure and access to justice, respectively. While acknowledging that international commercial courts may improve access to justice in international commercial disputes, it is highlighted that, under certain circumstances, the forum selling of these courts may have a negative impact on access to justice and on the role of courts

as public institutions. The last part recounts the development of international commercial courts, and suggests a few topics for future research.

2. Explaining Forum Selling

2.1. Economic and Reputational Motives

To date, the literature on forum selling has examined the topic in the domestic context. It focuses on a competition between different state courts in the United States and in Germany, and claims that mainly economic and reputational motives explain why courts and judges engage in forum selling. By contrast, international commercial courts are established in different countries, and aim at attracting disputes connected to more than one jurisdiction. The international environment complicates the standard account of forum selling motives, as it amplifies the economic and reputational motives, and adds different actors, as well as broader interests.

Chapter 2 provided an overview of the existing international commercial courts and the reasons behind their establishment. It also explored how the reasons for establishing these courts prompt them to engage in forum selling and may therefore be translated into forum selling motives.

The reasons behind the establishment of international commercial courts are as diverse as the countries hosting the courts. In the mixed bag, one can find economic considerations as well as those relating to access to justice. International commercial courts are considered conducive to a better business climate, and may generate business for the legal services sector. At the same time, international commercial courts may improve access to justice in international commercial disputes by increasing judicial specialisation and offering proceedings tailored to the particular requirements of these disputes.

Nevertheless, an economic thinking traverses the reasons behind the establishment of international commercial courts across countries. In the Middle East and Kazakhstan, the Dubai International Financial Centre (DIFC) Courts, the Qatar International Court (QIC), the Abu Dhabi Global Market (ADGM) Courts, and the Astana International Financial Centre (AIFC) Court are established in Special Economic Zones. The courts aim at offering prospective investors the reassurance of a well-functioning and reliable justice system, and are therefore dubbed ‘investment-minded’ courts. Although one cannot rule out considerations regarding the attracting of investment, the aim of attracting dispute resolution was the main impetus behind the establishment of international commercial courts in Singapore and in Europe. The

Singapore International Commercial Court (SICC) was established as part of the country's broader strategy to become an Asian dispute resolution hub. Even if international commercial courts in Europe date back to older initiatives to make public courts more attractive to foreign litigants, Brexit accelerated their establishment. The Paris International Chambers, the Chambers for International Commercial Disputes and the Commercial Courts in Germany, and the Netherlands Commercial Court (NCC) aim at attracting litigation away from London, and are therefore often viewed as being the expression of an intramural competition among European civil justice systems. Lastly, China established the China International Commercial Courts (CICC), with the aim of resolving disputes arising from projects included in the 'Belt and Road Initiative'. Commentators ascribe the establishment of the Chinese courts to the aim of increasing judicial control over disputes involving Chinese companies and business interests, and therefore perceive the CICC as being politically embedded.[1] Although the reasons behind the establishment of international commercial courts vary, an economic thinking is prevalent.

In chapter 2 I explored how the economic reasons behind their establishment may at the same time prompt international commercial courts to engage in forum selling. International commercial courts benefit the national economies of the countries hosting them. According to the World Bank Doing Business reports, specialised commercial courts facilitate contract enforcement and improve the business climate. In September 2021, the World Bank Group announced the discontinuation of the Doing Business reports because of data irregularities and ethical issues.[2] Nevertheless, the reports illustrate how the establishment of commercial courts are part of broader national policy reforms targeted towards economic development. The link between commercial courts and economic development is particularly evident in countries facing a financial crisis and austerity measures. For example, the establishment of a commercial court in Cyprus was one of the many measures put into place to facilitate and attract economic activity. Therefore, international commercial courts signal to foreign investors a reliable justice system and a good business climate. The role of specialised courts in attracting foreign investment in addition reveals that the worldwide proliferation of international commercial

[1] See also Kwai Hang Ng and Xin He, *Embedded Courts, Judicial Decision Making in China* (Oxford University Press 2017) 83.
[2] World Bank, 'World Bank Group to Discontinue Doing Business Report' (16 September 2021), available at <https://www.worldbank.org/en/news/statement/2021/09/16/world-bank-group-to-discontinue-doing-business-report> accessed January 2022.

courts and the associated civil justice systems competition may not be a self-standing competition but the by-product of another one: namely, the competition to attract investment.

As well as attracting foreign investment, international commercial courts may also be of direct benefit to national economies. They attract litigation and generate business for the legal services sector, and thereby contribute directly to a country's GDP by way of income generated by law firms and third-party financers. If successful, especially in attracting 'offshore' disputes – namely ones unrelated to their home countries – international commercial courts will attract litigation that would otherwise have bypassed national courts. Furthermore, the courts may have a positive spill-over effect on other economic sectors. According to the various documents that preceded the establishment of these courts, it is expected that they will benefit small- and medium-sized enterprises in particular, by offering them an affordable alternative to international commercial arbitration. Furthermore, litigants and their lawyers heading to the international commercial courts in Amsterdam, Paris, Dubai, or Singapore will make use of local hotels and restaurants. The significance of international commercial courts for national economies is the first reason for them to engage in forum selling.

However, their economic salience does not fully explain why the courts engage in forum selling. Forum selling in addition finds its explanation in some of the courts' institutional and procedural features. Higher court fees and the case-dependent remuneration of international judges at certain international commercial courts may prompt these to engage in forum selling. For instance, the NCC and the SICC, charge higher than the ordinary courts court fees. Chapter 2 examined in more detail how international commercial courts, if successful in acquiring a significant caseload, may generate significant court revenue. This could in turn be poured into the funding of other national courts, and thereby cross-subsidise the justice system. In addition, some international commercial courts have foreign nationality judges – referred to as international judges – sitting on their bench. Different appointment conditions and a distinct remuneration system applies to them. International judges at the international commercial courts in the Middle East, Kazakhstan, and Singapore serve fixed and renewable terms, and are paid an hourly fee for the time spent on each case assigned to them. Unlike ordinary judges, who enjoy tenure and a steady salary, and are therefore insulated from the economic incentives to attract cases, the short-term appointment and case-dependent remuneration of international judges means that they have an economic interest in attracting cases. International judges are therefore not simply theatrical spectators to the ongoing forum shopping, but may have economic motives for engaging in forum selling.

Lastly, reputational motives also lie behind forum selling. The literature on domestic forum selling identifies reputation as one of the main reasons judges in particular engage in forum selling. Considering that international commercial courts focus mainly on cross-border disputes involving parties from different jurisdictions, as well as on high-value claims, these courts promise judges an enhanced and worldwide reputation. Especially in the case of international judges who are simultaneously appointed at various international commercial courts ,or who serve as arbitrators, an international reputation may generate future judicial and arbitral appointments. Consequently, the international dimension amplifies the reputational benefits that may induce judges to participate in forum selling. At the same time, the courts may augment not only the reputation of their judges but also that of the surrounding justice system. If coupled with other dispute resolution measures, such as digitised proceedings, litigation funding regulation, collective action vehicles, and a developed dispute resolution market, international commercial courts may improve the overall reputation of a national justice system and boost its attractiveness to foreign litigants.

Unlike in the literature on domestic forum selling, the above reveals that the forum selling motives of international commercial courts do not fit neatly within the classification of institutional and individual motives. In the context of international commercial courts, forum selling transcends the institutional interest of specific courts and the individual interest of judges in an increased caseload, and extends to broader state interests. In international commercial dispute resolution, individual forum selling motives become institutional, institutional motives become national, and national motives become international.

2.2. Complementary Explanations: Forum Shopping and Court Specialisation

The literature notes that forum selling is a response to forum shopping and therefore requires lenient and overlapping jurisdiction rules. Granting jurisdiction to more than one court allows parties to shop around, and to choose the most favourable forum. At the same time, choice of court agreements and the increased focus on party autonomy, especially in civil and commercial disputes, allow parties to choose virtually any court they prefer. The literature further notes that court specialisation fosters forum selling. The small number of judges at specialised courts ensures that these judges will be assigned the specialised cases; it also facilitates coordination among them, and leaves some room for judge shopping. More significantly, court specialisation turns caseload into an existential issue. A small number of incoming cases may call into question the necessity, and, as a result, the very existence of specialised courts.

Forum shopping is indeed especially evident in the case of international commercial courts, and therefore it offers a complementary explanation with regard to their forum selling endeavours. The Brussels Ibis Regulation and the Hague Choice of Court Convention allow parties in international civil and commercial disputes to choose any court they like, despite the lack of any objective, dispute-related links between the claim and the chosen forum. In a similar vein, national laws in countries with an international commercial court respect party autonomy and the parties' choice of court. In order to facilitate forum shopping and in effect the establishment of their jurisdiction, some international commercial courts have further relaxed other jurisdictional requirements. As discussed in chapter 4, as long as parties have chosen an international commercial court in a choice of court agreement, the SICC, the NCC, and the DIFC Courts are reluctant to decline jurisdiction, even if the dispute is more closely linked to another country, or if the choice of court agreement fails to meet formal requirements. The SICC and the European international commercial courts also adopt broad definitions of an international dispute. By characterising domestic disputes as international, and thereby triggering the application of international instruments that have endorsed choice of court and choice of law, international commercial courts allow litigants to dig their hands dip into more forum shopping options.[3]

However, the courts' jurisdiction rules do not just permit forum shopping. With the exception of those established in the Middle East and Kazakhstan, international commercial courts lack compulsory jurisdiction, and derive their jurisdiction from choice of court agreements. Consequently, the jurisdiction of international commercial courts and, by extension, their caseload depend on forum shopping. In line with the literature on domestic forum selling, according to which forum selling is conditioned upon forum shopping, chapter 2 illustrates that the jurisdiction of international commercial courts depends on forum shopping, and therefore encourages international commercial courts to engage in forum selling.

As opposed to the literature on domestic forum selling, according to which forum selling is evident especially with regard to specialised courts, the present research claims that in the context of international commercial courts, forum selling finds its explanation not in the courts' narrow subject matter specialisation but in their voluntary jurisdiction. After all, international commercial courts do not focus on specific types of disputes, such as intellectual property or anti-trust disputes; their caseload spreads over different fields of civil and commercial law.

[3] See also Jens Dammann and Henry Hansmann, 'Globalizing Commercial Litigation' (2008) 94 Cornell Law Review 1, 47-48, 54-55.

However, their lack of compulsory jurisdiction limits the pool of incoming cases, especially during their early years of functioning, and transforms caseload into an existential issue. The study of the forum selling of international commercial courts refines the literary theory that forum selling is inherent only to specialised courts. The present research illustrates that forum selling may also emerge in courts with a more generalist docket, as long as other rules, such as international or territorial jurisdiction rules, put a strain on the number of incoming cases.

3. The Forum Sellers

It is argued in the literature that courts and judges mainly engage in domestic forum selling. In doing so, they leverage procedural rules and case management practices in order to attract cases. The literature focuses predominantly on the forum selling of domestic courts in different states in the United States and in Germany. It maintains that despite differences between the substantive laws of the different states, these laws play only a minor role, because they lie beyond the influence of court administrators and judges. In addition, conflict of laws rules and case law have restricted the parties' ability to shop around for laws. Therefore, the only thing left is procedure. Furthermore, the fact that procedural rules and practices are subject to limited and stringent appellate review offers first instance courts some leeway in shaping procedure, and allows them to engage in forum selling. Procedure also has a signalling effect. By adopting distinct procedural rules and administrative practices, forum selling courts signal their intention to become attractive to litigants and to grant litigants procedural benefits.

The present research reveals that national legislatures play a more prominent role in international forum selling. They draft and enact the laws governing civil procedure. The classic axiom *lex fori regit processum*, means that national laws regulate proceedings before national courts, even if a foreign substantive law applies to the dispute, owing to territorial links to other countries or to the parties' choice of law agreement. Indeed, parties and their agreement have little influence on civil procedure. As Briggs characteristically notes, unlike arbitration where parties may write their own rulebook for the settlement of disputes, civil procedure '*comes in a standard, plain vanilla, form, […] which must be taken more or less as it is given*'.[4] Efforts to harmonise civil procedure laws offer some source of inspiration, but remain for the moment soft law instruments that have found little resonance with national legislators. Consequently, stark variations are evident between different national rules of civil procedure. International and European instruments, notably the Hague Choice of Court

[4] Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford Private International Law Series 2008) para. 1.09.

Convention, the Hague Judgments Convention, and the Brussels Ibis Regulation, regulate international jurisdiction and the recognition and enforcement of judgments abroad, but leave various stages of dispute resolution, such as evidence proceedings, untouched. In Europe particularly, the principle of procedural autonomy places court administration and civil procedure in the hands of national legislators, as long as they do not undermine the effectiveness of European Union laws.[5] All this means is that in civil procedure, national legislators enjoy almost absolute law-making power that may translate into complete forum selling power. National legislators may design national civil procedure and shape the rules in ways that distinguish them from other jurisdictions, and that make their courts more attractive to prospective litigants.

According to the literature on domestic forum selling, district courts across the United States have adopted local rules for specific kinds of disputes. That local rules mainly serve a signalling function for courts looking to attract litigants. In international forum selling, the adoption of distinct civil procedure rules was taken over by the national legislators. International commercial courts were introduced on the basis of national laws devised specifically for the courts' establishment. A distinct set of rules regulates procedure before these courts, and sets them apart from the rest of the courts within a country. For instance, international commercial courts in the Middle East find themselves in Special Economic Zones that indirectly or directly apply English law. The stark difference between, on the one hand, the laws applicable to these Special Economic Zones and the courts established therein and, on the other hand, the jurisdictions surrounding them is captured well in an analogy to the China-Hong Kong principle of 'one country, two systems', or their characterisation as 'common law islands in civil law oceans'.[6] Similarly, the SICC is a Division of the General Division of the High Court of Singapore. Despite being simply a division of the High Court, a distinct set of rules regulates proceedings spanning from jurisdiction to appeal. The SICC therefore rightfully calls itself an 'uncommon, common law court'. In Europe, legislators were more hesitant, due to the uncertainty with regard to the demand for international commercial courts and budgetary

[5] Case 119/84 *P. Capelloni and F. Aquilini* v *J. C. J. Pelkmans*, [1985] EU:C:1985:388, para. 21; 420/07, *Meletis Apostolides* v *David Charles Orams, Linda Elizabeth Orams*, [2009] ECLI:EU:C:2009:271, para. 69; 189/08, *Zuid-Chemie BV* v *Philippo's Mineralenfabriek NV/SA*, [2009] ECLI:EU:C:2009:475, para. 30; C-379/17, *Società Immobiliare Al Bosco Srl*, [2018] ECLI:EU:C:2018:806, para. 26. See also Case C-92/12 PPU, *Health Service Executive* v *S.C., A.C.*, [2012] ECLI:EU:C:2012:255, para. 79; Cases 400/13 & 408/13, *Sophia Marie Nicole Sanders* v *David Verhaegen & Barbara Huber* v *Manfred Huber*, [2014] ECLI:EU:C:2014:2461, paras. 31-32.

[6] Michael Hwang, 'The Courts of the Dubai International Financial Centre: A Common Law Island in a Civil Law Ocean', Lawasia Conference, Kuala Lumpur, Malaysia (1 November 2008); Michael Hwang, 'Commercial Courts and International Arbitration – Competitors or Partners?' (2015) 31 Arbitration International 193, 202.

constraints. Therefore, rudimentary legislative amendments introduced the establishment of international commercial courts on the continent, and focused mainly on introducing English as the language of court proceedings or on the higher court fees. Alongside national legislators, the judiciaries devised separate rules for the courts. Although in the case of most European international commercial courts, these rules are an English language translation of the national civil procedure rules that apply equally to international commercial courts, they nevertheless diverge from national court practices by emphasising case management conferences, or by adopting a more common law approach to evidence. By adopting their own miniature civil procedure codes, international commercial courts lay out the welcome mat and signal to litigants their interest in attracting cases.

The legislative underpinning of international commercial courts rules and practices illustrates that both national legislators and judiciaries have a role to play in international forum selling. In this regard, however, procedure is not the only tool employed to signal forum selling endeavours. Owing to stark differences in national substantive laws, their varied interpretation may enhance the attractiveness of some international commercial courts over others. Future research could shed light on how these courts treat substantive law issues, and whether any differences in treatment could be one more instance of forum selling.[7]

4. Forum Selling Techniques

The present research has identified three forum selling techniques. First, chapter 3 showed how international commercial courts make themselves more attractive to prospective litigants by engaging in forum marketing. Second, chapter 4 demonstrated how international commercial courts are casting a wide jurisdiction net by adopting jurisdiction rules and case law that facilitate the establishment of their jurisdiction. Lastly, chapter 5 explored how international commercial courts are competing with international commercial arbitration by emulating some of its most valuable features.

4.1. Forum Marketing

The first forum selling technique employed by international commercial courts is forum marketing. Chapter 3 defined forum marketing as the use of strategic communication and advertising by forum selling courts. It examined this as yet under-studied technique, and looked closely at how international commercial courts market themselves in order to attract cases.

[7] See also Ewan Mckendrick, Juliette Luycks JM and Anne Hendrikx, 'A NCC Case on Contract Interpretation from an English and Dutch Law Perspective' (2021) 29 European Review of Private Law 71.

Unlike forum selling, which takes place behind the scenes, forum marketing brings courts and judges into the spotlight. International commercial courts do not make themselves more attractive to prospective litigants simply by practicing forum selling; they actively reach out to litigants, and promote their procedural traits by engaging in forum marketing.

The reasons behind forum marketing and forum selling are largely similar. However, certain reasons are different from the common ones that prompt the courts to engage in forum selling, and are intrinsic to international commercial courts. The courts' voluntary source of jurisdiction, the jurisdictional overlap with other courts and dispute resolution methods, and the fact that international commercial courts are reputation sensitive prompt the courts to engage in forum marketing.

According to the literature on domestic forum selling, courts in non-contractual disputes make themselves more attractive to prospective litigants by adopting various techniques, such as speeding up trials, increasing the predictability of their judgments, or adopting pro-claimant approaches. Forum selling courts favour claimants, because in non-contractual disputes the decision regarding where to file a claim rests with the claimant. However, international commercial courts deal predominantly with contractual disputes, and derive their jurisdiction from choice of court agreements. Favouring one party over the other by granting procedural advantages would harm the reputation of international commercial courts, and discourage parties from choosing in their favour. Hence, in the context of international commercial courts, pro-claimant approaches are an unsuitable forum selling technique. The inability of international commercial courts to favour one party over the other leads them to cultivate a positive reputation, and – by engaging in forum marketing – to persuade both parties to choose in their favour. However, because most courts are newly established institutions, parties may be unaware of them. By engaging in forum marketing, international commercial courts raise awareness of their existence.

A further reason to engage in forum marketing is that the courts' jurisdiction overlaps with that of ordinary courts and other private dispute resolution methods, notably international commercial arbitration. The courts therefore operate in a highly competitive environment where parties enjoy a wide variety of forum shopping options. Parties may choose from among different ordinary courts or international commercial courts, or contract out of public courts and into international commercial arbitration. International commercial courts' voluntary source of jurisdiction, their recent establishment, and the increased competition in international

commercial dispute resolution challenges the courts to raise awareness as to their existence; to stand out from other dispute resolution methods; to persuade both parties to choose in their favour; and consequently, to carve out their own piece of international commercial dispute resolution.

A final reason for their forum marketing is that international commercial courts are reputation sensitive. Chapter 3 illustrated that parties choose a court for a variety of reasons, such as the quality of the judiciary or the speed of the dispute resolution process. However, not all reasons are related to the procedural merits of the chosen court and the surrounding justice system. Non-legal factors that equally motivate parties' choice of court are familiarity with a court or established market practices. Based on the assumption that parties tend to gravitate towards the familiar, and are often guided by a court's sheer reputation, international commercial courts and some of their innovative features – particularly those lacking a tangible dimension – contribute primarily to the courts' marketing by sending signals of quality and familiarity to prospective foreign litigants.

International commercial courts employ various forum marketing techniques. They adopt brand names, associate their reputation with the established reputation of the cities and the buildings hosting them, seek the endorsement of internationally renowned legal figures, have created a network with other jurisdictions and commercial courts, and showcase their procedural innovations through academic literature and case law. In addition, some of the courts' innovative features lack tangible innovations and therefore mainly contribute to the marketing of international commercial courts by sending signals of quality and familiarity to foreign litigants.

Most international commercial courts present themselves as self-standing courts, although they are simply chambers or divisions within existing courts. For instance, the NCC is a specialised chamber of the Amsterdam District Court; the SICC is a division of the General Division of the Singapore High Court; and the CICC are divisions of the Supreme People's Court. The use of these brand names creates recognition, raises the visibility of the courts and sets them apart from other chambers within a court. In addition, the marketing of international commercial courts is linked to the marketing of the cities in which they are located as well as to the host buildings. The marketing material illustrates how the courts attempt to enhance their recognition in this manner. For example, a video published on the official website of the NCC broadcasts the courts' main features. As seen in the video, the court is situated in Amsterdam,

'*a city with a proud history of commerce and justice*'. Scenes of canals and young people riding bikes might lead one to wonder whether the video is advertising the NCC or the city of Amsterdam. It therefore reveals that the marketing of the NCC is linked to the marketing of the city. In the case of the CICC, the cities hosting the courts additionally carry with them some symbolism. The First CICC is situated in Shenzhen, while the Second CICC is in Xi'an. Both cities are included in the 'Belt and Road Initiative', with Shenzhen the starting point of the 'Belt' route, and Xi'an the starting point of the 'Road' route.

In addition to the use of brand names and cities, another common forum marketing technique is what chapter 3 labelled 'courting and networking'. International commercial courts market themselves by seeking the endorsement of internationally renowned legal figures and creating a network. In particular, international commercial courts in the Middle East and Kazakhstan, the SICC, and the Expert Committee of the CICC have appointed reputable foreign judges that served formerly at world-renowned commercial courts, such as the London Commercial Court or the Delaware Court of Chancery. Even if appointed primarily for their expertise in international commercial dispute resolution, international judges contribute to the marketing by lending the courts an international reputation and a worldwide network. Especially in countries whose justice systems lack credibility and international standing, international judges bring with them the credibility and the international standing of their home justice systems. Through various 'off the bench' activities, such as conference speeches or publications, judges at international commercial courts market the establishment of the courts and their innovative features. In addition, some international judges simultaneously serve at different international commercial courts, or are well known arbitrators, and thereby hint at the ties international commercial courts are forging, not only among themselves but also with the arbitration community. By founding and participating at the Standing International Forum of Commercial Courts and signing Memoranda of Understanding – namely, cooperation agreements – with other commercial courts, arbitration institutions, or regulatory authorities, international commercial courts create a network and engage in forum marketing.

Crucial in this marketing is the close and collaborative relationship with academia and the legal profession. Academics as well as the local bar offered their advice with regard to the courts' institutional and procedural features. However, the relationship between international commercial courts and the bar unfolds in more intricate ways. The courts rely on local lawyers to bring them cases, and their initial caseload is largely dependent on a domestic buy-in. At the same time, the marketing of international commercial courts creates a marketing opportunity

for legal practitioners. In chapter 3, some of the first lawyers who appeared before an international commercial court reported having attracted the attention of the bar, and expressed the hope that the experience of litigating before an international commercial court would translate into more business in the future. Nevertheless, some of the lawyers interviewed had second thoughts. They were concerned that bringing a case before an international commercial court would turn it into a 'showcase'. Publications on some of the courts' first cases lend merit to such concerns. The tight relationship between the courts, academia, and the bar may infuse into academic discourse and the practitioners' views a marketing narrative that contributes to the forum marketing of international commercial courts.

Last among the marketing techniques of international commercial courts are what are referred to as brand features: namely, features that lack tangible innovations, and therefore contribute mainly to the marketing of international commercial courts by sending signals of quality and familiarity to prospective litigants. These features are the use of English as the court language; the application of common law and arbitration rules and practices; the signing of Memoranda of Guidance on the recognition and enforcement of international commercial court judgments; and the claim of developing a new *lex mercatoria*.

One of the innovative features of international commercial courts is the use of English as the court language. Except for the CICC, which conduct trials in Chinese, and the SICC, which is established in an English-language jurisdiction, the rest of the international commercial courts use English as the language of court proceedings. However, the potential of English to draw litigants to international commercial courts is limited if not combined with other innovations. Research indicates that English does not in itself account for the popularity of English courts or international commercial arbitration. In addition, various European international commercial courts, such as the Paris International Chambers, the German Chambers for International Commercial Courts and the Commercial Courts in Germany, limit the use of English to certain parts of the procedure. The limited attractiveness of English as a procedural innovation and its limited scope in the case of some European international commercial courts indicate that the use of English as the court language is mainly a marketing tool aimed at making the courts more attractive and accessible to international parties.

Similarly, the use of best practices from common law courts and arbitration is very limited in the case of European international commercial courts. This is understandable, especially if we take into consideration that time and budgetary constraints lead to limited legislative

amendments preceding the establishment of these courts. The European international commercial courts apply national rules of civil procedure that deviate only slightly from the rules applicable to the ordinary courts within the country. As such, only a few best practices have found their way into the rules and practices of European international commercial courts. The limited scope of such best practices hints at their primary marketing value. Another brand feature of international commercial courts is the signing of Memoranda of Guidance on the recognition and enforcement of international commercial court judgments. These are agreements between courts that aim at setting down and clarifying the rules applicable to the recognition and enforcement of public court judgments. Although the Memoranda of Guidance lack a legally binding effect, international commercial court stakeholders have emphasised their potential to improve the recognition and enforcement prospects of court judgments abroad. Despite such professions, the soft law nature of the instruments calls into question their effectiveness, and lends grounds to the claim that Memoranda of Guidance are a marketing tool aimed mainly at improving public perception regarding the recognition and enforcement of international commercial court judgments. Lastly, chapter 3 argued that the claim of some international commercial courts of developing a new *lex mercatoria* is one more brand feature. Based on empirical research that finds that the new *lex mercatoria* has limited practical relevance in international commercial arbitration but increased symbolic and signalling force, it has been similarly concluded that the claim of international commercial courts to be developing a new *lex mercatoria* is – given their currently predominantly domestic caseload – one more marketing technique that signals to prospective litigants the courts' more international outlook.

4.2. Casting a Wide Jurisdiction Net

The second forum selling technique of international commercial courts are rules and case law that facilitate establishing jurisdiction. Chapter 4 illustrated that although different courts opt for different rules and interpretations, what these all have in common is that they enable international commercial courts to cast a wide jurisdiction net, and may therefore function as forum selling techniques.

With the exception of the international commercial courts established in the Middle East and Kazakhstan, the rest of the courts base their jurisdiction on choice of court agreements. As noted above, the voluntary jurisdiction of international commercial courts combined with the fact that they may yet be unknown to parties limits the number of incoming cases, and turns caseload into an existential issue. Moreover, the courts' jurisdiction overlaps with that of the

ordinary courts and international commercial arbitration. Their voluntary and non-exclusive jurisdiction challenges the courts to attract cases and carve out their own piece of international commercial dispute resolution. Yet building a caseload was not without challenges for the courts in the Middle East and Kazakhstan. Although they are vested with compulsory and exclusive jurisdiction over disputes arising within the respective Special Economic Zones, the small number of companies established there as well as the zones' limited territorial ambit restricts the courts' jurisdictional remit.

In order to build a caseload, international commercial courts have adopted lenient jurisdiction rules, and pursued an expansive interpretation of these rules that facilitates the establishment of their jurisdiction. Chapter 4 explored three case-attracting mechanisms found among the SICC, the NCC, the CICC, the Paris International Chambers, and the German international commercial courts: namely, the increased emphasis on choice of court agreements; the transfer jurisdiction; and the adoption of party-controlled jurisdictional requirements.

With the exception of those established in Special Economic Zones, international commercial courts derive their jurisdiction from choice of court agreements. It is therefore claimed – in a way strongly reminiscent of arbitration – that these agreements are the courts' jurisdictional cornerstone. The fact that international commercial courts depend largely their jurisdiction on choice of court agreements prompts the courts to prioritise the parties' choice of court agreement over other jurisdictional requirements.

As regards the SICC, although the court is simply a division of the General Division of the Singapore High Court, it applies a different set of rules with respect to the existence and the exercise of extra-territorial jurisdiction. Some of these rules and their interpretation facilitate the SICC in establishing jurisdiction. The SICC rules dispense with the need to obtain a leave of court to serve out of Singapore in the presence of a SICC choice of court agreement. It is therefore easier for the SICC than for the General Division of the Singapore High Court to establish jurisdiction over disputes involving a foreign defendant. In addition, the SICC Rules restrict the court's discretion to deny the exercise of jurisdiction. The rules achieve this by conflating the requirements for the SICC's existence of jurisdiction with those of the exercise of jurisdiction, and decreasing the significance of territorial links to competing fora. Interestingly enough, SICC case law considers its innovative features, such as its international bench, to be factors that render the court a convenient forum. All these facilitative rules and case law reveal a tension. On the way to becoming an Asian dispute resolution hub, and to

attracting disputes connected only loosely to Singapore, the SICC has to give up the traditional *forum non conveniens* inquiry and the significance of territorial links between the claim and the forum.

In a similar vein, the NCC has relaxed the formal requirements set on agreements in its favour. Although Article 30r Dutch Code of Civil Procedure requires NCC clauses to be in writing and explicit, in *McCourt Global Sports & Media LLC* v *Tennor Holding B.V.*,[8] the NCC has advocated for a more case-by-case approach that takes into consideration the parties and their capacities. As long as the parties are versed in international commercial practices and English language communication and are not, in the court's own words, '*the hairdresser on the corner*', the NCC has jurisdiction, even if the NCC clause does not fully abide by the formal requirements. By adopting a more case-by-case approach in which the parties and their capacities validate or invalidate the clause, the NCC has facilitated the establishment of its jurisdiction.

The examples of the SICC and the NCC illustrate how these international commercial courts treat choice of court agreements in their favour as 'super-contracts' that prevail over other jurisdictional requirements.[9]

Another mechanism that facilitates international commercial courts in acquiring a caseload is the transfer of cases from the ordinary courts. The transfer enables some courts to acquire their first cases, even though parties may not yet have been aware of the courts' existence. The transfer jurisdiction was found to be used most frequently by three courts: namely, the SICC, the CICC, and the Paris Chambers for International Commercial Disputes. The reason these courts more than others have made use of the transfer jurisdiction is because, according to the respective rules, ordinary courts may transfer cases to international commercial courts without the consent of both parties.

The transfer jurisdiction is a useful tool that channels cases to international commercial courts, and allows them to gain an edge. It explains why the SICC, the CICC and the Paris International Chambers have dealt with more cases than the NCC or the German international commercial courts. The transfer of cases calls into question the claim that choice of court agreements are

[8] *McCourt Global Sports & Media LLC* v *Tennor Holding B.V. document* [2020] NCC 20-014 ECLI:NL:RBAMS:2020:2277.
[9] David H. Taylor and Sara M. Cliffe, 'Civil Procedure by Contract: A Convoluted Confluence of Private Contract and Public Procedure in Need of Congressional Control' (2002) 35 University of Richmond Law Review 1085, 1088.

the jurisdictional foundation of international commercial courts and reveals that for the moment the real foundation of the SICC, the CICC, and the Paris International Chambers is the transfer of cases. Furthermore, the transfer of cases, despite the parties' opposing will, may raise concerns about recognition and enforcement. It is doubtful, whether foreign courts would treat such cases as falling under the Hague Choice of Court Convention, as the Convention requires the parties' consent to a transfer.

Lastly, the use of party-controlled jurisdictional requirements facilitates international commercial courts in casting a wide jurisdiction net, and enables them to engage in forum selling. As their official names suggest, these courts focus on international commercial disputes. However, some courts allow parties to agree that their dispute is international or commercial, despite the absence of objective elements, and thereby place it under their jurisdiction. By subjectivising otherwise objective jurisdictional requirements, international commercial courts facilitate the establishment of their jurisdiction. Examples of such courts are the SICC as well as the Brussels International Commercial Court (BIBC), whose proposal for establishment was subsequently withdrawn. Although European international commercial courts hinge their jurisdiction on objective criteria that lend to the dispute the required international nature, some criteria, such as the English language of the contract or the application of foreign law, are nevertheless easy to manipulate. By drafting their contracts in English or agreeing on the application of a foreign law, parties may indirectly create an international dispute, and thereby expand the court's jurisdiction over disputes lacking a genuinely international character. Furthermore, such criteria are at odds with the definition of an international dispute under the Hague Choice of Court Convention and the Brussels Ibis Regulation.

After identifying the jurisdiction rules and their interpretations that may facilitate international commercial courts in forum selling, Chapter 4 turned to the DIFC Courts. It illustrated how these courts have applied a broad array of jurisdiction rules and interpretations that tilt disputes towards a finding that jurisdiction exists. The DIFC Courts are therefore an extreme illustration of a forum selling court.

The DIFC Courts have adopted various 'exorbitant' jurisdiction rules, and interpreted them in overly expansive ways that facilitate the establishment of their jurisdiction. More specifically, these courts adopt a *forum actoris*; establish an *ad hominem* jurisdiction over DIFC entities, even if the dispute lacks links to the DIFC; accept an 'after the facts' jurisdiction; establish

jurisdiction if the place of the conclusion of the contract is in the DIFC; and have adopted a lenient interpretation regarding the place where the contract was concluded. By adopting these jurisdiction rules, which are premised upon malleable connecting factors, the DIFC Courts have expanded their jurisdictional reach. Moreover, despite the absence of an explicit statutory provision, the courts extend jurisdiction over third parties; establish jurisdiction over applications for the recognition and enforcement of foreign arbitral awards and judgments, even if the defendant lacks assets in the DIFC, and the dispute is otherwise unrelated to the DIFC; dispense with the requirement of an express choice of court agreement; and regard agreements in favour of the Dubai or UAE courts as including an agreement in favour of the DIFC Courts. The DIFC Courts relax the *forum non conveniens* doctrine by adhering to the more lenient 'clearly inappropriate' standard, and, lastly, refuse to apply the *forum non conveniens* doctrine when the competing jurisdictions are the ordinary Dubai or other UAE courts.

The DIFC Courts and their multiple expansive jurisdiction rules are examples of engaging in forum selling. The forum selling of the DIFC Courts eventually resulted in jurisdictional tensions between these courts and the regular Dubai Courts. In 2016, the Emirate of Dubai established the Judicial Tribunal, and assigned it the task of resolving conflicts of jurisdiction between the DIFC and the Dubai Courts. Thus, the DIFC Courts generated disputes just as much as they resolved them.

4.3. 'Arbitralising' Courts

As observed, international commercial dispute resolution is a highly competitive field. Litigants may choose to resolve their disputes in the ordinary courts, in international commercial courts, in international commercial arbitration, or by way of other alternative dispute resolution providers. On the basis of surveys, international commercial arbitration is seen to be the most preferred dispute resolution option. Chapter 5 explored how international commercial courts compete with international commercial arbitration by emulating some of arbitration's most valued features. The arbitration features of international commercial courts are the courts' third and last forum selling technique.

Chapter 5 first examined the role of arbitration in the establishment of international commercial courts, and identified a Europe-Asia divide. European courts present their relationship to international commercial arbitration in more competitive terms. It is, in particular, expected

that the NCC, and the proposed German Chambers for International Commercial Disputes and Commercial Courts, will reverse the trend of the 'vanishing trial': namely, the increasing number of international commercial disputes resolved abroad or in arbitration, and the corresponding decline in the caseload of public courts. By contrast, Asian international commercial courts attenuate the 'competition with arbitration' rhetoric. They present themselves as simply being a complementary method, and available for disputes better suited for public court proceedings. This could be attributed to the fact that, as noted above, the main driver for the establishment of international commercial courts in some of these jurisdictions was not the attraction of litigation but the attraction of investment. In other jurisdictions, international commercial courts are part of broader strategies to attract dispute resolution, and are seen as one of many dispute resolution options. The SICC is an example of an international commercial court that presents itself as an alternative to international commercial arbitration and its shortcomings. Among arbitration's shortcomings, the court's website singles out over-formalisation; delays; the rising costs of arbitration, also known as the judicialisation of international commercial arbitration; the absence of a developed and consistent body of jurisprudence; the absence of appeals; and the inability to join third parties to the arbitration.

However, defining the relationship between international commercial courts and international commercial arbitration in competitive or complementary terms is mainly a rhetorical dilemma that bespeaks diverging policy objectives and local particularities. Whether 'competitors or partners',[10] international commercial arbitration and its predominance in international commercial dispute resolution has played a significant role in the emergence of international commercial courts, and has largely influenced their institutional and procedural lay-out. In order to attract parties with a preference for international commercial arbitration, international commercial courts have borrowed various arbitration features. Hence, while arbitration is claimed to have become increasingly judicialised, international commercial courts and their arbitration features are evidence of an opposite trend: the 'arbitralisation' of public courts and justice.

Most international commercial courts require parties to agree in their favour in order to establish international jurisdiction. It is therefore claimed that just as arbitration agreements are

[10] Michael Hwang, 'Commercial Courts and International Arbitration – Competitors or Partners?' (2015) 31 Arbitration International 193.

the cornerstone of international commercial arbitration, choice of court agreements are the jurisdictional foundation of international commercial courts. In the case of certain international commercial courts, such as the SICC or the BIBC, the parties' agreement establishes not only international jurisdiction but also subject-matter jurisdiction. Modelled on Article 1 (3) (c) UNCITRAL Model Law, the SICC allows parties to turn their dispute into an international one simply by their agreement, despite the absence of objective, cross-border elements. In a similar vein, the court rules provide that parties may agree that their dispute is commercial, and thereby establish the subject-matter jurisdiction of the court in question.

More significantly, international commercial courts and their rules increase procedural flexibility by allowing parties to design proceedings by way of their agreement. According to the SICC Rules, parties may opt out of national rules of evidence and opt instead in to foreign rules or non-state, soft law instruments such as the IBA Rules on the Taking of Evidence in International Commercial Arbitration. By allowing parties to choose foreign or arbitration rules of evidence, the SICC upsets the basic tenet in civil procedure, *lex fori regit processum*, according to which the civil procedure rules of the forum govern proceedings. Other international commercial courts, such as the NCC or the pending proposal for the establishment of Chambers for International Commercial Disputes and Commercial Courts in Germany, underline in their rules that parties may design evidence proceedings by entering into respective procedural agreements.

Another feature of international commercial courts that finds its inspiration in international commercial arbitration is the proof of foreign law on the basis of submissions. In order to avoid the time and costs spent on obtaining expert evidence, the SICC and the DIFC Courts allow the proof of foreign law on the basis of submissions, oral or written. In this way, these courts take full advantage of the international judges sitting on their bench, and of the foreign lawyers allowed to represent parties before them.

Unlike arbitral awards, the judgments of international commercial courts are appealable. The only court that deprives parties of the right to appeal is the CICC, which is a division of the highest adjudicative body in China, the Supreme People's Court. Similarly, the proposed 'Commercial Courts' in Germany are divisions of the Highest Regional Courts, and therefore lack an appellate review mechanism. However, in order to attract parties with a preference for international commercial arbitration, various courts highlight that parties may enter into

procedural agreements by waiving or limiting their right to appeal. The SICC Committee Report, which preceded establishment of the SICC, clarified that when limiting their right to appeal, parties could restrict review to grounds modelled after international arbitration, such as breaches of natural justice or defects in the validity and the scope of the SICC jurisdiction agreement based on Article 34 Model Law.

One of arbitration's most valued features is the parties' ability to select the arbitrators. However, the participation of parties in the selection of arbitrators gives rise to biases and conflicts of interest. By contrast, parties litigating at an international commercial court may not select the judges. Party participation in case assignment would undermine the independence and impartiality of the judiciary, and would violate the principle of the lawful judge as protected in the national constitutions of some of the countries with an international commercial court.[11] However, international commercial courts share ample information online on their judges, on their expertise, or on their professional background. In some instances, a specific type of case is assigned to the same judge or judges and not all listed judges hear cases. In this way, although parties may not select the judge(s) at an international commercial court, they may nevertheless predict which judge will be assigned to their case, based on the nature of the dispute or the foreign law applicable. For the international commercial courts that share less information online, such as the Paris International Chambers or the German Chambers for International Commercial Disputes, the small number of judges combined with frequent public appearances makes it similarly easier for parties and their lawyers to predict case assignments.

International commercial courts claim that the inability of parties to select the judges helps them avoid biases and the conflicts of interest frequent in arbitration. Although this claim holds indeed true for international commercial courts that are staffed exclusively with national judges, it is not true for courts staffed additionally with international judges. The claim disregards the fact that some courts are established in states with opaque provisions on the appointment conditions of international judges. Such provisions expose these judges to executive pressures. Moreover, the short-term appointment and case-dependent remuneration of international judges reveals that they have a personal and economic interest in being assigned to cases. Consequently, the claim that judges at international commercial courts are

[11] See also European Network of Councils for the Judiciary (ENCJ), Minimum Judicial Standards IV: Allocation of Cases, Report 2014, available at <Standards IV: Allocation of Cases | ENCJ - European Networks of Councils for the Judiciary> accessed January 2022.

free of the conflicts of interest common in arbitration overlooks the fact that some judges simultaneously practise as arbitrators or counsel, and that these parallel practices may create a conflict of interests.

Another arbitration feature adopted by international commercial courts is the ability to be represented by a foreign lawyer, who may represent parties in the DIFC Courts, the SICC, the QIC, the ADGM Courts, and the AIFC Court. The ability to be represented by a foreign lawyer can be similarly traced to international commercial arbitration, and is aimed at incentivising foreign lawyers to choose in favour of an international commercial court.

Unlike arbitration proceedings and awards that are private and confidential, court proceedings and judgments are public. It is claimed that parties in international commercial disputes value the privacy and confidentiality of arbitration, because it allows them to keep trade secrets and the inner workings of companies away from the public eye. Although proceedings at international commercial courts are by default public, some international commercial courts have relaxed conditions regarding the conduct of proceedings in private and confidentially. In particular, the SICC allows for three different types of confidentiality orders in 'offshore' disputes that lack a substantial connection to Singapore. It is claimed that due to their weak link to Singapore, the conduct of proceedings privately and confidentially in 'offshore' disputes does not clash with national public policy. Similarly, the proposal for the establishment of Chambers for International Commercial Courts and Commercial Courts in Germany extends the ability of the courts to grant confidentiality orders upon the parties' request.

International commercial courts trail international commercial arbitration with regard to the recognition and enforcement of their judgments. While the New York Convention with more than 150 Member States grants arbitral awards nearly worldwide recognition and enforcement, international instruments on the recognition and enforcement of court judgments, such as the Hague Choice of Court Convention, have at the time of writing gained less traction. The recognition and enforcement of international commercial court judgments appears especially challenging in Asia, owing to the lack of respective treaties in the region. By contrast, European international commercial court judgments can be recognised and enforced in other European Union Member States on the basis of the Brussels Ibis Regulation, and in the European Free Trade Association Member States on the basis of the Lugano Conventions. So as to enhance the recognition and enforcement of their judgments, the DIFC Courts came up with the

conversion of their judgments into arbitral awards. Parties could in particular agree that any dispute arising out of or in connection with the non-payment of any money judgment given by the DIFC Courts may, at the option of the judgment creditor, be referred to arbitration under the Arbitration Rules of the DIFC-LCIA Arbitration Centre. In this way, the DIFC Courts aimed at profiting from the extensive territorial reach of the New York Convention and at lending nearly worldwide enforceability to their judgments. The conversion of judgments into arbitral awards is the last arbitration feature of international commercial courts. Although the conversion of judgments into arbitral awards was not used in practice, and, according to Michael Hwang, former Chief Justice of the DIFC Courts, it was simply a marketing trick, it is nevertheless a fascinating feature. The conversion of court judgments into arbitral awards shows how international commercial courts attempt to borrow some of arbitration's most valued characteristics, and vividly illustrates the 'arbitralisation' of courts.

The study of how international commercial courts engage in forum selling reveals three main techniques: forum marketing; casting a wide jurisdiction net; and emulating international commercial arbitration by borrowing some of its features. However, while some courts, such as the SICC or the DIFC Courts, employ multiple forum selling techniques, others, such as the European international commercial courts, employ very few. For instance, the SICC and the DIFC Courts market themselves, they have employed a broad array of expansive jurisdiction rules and interpretations, and they have adopted multiple arbitration-like features. The European international commercial courts similarly engage in forum marketing, but they have adopted fewer expansive jurisdiction rules, and their arbitration features are minimal. In addition, the small caseload of the European international commercial courts makes it difficult at the time of writing to examine the practices of these courts, and to uncover evidence of forum selling. Therefore, research into forum selling on the part of European international commercial courts awaits further case law.

Lastly, it should not be ruled out that the forum selling carried out by these international commercial courts will decline in the future. In that respect, the example of the DIFC Courts is once again illustrative. Although during their early years the DIFC Courts were actively competing for cases and engaged in forum selling, in recent years a decline in the courts' forum selling activities has been noticeable. Such developments could be the result of efforts to limit the courts' forum-biased jurisdictional approaches, and to relieve the jurisdictional competition between these and the ordinary Dubai courts. Further, one may notice that more Emirati judges

have been appointed recently at the DIFC Courts. The appointment of local judges similarly aims at blending the DIFC Courts better into the local justice system, and reveals plans for the courts' gradual 'Emiratisation'.

5. The Implications of Forum Selling with regard to Civil Procedure

Forum selling encourages international commercial courts to engage in certain practices, and to apply and interpret procedural rules in ways that make them more attractive to prospective litigants. Forum selling therefore explains which doctrines international commercial courts are more likely to prioritise, how these will be applied and interpreted, which new rules and practices are likely to develop, and which old ones are likely to become obsolete. Hence, the identified forum selling techniques redefine and reconceptualise procedural doctrines, and have broader normative implications with regard to civil procedure.

Admittedly, there are reasons to be sceptical of this proposition. Some international commercial courts lack a significant caseload, and not all of these courts engage to the same degree in forum selling practices. However, the present study has illustrated that all international commercial courts engage in forum marketing, and that various forum selling rules and practices can be found across different courts. Forum selling therefore opens the door to distinct rules and interpretations, and leaves a normative footprint on civil procedure that could in many ways have a broader effect. Especially if proven successful, international commercial courts might have a positive spill-over effect on the ordinary courts and their rules of civil procedure. In particular, the parliamentary debate that preceded the adoption of the NCC law debated the possibility of adopting some of the NCC's features in ordinary court proceedings.[12] Similarly, a pending legislative initiative in Singapore is contemplating the amendment of national civil procedure rules according to the rules applicable to SICC proceedings.[13] These examples demonstrate that international commercial courts could

[12] Parliamentary Papers I 2017/18 (*Kamerstukken I*), 34 761 C, Amendments to the Code of Civil Procedure and the Civil Court Fees Act with regard to the introduction of English-language case law at the international commercial chambers of the Amsterdam District Court and the Amsterdam Court of Appeal (*Wijziging van het Wetboek van Burgerlijke Rechtsvordering en de Wet griffierechten burgerlijke zaken in verband met het mogelijk maken van Engelstalige rechtspraak bij de internationale handelskamers van de rechtbank Amsterdam en het gerechtshof Amsterdam*) 18 June 2018. See also Eddy Bauw, 'Commercial Litigation in Europe in Transformation: The Case of the Netherlands Commercial Court' (2019) 12 Erasmus Law Review 15, 22.

[13] Supreme Court of Judicature Act (Chapter 322), Rules of Court 2021, available at <Rules of Court 2021 - Singapore Statutes Online (agc.gov.sg)>. See also Ministry of Law – Legal Policy Division, *Public Consultation on Proposed Reforms to the Civil Justice System*, available at <https://www.reach.gov.sg/participate/public-consultation/ministry-of-law/legal-policy-division/public-consultation-on-proposed-reforms-to-the-civil-justice-system> accessed January 2022.

function as procedural laboratories,[14] where rules are tested before extending their application to the rest of the courts within a country. Furthermore, international commercial courts aim at attracting international disputes, and therefore compete with different dispute resolution methods. The competition for dispute resolution encourages cross fertilisation and common approaches to procedure. As discussed in chapter 3, in order to make themselves more attractive to prospective litigants, international commercial courts borrow various arbitration features. It is also expected that just as these courts are shaped by arbitration, they may also reshape it. By increasing the competition in international commercial disputes, the courts may prompt revisions in arbitration rules and practices.[15] Therefore, as King observes, international commercial courts participate in the creation of a 'global civil procedure' that includes the rules, practices, and social understandings that govern the transnational litigation and arbitration of commercial disputes.[16] While the global civil procedure norms were originally adopted in response to global or regional competition as well as domestic considerations, the author notes that they take on a life of their own and are eventually regarded as 'common sense'.[17]

After first identifying different forum selling techniques, chapters 3, 4, and 5 explored how these techniques reshape, and have a broader normative influence on court publicity, jurisdiction, as well as on procedure. This part draws these normative implications together, and explores how international commercial courts participate in the formation of a global civil procedure and which specific norms they contribute.

5.1. The Implications of Forum Marketing with regard to Publicity

Chapter 3 showed that in order to raise awareness of their recent establishment, to distinguish themselves from existing dispute resolution methods, and to become more attractive to prospective litigants, international commercial courts and their judges actively reach out to parties and engage in forum marketing. Forum marketing alters and redefines court publicity, since in the context of international commercial courts, publicity includes not only the

[14] Alexander Biard, 'International Commercial Courts in France: Innovation Without Revolution?' 2019 (12) Erasmus Law Review 24, 32.
[15] Anselmo Reyes and Kevin Tan, 'Recognition and Enforcement of International Commercial Court Judgements' 32 in Lei Chen and André Janssen (eds), *Dispute Resolution in Europe, China and the World* (Springer 2020)
[16] Alyssa King, 'Global Civil Procedure' (2021) 62 Harvard International Law Journal 223. See also Helen Ruiz Fabri and Joshua Paine, 'The Procedural Cross-Fertilization Pull' (2019) 6 Max Planck Institute Luxemburg Research Paper.
[17] Ibid. 255.

traditional notion of access to court trials and judgments but also the idea that courts and judges have to become more visible to prospective litigants.

Although forum marketing increases the transparency of civil justice systems and boosts public trust, it clashes with our traditional perception of courts and judges as being anonymous, disengaged, and dispassionate.[18] When Jeremy Bentham wrote '*publicity is the very soul of justice*',[19] we may safely assume that forum marketing was not exactly what he must have had in mind. International commercial courts are high visibility courts, and the judges at these courts are high visibility judges. Accordingly, international commercial court judges actively promote the courts and their procedural merits, and thereby perform new roles that exceed the remit of traditional judicial roles. A great deal of marketing material and numerous public appearances by judges illustrate how, by engaging in forum marketing, faceless justice is broken down into faces.

5.2. The Implications of Forum Selling with regard to Jurisdiction

Chapter 4 demonstrated that in an attempt to engage in forum selling, some international commercial courts adopt expansive jurisdiction rules and interpretations. While interpretating these rules in ways that facilitate the establishment of their jurisdiction, these courts elevate specific doctrines while they subordinate others. Chief among these doctrines is party autonomy.

The international commercial courts that base their jurisdiction primarily on choice of court agreements, such as the SICC, the CICC, and the European international commercial courts, apply three techniques that facilitate attracting cases. The SICC and the NCC place considerable weight on choice of court agreements; the SICC, the CICC, and the Paris International Chambers accept cases transferred from the ordinary courts; and the SICC allows parties to agree that their dispute is international or commercial. Similarly, the European international commercial courts adopt internationality criteria that leave room for the parties to agree that their dispute is international, and thereby place it under the courts' jurisdiction.

[18] For similar developments regarding national courts, such as the increasing use of social media, see Andrew J.A. Mattan, Kate Puddister and Tamara A. Small, 'Tweet Justice: The Canadian Court's Use of Social Media' (2020) 50 American Review of Canadian Studies 229.

[19] Jeremy Bentham, 'Bentham's Draught for The Organization of Judicial Establishments, Compared with That of the National Assembly, with a Commentary on the Same' in John Bowring (ed), *The Works of Jeremy Bentham*, Volume 4 (Edinburgh, Scot.: William Tait, 1843) 316.

While different international commercial courts opt for different rules and interpretations, what most of these rules have in common is that they prioritise party autonomy over other procedural requirements. For example, the SICC and the NCC emphasise the existence of a choice of court agreement in their favour, as well as the parties' will to litigate before them. In the presence of a choice of court agreement, the SICC is reluctant to deny the exercise of its jurisdiction, even if the dispute lacks territorial links to Singapore, and is more closely connected to another country. In a similar vein, the NCC has ruled in favour of its own jurisdiction, despite the fact that the choice of court agreement failed to fully abide by the formal requirements. The increased emphasis on party autonomy is evident not only in the greater emphasis these courts place on choice of court agreements in their favour but also in the rules that allow parties to agree that their dispute is international or commercial. By subjectivising otherwise objective procedural requirements, the SICC as well as the European international commercial courts expand their jurisdictional reach. It therefore becomes apparent that in the context of these international commercial courts, party autonomy acquires increased significance, and offers the doctrinal justification that enables the courts to cast a wide jurisdiction net.

These expansive jurisdictional approaches are not justified only on the grounds of party autonomy and respect for the parties' will. It has been claimed as well that by respecting the parties' choice of court agreement, and by doing away with procedural technicalities, international commercial courts promote resolution of the dispute on the merits, and thereby the parties' right to access justice on the merits. This approach of access to justice on the merits changes international jurisdiction from being, as traditionally perceived, a state discretion into a state obligation, and therefore gives away the underlying idea that disregarding a choice of court agreement would amount to a denial of justice.[20] The approach also reveals that international commercial courts view procedural requirements as obstacles standing in the way of substantive justice, and therefore treat civil procedure rules as secondary, and as a lesser body of law.

5.3. The Implications of Forum Selling with regard to Procedure

Lastly, international commercial courts engage in forum selling by borrowing some of the features most valued in international commercial arbitration. From among these features, chapter 5 identified party autonomy as the common connecting thread.

[20] Alex Mills, 'Rethinking Jurisdiction in International Law' (2014) 84 The British Yearbook of International Law 187, 225.

As indicated above, parties before different international commercial courts have various options. In particular, they may agree to disapply national rules of evidence; apply to prove foreign law on the basis of submissions; be represented by a foreign lawyer; or apply for proceedings to be conducted in private and confidentially. Although different courts offer divergent options, they all similarly reflect a more party-centric approach. As in international commercial arbitration, where parties may design proceedings on the basis of their agreement, international commercial courts similarly allow parties to shape proceedings according to their will.

By emphasising party autonomy, international commercial courts turn procedure into a contract that the parties' agreement may waive or modify.[21] In this 'contract procedure', the judges' roles are shifting from applying civil procedure rules to judging the agreement of the parties on the rules. Reorienting procedure before international commercial courts to assimilate international commercial arbitration therefore diminishes court intervention, and makes room for the parties and their preferences.

5.4. The Civil Procedure of International Commercial Courts

The foregoing analysis illustrates that forum selling alters the meaning of established doctrines, and prioritises specific doctrines over others. It therefore has normative implications, and reshapes civil procedure. Forum selling encourages international commercial courts to engage in marketing, and thereby adds to the traditional notion of court publicity the idea that courts and judges have to become more visible to prospective litigants. Moreover, party autonomy facilitates forum selling, and is therefore prioritised. By contrast, the *forum non conveniens* doctrine or the territoriality principle impede forum selling and are pushed aside. Similarly, some international commercial courts downplay the significance of formal requirements on choice of court agreements in order to immunise agreements against any objections concerning validity, and thereby preserve their own jurisdiction.

[21] Judith Resnik, 'Procedure As Contract' 2004 (80) Notre Dame Law Review 593, 640. See also David H. Taylor and Sara M. Cliffe, 'Civil Procedure by Contract: A Convoluted Confluence of Private Contract and Public Procedure in Need of Congressional Control', 2002 (35) University of Richmond Law Review 1085; Robert Bone, 'Party Rulemaking: Making Procedural Rules Through Party Choice' (2012) 90 Texas Law Review 1329; Daphna Kapeliuk and Alon Klement, 'Changing the Litigation Game: An Ex-Ante Perspective on Contractualized Procedures' (2013) 91 Texas Law Review 1475.

Party autonomy is a doctrine central to international commercial courts. It motivates the courts' rules and case law on jurisdiction, and it regulates proceedings. Unlike Briggs, who, as noted above, has claimed that civil procedure rules come in a standard, plain vanilla form, international commercial courts place procedure in the hands of the parties, and add a few party autonomy 'sprinkles' to it. Sceptics could point out that even if the courts offer parties various procedural options, this does not necessarily mean that parties will make full use of them, and consequently draft their own miniature civil procedure codes. After all, the example of international commercial arbitration illustrates that even when presented with a variety of procedural choices, parties still prefer institutional arbitration with 'off the shelf' arbitration rules for the conduct of proceedings. Although such considerations are valid, one would hardly question the significance of party autonomy in international commercial arbitration. Similarly, while it remains to be seen whether parties before international commercial courts will make full use of the various procedural options on offer, the courts open the door to party autonomy in a way unmatched by the ordinary courts. The shift from rules to options, even if only a normative one, reshapes our thinking about civil procedure rules, and, as a consequence, it reshapes procedure.

The increasing importance of party autonomy in private international law is not unprecedented. Various international instruments on international jurisdiction, such as the Brussels Ibis Regulation or the Hague Choice of Court Convention, endorse party autonomy, and permit parties to choose any court they prefer, even if the court lacks territorial links to the dispute. Party autonomy plays an even more important role in international commercial arbitration rules: notably the New York Convention and the UNCITRAL Model Law. However, the present study argues that international commercial courts and their procedural rules are in line with these international instruments, not only because they wish to harmonise their rules with international standards but also because such rules facilitate forum selling as well as the aim of the countries hosting international commercial courts to attract and boost dispute resolution. It therefore becomes apparent that, as stated in chapter 4, the forces of harmonisation are more selfish and inward looking.

Similarly, the waning role of territoriality in the determination of international jurisdiction is not without precedent. This decline of territoriality, which has been characteristically described

elsewhere as 'the end of geography',[22] is a broader trend, and is especially evident in internet-related disputes that are difficult or even impossible to pin down to a specific territory.[23] International commercial courts aim at attracting international disputes that may have only a few and simultaneously weak links to the forum, while others, referred to as 'offshore' disputes, may not be linked to the forum at all. The aim of attracting disputes connected only loosely to the forum explains why international commercial courts place increasing importance on choice of court agreements, while they place little weight on the territorial connections between the disputes and the forum. Territoriality would stand in the way of these courts, whose aim is to attract cases and to go global.

Forum selling additionally illustrates how civil procedure rules, especially those on international jurisdiction, may not only facilitate international commercial courts in attracting cases but also promote the broader aims of the countries hosting the courts to rise to dispute resolution hubs or to attract foreign investment. Although research has shed light on how, if appropriately devised, choice of law rules may ultimately promote specific state interests,[24] there is less discussion on how civil procedure rules may similarly promote broader state interests and policy objectives.[25] Forum selling demonstrates that international commercial disputes, although private, may implicate not only the interests of the litigants but also state interests that exceed those of the immediate parties involved. It illustrates that civil procedure does not take place in a vacuum, but in the context of specific policy objectives. Consequently, forum selling turns civil procedure from a field commonly regarded as highly technical, neutral, 'apolitique' or 'innocent' into a politically laden field of law, just like any other field.[26] In the context of international commercial courts, forum selling adds a public perspective to private disputes, and signals that the days of innocence are over.

6. The Implications of Forum Selling with regard to Access to Justice

The literature on forum selling explores whether forum selling leads to a race to the top or a race to the bottom by focusing on its effects, such as whether forum selling speeds up trials,

[22] Daniel Bethlehem, 'The End of Geography: The Changing Nature of the International System and the Challenge to International Law' (2014) 25 The European Journal of International Law 9.
[23] Inter alia Julia Hörnle, *Cross-border Internet Dispute Resolution* (Cambridge University Press 2009) 21.
[24] Symeon C. Symeonides, 'The Publicization of Private International Law: Unilateralism, State Interests, and International Uniformity', in *Codifying Choice of Law Around the World: An International Comparative Analysis* (Oxford University Press 2014); Susanne Lilian Gössl, Rafael Harnos, Leonhard Hübner, Malte Kramme, Tobias Lutzi, Michael Florian Müller, Caroline Sophie Rupp, Johannes Ungerer (eds), *Politik und Internationales Privatrecht* (Mohr Siebeck 2017).
[25] See also Mills (n 20).
[26] See also Symeonides (n 24) 344.

encourages the publication of judgments or results in pro-claimant approaches. Hence, access to justice is the implicit normative standard used in the literature to evaluate forum selling. The introduction to the present research defined access to justice in the context of international commercial courts. It has been noted that in this context access to justice is not understood as an obligation to ensure the parties' ability to access an international commercial court but refers mainly to the fair conduct of proceedings. Understanding access to justice in the context of international commercial courts as the right to access an international commercial court would sit uneasily with the courts' voluntary source of jurisdiction, as well as with their aim of attracting high-value claims involving well-resourced and legally sophisticated parties.

Chapters 3, 4, and 5 examined the implications of forum marketing and forum selling with regard to access to justice. This part pulls these findings together, and answers the associated question of whether forum selling in the context of international commercial disputes leads to a race to the top or a race to the bottom.

The existing literature on forum selling focuses on a competition between domestic courts dealing mainly with non-contractual disputes. Although it acknowledges that forum selling may speed up trials, increase judicial expertise, and enhance the efficiency of the justice system, it nevertheless denounces forum selling because it leads to pro-claimant approaches.[27] In non-contractual settings, where the claimant has the initiative as to where to file the claim, forum selling courts favour claimants as being the actual 'case placers'.[28] Forum selling courts grant claimants procedural advantages that may eventually tilt the scales of justice in their favour. Hence, the literature is in agreement that in non-contractual disputes, forum selling leads to a race to the bottom.

The study of the forum selling of the DIFC Courts dealing with non-contractual disputes confirms this theory. As indicated above, the DIFC Courts have expanded their jurisdiction by adopting exorbitant jurisdiction rules and case law. Such rules may result in pro-claimant approaches, and thereby undermine the right of the defendant to a fair trial. Exorbitant

[27] Jonas Anderson, 'Court Competition for Patent Cases' (2015) 163 University of Pennsylvania Law Review 631, 678-680; Daniel Klerman and Greg Reilly, 'Forum Selling' (2016) 89 Southern California Law Review 241, 245, 302-303; Stefan Bechtold, Jens Frankenreiter and Daniel Klerman, 'Forum Selling Abroad' (2019) 92 Southern California Law Review 487, 512-513, 526-531.
[28] Lynn LoPucki, *Courting Failure: How Competition for Big Cases is Corrupting the Bankruptcy Courts* (University of Michigan Press 2005) 17.

jurisdiction rules favour the claimant by granting them a wider choice of courts and more forum shopping options. They disfavour the defendant by making the international jurisdiction of international commercial courts highly unpredictable. In addition, exorbitant jurisdiction rules deprive not only foreign courts of cases but also the ordinary courts within a country, and may therefore create overlapping jurisdictions and a competition within a single jurisdiction. The rivalry between the DIFC Courts and the ordinary Dubai courts are an extreme illustration of how expansive jurisdiction rules may deprive ordinary courts of cases, and create a domestic competition. Therefore, the present research validates the literary theory, according to which forum selling in non-contractual disputes leads to pro-claimant approaches and to a race to the bottom.

By contrast, the existing literature claims that in contractual disputes, where both parties choose the court, favouring one party over the other would harm the reputation of the court and its decision-makers. In the context of such disputes, pro-claimant approaches are therefore an unsuitable forum selling technique. Consequently, it is claimed that in contractual disputes, forum selling leads to a race to the top. It encourages courts to experiment, innovate, and improve their procedural rules and decision-making processes in order to become more attractive to prospective litigants.[29]

The study of international commercial courts, which derive their jurisdiction primarily from choice of court agreements, and therefore deal mainly with contractual disputes, calls into question the prevalent account that forum selling in contractual disputes leads to a one-way race to the top.

In the context of international commercial courts, forum selling may enhance access to justice in international commercial disputes. International commercial courts promise litigants increased judicial expertise, together with proceedings attuned to the particularities of international commercial disputes. The courts focus on a broad array of civil and commercial disputes. However, the international, cross-border character of these disputes adds some degree of complexity. It gives rise to conflicts of laws, conflicts of jurisdictions, and the application of foreign laws. The fact that most international commercial courts are staffed with judges

[29] See Craig Allen Nard and John F. Duffy, 'Rethinking Patent Law's Uniformity Principle' (2007) 101 Northwestern University Law Review 1619, 1650.

versed in international commercial disputes promises affinity with such issues as well as greater private international law specialisation. Furthermore, the courts' rules allow parties to design proceedings by their agreement, and thereby offer increased flexibility and customisation. Similarly, the distinctive features of international commercial courts improve court litigation. For instance, the use of English as the court language saves parties from translation obligations as well as from the resulting time and costs. It also opens up the courts to parties from different parts of the world. Although some international commercial courts are more expensive than the ordinary courts, they are nevertheless cheaper than international commercial arbitration. These courts therefore offer a real and a cheaper alternative. This is expected to improve commercial dispute resolution, especially for small- and medium-sized enterprises unable to afford the rising costs of arbitration. In terms of innovation, international commercial courts stretch the imagination of justice. Multiple innovative features, such as the appointment of foreign nationality judges or the conversion of judgments into arbitral awards, demonstrate how the competition between courts and dispute resolution methods may generate ideas and spur innovation. If proven successful, these innovations may have a positive spill-over effect on the ordinary courts, and serve to cross-fertilise the justice system. All these factors reveal, that in the attempt to become more attractive to prospective litigants, and to engage in forum selling international commercial courts offer more specialised, more flexible, and cheaper compared to arbitration procedures.

However, the present research shows that the forum selling of international commercial courts may also have a negative impact on access to justice. Chapter 3 argued that forum marketing may mislead parties in their choice of an international commercial court, and may undermine the independence and impartiality of the judiciary. Chapter 4 illustrated that the expansive jurisdiction rules of international commercial courts may undermine the parties' right to a fair trial. Lastly, chapter 5 demonstrated that some of these courts' arbitration-inspired features could threaten the rights of third parties to a fair trial, call into question the independence and impartiality of their judges, and undermine the role of courts as public institutions.

First, forum marketing may be deceptive and mislead parties in their choice of court. As chapter 3 explained in more detail, some international commercial courts in Europe limit the use of English as the court language to specific parts of the procedure, while their arbitration and common law features are scarce and limited in scope. As regards international commercial courts in Asia, due to the lack of international treaties on the recognition and enforcement of

court judgments, these courts attempt to enhance the recognition and enforcement prospects of their judgments abroad by concluding Memoranda of Guidance with foreign courts. However, these are legally non-binding documents and their potential to enhance the recognition and enforcement of international commercial court judgments abroad is therefore limited. By overstating the procedural advantages of international commercial courts, forum marketing may give parties the wrong impression that some of these courts use English throughout court proceedings; that they strongly resemble arbitration or common law courts; and that the Memoranda of Guidance could actually facilitate the recognition and enforcement of court judgments abroad.

Moreover, forum marketing may raise concerns about independence and impartiality, especially in the case of international judges who serve at various international commercial courts, or who are at the same time engaged in parallel activities as lawyers and arbitrators. Furthermore, the close relationship between international commercial courts and the bar encourages the courts to adopt a more customer-oriented approach, and could give rise to procedural accommodations and a procedural *quid pro quo*.

Second, the SICC and the NCC downplay the lack of territorial links between the dispute and the forum, or disregard the formal irregularities of choice of court agreements. However, downplaying the lack of territorial links may undermine the procedural rights of the parties, create overlapping jurisdictions, and deprive foreign courts of cases that otherwise would have been brought before them. Similarly, disregarding formal requirements pertaining to choice of court agreements may undermine the parties' procedural rights. Formal requirements safeguard the agreement of both parties on the chosen court, and thereby take into consideration unequal bargaining positions. Therefore, by minimising the significance of formal requirements, international commercial courts downplay their function of ensuring a fair trial.

Third, the arbitration features of international commercial courts may similarly violate the parties' right to a fair trial and access to justice. As observed, the SICC bases its jurisdiction primarily on choice of court agreements. Nevertheless, the SICC rules allow the joinder of third parties despite their opposing will. It is claimed that in this way the court counters the shortcomings of international commercial arbitration and, in particular, the inability to join third parties or consolidate arbitration proceedings. The joinder of third parties against their will is in stark contrast to the court's voluntary source of jurisdiction and its respect for party

autonomy. The involuntary joinder of third parties does not just reveal that the SICC is adhering to party autonomy in an inconsistent manner. More significantly, it violates the right of third parties to a fair trial, especially if we take into consideration that the SICC charges court fees that are significantly higher than those of the ordinary courts. It therefore becomes apparent that international commercial courts may not borrow one of arbitration's most valued features – namely, its consent-based procedural lay-out – without at the same time having to pay the price of consent: namely, its relative nature.

As indicated, international commercial courts in Asia have appointed foreign nationality judges – referred to as international judges – to their bench. The appointment conditions of these judges and their multiple roles may give rise to questions regarding independence and impartiality. In particular, international judges lack tenure, and rely on the local governments for their short-term appointments. These judges may therefore be exposed to executive pressures. The risk of 'executive capture' is especially acute for international commercial courts in countries with obscure safeguards relating to independence and impartiality. Furthermore, the fact that some international judges are simultaneously practising as arbitrators may give rise to 'double-hatting' practices and create conflicts of interest.

Lastly, the SICC allows parties in 'offshore' disputes to apply for proceedings to be conducted in private and confidentially. According to commentators, the conduct of such proceedings at the SICC does not clash with national public policy, since 'offshore' cases are only linked tenuously to Singapore. However, one could object that in addition to a national public policy there is also a transnational public policy, according to which court trials are required to be open to the public. The public character of court proceedings not only safeguards the parties' right to a fair trial but also fulfils a broader public function. It guarantees the accountability of the judiciary and stimulates public debate on legal rules and jurisprudence. Therefore, private and confidential court proceedings at the SICC, even if premised upon the parties' consent, violate a transnational public order. Moreover, judgments rendered in cases where publicity was excluded could clash with the national public policy of the enforcing state, and therefore be refused recognition and enforcement abroad. Although the SICC is the only international commercial court that allows for private and confidential proceedings in offshore disputes, the most recent proposal for the establishment of Chambers for International Commercial Disputes has similarly responded to parties' preference for private and confidential proceedings, and

expands the parties' right to request confidentiality orders.[30] Consequently, international commercial courts are gradually opening the door to private and confidential court proceedings.

It has been argued in the present research, that as international commercial disputes are crossing borders, and as international commercial courts are giving rise to a global civil procedure, it is necessary to identify a global procedural public policy that sets the outer limits of party autonomy in civil procedure, and thereby safeguards access to justice. While international commercial courts are prioritising party autonomy over other procedural requirements, they must safeguard the will of both parties to litigate before an international commercial court. Although these courts enjoy the coercive powers of public courts, they must not join third parties to proceedings against their will. While international judges bring with them increased expertise in cross-border commercial disputes, strict statutory provisions are necessary to ensure their independence and impartiality. While international commercial courts allow parties to design proceedings by way of their agreement, the publicity of court trials should be exempted from the parties' agreement. The research identifies the parties' right to a fair trial, the impartiality and independency of the judiciary, and the publicity of trials as core elements of a transnational public policy on access to justice.

In addition, as the comic in the starting page of this research illustrates international commercial courts may give rise to unequal access to justice. As explained in more detail in Chapter 3, the innovative features of international commercial courts mainly aim at appealing to lawyers in international commercial disputes, these being the actual 'forum shoppers'. Given that lawyers have a preference for familiar procedures, some of the features of international commercial courts are not necessarily 'good' features but primarily familiar features.[31] Familiarity therefore explains some of the rules and practices of international commercial courts and largely defines the courts' institutional and procedural lay out. Furthermore, according to Chapter 3, the bar was actively involved in the legislative processes that preceded the establishment of international commercial courts. Well-known law firms opined on the courts' rules and practices. All this lays bare, that a niche of the bar, commercial litigators, exercise disproportionate control over international commercial courts. As the preferences of these litigators are additionally labelled 'efficient' they could easily find their way into the

[30] German Chambers Legislative Proposal 2021, Article 2 – Amending the Code of Civil Procedure (*Änderung der Zivilprozessordnung*), Draft Article 510 (5) and (6).
[31] King (n 16) 250.

ordinary courts and shape ordinary court proceedings. Forum marketing facilitates the labelling of these rules and procedures as efficient and furthers their dissemination. By contrast, other types of litigation, such as family or criminal law, may be underestimated and undervalued.[32] Subjecting the law and the courts to market pressures empowers those actors in a position to influence the law-making process and undermines broader participation and democratic values.[33] Thus, even if international commercial courts improve civil court proceedings they will do so for a specific type of parties, namely multinational corporations and the multinational law firms representing them in cross-border commercial disputes. International commercial courts may therefore leave some judges, lawyers and parties behind. They might give rise to a two-tier justice system and create procedural inequality.

From a broader societal standpoint, forum selling signals the commodification of public justice. This is especially evident in the economic reasons behind the establishment of international commercial courts, the higher fees imposed by some courts, and their forum marketing. The use of marketing practices in a traditionally non-market space bears the risk of prioritising market values over social values.[34] For instance, the argument that although some international commercial courts charge higher court fees than ordinary courts, they are nevertheless cheaper than international commercial arbitration, emphasises the exchange value of international commercial courts, and obstructs discussions on 'whether' and 'how expensive' public courts should be. Likewise, the claim that any proceeds from higher court fees could be poured into funding the ordinary courts and cross-subsidise the justice system echoes the growing economic thinking in justice, and reminds as of the 'trickle-down' theory and the economics of first-class airplane tickets. The emphasis on its economic salience highlights justice as a tool, instrumental for the attainment of economic gains; an industry in the service of other industries.

Perceiving justice as the means to an end means considering it to be an empty vessel that can be used to achieve any end.[35] Even if both parties to a choice of court agreement have equal bargaining power, and therefore the choice of an international commercial court is truly theirs, and even if the circumstances that give rise to conflicts of interest are exceptional, and therefore

[32] Brooke D. Coleman, 'One Percent Procedure' (2016) 91 Washington Law Review 1005, 1041; King (16) 252.
[33] Ralf Michaels, 'Make or Buy – A Public Market for Legal Transplants?' 28 in Horst Eidenmüller (ed.), *Regulatory Competition in Contract Law and Dispute Resolution* (C.H. Beck 2013).
[34] See also Christine Schwöbel-Patel, *Marketing Global Justice: The Political Economy of International Criminal Law* (Cambridge University Press 2021) 269.
[35] Brian Z. Tamanaha, *Law as a Means to an End, Threat to the Rule of Law* (Cambridge University Press 2006) 219.

represent lesser concerns, treating justice as the means to an end is of a much greater concern. The instrumental view of justice downplays the built-in, principled value of civil justice, which lies in the service of the public good. Thus, similar to other types of regulatory competition,[36] the competition of civil justice systems and forum selling, even if not detrimental to the fair trial rights of the parties, has negative externalities for third parties and, more significantly, for society at large.[37] Forum selling cultivates a marketing culture that reduces justice to a commodity, and minimises its public role.[38] The present research has highlighted multiple instances in which public court features should and could be safeguarded, in order to prevent forum selling and to preserve the role of courts as public institutions.

7. Success Stories

As this study draws to a close, one might expect a discussion on the outcomes of forum selling; an account of the forum selling winners and the forum selling losers. Have the international commercial courts that engage in forum selling been successfully in attracting cases? Have some courts failed to acquire a significant caseload? While international commercial courts in the Middle East, Kazakhstan, and Singapore have gained a significant caseload, those in Europe are trailing behind their Asian counterparts. However, given that European international commercial courts have been established only recently, it would be too soon to evaluate their potential to become popular among litigants and to attract cases.

Nevertheless, an account of the courts' current caseload could offer insights into their present state of development, and signal future trends. At the time of writing, the most recent available report is the 2021 Portland Commercial Courts Report, which states that the London Commercial Court docket remains robust. Despite the proliferation of international commercial courts around the world, and the increased competition in international commercial dispute resolution, between April 2020 and March 2021, the London Commercial Court had a record year compared to the previous six years.[39] Litigants from the United States and Russia were

[36] Inter alia, Lucian Arye Bebchuk, 'Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law' (1992) 105 Harvard Law Review 1435.

[37] Thomas Schultz and Clément Bachmann, 'International Commercial Courts: Possible Problematic Social Externalities of a Dispute Resolution Product with Good Market Potential' 52 in Stavros Brekoulakis and Georgios Dimitropoulos (eds), *International Commercial Courts: The Future of Transnational Litigation* (Cambridge University Press 2022).

[38] See also Michael J. Sandel, *What Money Can't Buy, The Moral Limits of Markets* (Penguin 2013).

[39] Portland, *Commercial Courts Report*, 1 available at <https://portland-communications.com/publications/commercial-courts-report-2021/> accessed January 2022. See also Singapore International Dispute Resolution Academy, *International Dispute Resolution Survey: 2020 Final Report*, Exhibit 8.2.3, available at <https://sidra.smu.edu.sg/research-program/international-dispute-resolution-survey/sidra-survey-2020> (hereafter: SIDRA International Dispute Resolution Survey 2020).

the most common foreign litigants.[40] However, while the London Commercial Court has maintained its pre-eminence, it appears that two groups of litigants are slowly fleeing its premises.

First, the report finds a decline in the number of litigants from European Union (EU) Member States. According to the report, the decline in EU litigants reflects a steady trend since the 2016 'Brexit' referendum, and is associated with 'post-Brexit' enforcement uncertainties as well as with the establishment of international commercial courts in the Netherlands, Germany, and France.[41] Second, the report charts a decline in litigants from Singapore. This decline is linked to the increasing larger docket of the Singapore International Arbitration Centre and the establishment of the SICC.[42]

Although the decline in European litigants before the London Commercial Court could be attributed to 'post-Brexit' uncertainties, it is doubtful whether it could also be attributed to the establishment of international commercial courts in Europe, given their small caseload. The decline in Singaporean litigants before English courts is in line with the present research, according to which the SICC has multiple innovative features, and actively engages in forum selling. Furthermore, the fact that litigants consider geographical proximity an important factor when choosing an international commercial court[43] could be an additional reason that the impact of international commercial courts on the docket of the London Commercial Court is more evident in the case of the Asian courts.

As regards international commercial courts and arbitration, it is similarly quite early to judge the appeal of these courts to parties with a preference for arbitration. Compared to international commercial arbitration, the tiny caseload of international commercial courts suggests that they are not yet a challenge. Because reputation and established market practices drive choice of court and dispute resolution methods, it will take time for international commercial courts to cultivate a positive reputation and to persuade parties to rewrite their dispute resolution clauses. It should also be noted that the success of one dispute resolution method over others does not lie exclusively in parties' preferences. International commercial arbitration and its increased

[40] Ibid., 2. See also Pamela Bookman, 'Litigation Isolationism' (2015) 67 Stanford Law Review 1081; Delphine Nougayréde, 'Outsourcing Law in Post-Soviet Russia' (2013) 3 Journal of Eurasian Law 383.
[41] Ibid., 2.
[42] Ibid., 5. See also Queen Mary University of London, School of International Arbitration, 2021 International Arbitration Survey: Adapting Arbitration to a Changing World, Charts 2, 3 and 6, available at <https://arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/> accessed January 2022.
[43] SIDRA International Dispute Resolution Survey 2020, Exhibit 8.2.1.

popularity in some countries is a result of political support and broader 'arbitration-friendly' state policies.[44]

The present research has demonstrated the benefits of international commercial courts, and highlighted the safeguards necessary to prevent their negative consequences. My thesis is that international commercial courts and their procedural merits do not exclusively hold the keys to an attractive and successful dispute resolution system but that forum marketing and forum selling have a significant role to play.

Future research must focus on two topics that this study has not examined. First, it needs to explore whether and how national rules on lawyers' fees and the way these are allocated could make some international commercial courts more attractive than others. Second, it needs to examine how international commercial courts treat substantive law issues, and whether the forum selling of international commercial courts extends to their decision-making in matters involving substantive law.

[44] Joshua Karton, *The Culture of International Arbitration and the Evolution of Contract Law* (Oxford University Press 2013) 70; Fathi Massoud, 'International Arbitration and Judicial Politics in Authoritarian States' (2014) 39 Law and Social Inquiry 1.

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Summary

In recent years, international commercial courts, also known as international business courts, have been mushrooming in Europe and in Asia. Although the establishment of international commercial courts in Europe goes back to older initiatives to improve cross-border commercial litigation, their creation was accelerated by Brexit and by the aim of attracting litigation away from London. In France, one may find the International Chambers within the Paris Commercial Court and the Paris Court of Appeal inaugurated in 2011 and 2018, respectively. In 2017, Germany established a Chamber for International Commercial Disputes within the Frankfurt am Main Regional Court. In May 2018, a similar chamber was established within the Hamburg Regional Court, and in November 2020, Commercial Courts were established within the Stuttgart and Mannheim Regional Courts. In January 2019, the Netherlands Commercial Court (NCC) opened its doors to prospective litigants. Moving eastwards from Europe, most Asian international commercial courts predate their European counterparts. In 2005, the Emirate of Dubai established the Dubai International Financial Centre (DIFC) Courts within the DIFC, a special economic zone whose purpose is to attract foreign investment. Other investment-driven international commercial courts established in special economic zones are the Qatar International Court (QIC) (2009), the Abu Dhabi Global Market (ADGM) Courts (2015), and the Astana International Financial Centre (AIFC) Courts (2018). In 2015, Singapore established the Singapore International Commercial Court (SICC) with the aim of becoming an Asian dispute resolution hub. Lastly, in 2018, China launched the China International Commercial Courts (CICC) to resolve disputes arising from the 'Belt and Road Initiative'.

International commercial courts are national courts that focus on cross-border commercial disputes. Modelled on the London Commercial Court and international commercial arbitration, these new 'species' of courts have various features that distinguish them from ordinary courts. For example, some international commercial courts use English as the court language, while others appoint foreign nationality judges to their bench; these appointees are referred to as 'international judges'.

International commercial courts have become a hot topic in the academic literature. A significant body of research has focused mainly on these courts' worldwide proliferation as well as their innovative features in terms of court administration and procedural rules. While the literature acknowledges that, unlike ordinary courts, international commercial courts are the expression of a competition among civil justice systems, and their intention is to attract

cases, little is known about how this aim actually shapes the courts' rules, case law, and practices. With regard to whether and how international commercial courts are engaging in forum selling, the topic has remained unexplored.

The present research examines international commercial courts from a novel perspective: that of forum selling. It answers the main, twofold research question: *How are international commercial courts engaging in forum selling, and what are the implications of forum selling with regard to civil procedure and access to justice?* Drawing from interviews with lawyers and judges as well as from the study of case law and from academic literature, the research presents a comparative analysis of how different international commercial courts make themselves more attractive to prospective litigants, and it identifies forum selling techniques. Finally, the research discusses how forum selling reshapes civil procedure, and looks at the implications of forum selling with regard to access to justice. On the basis of this analysis, the research re-examines the existing theories on forum selling, and refines them in the specific context of international commercial courts.

A host of reasons are given to explain why international commercial courts engage in forum selling. These courts are part of broader state policies to improve the business climate, attract foreign investment, and create dispute resolution business. The research argues that the economic reasons behind the establishment of international commercial courts function simultaneously as forum selling motives and prompt for the courts to engage in forum selling. In addition, forum selling is explained in some of the courts' features. Higher court fees and the case-dependent remuneration of international judges at some international commercial courts may prompt the courts and their judges to engage in forum selling. However, these economic motives do not explain fully why international commercial courts engage in this activity. Reputational motives also lie behind forum selling. International commercial courts focus mainly on cross-border disputes involving parties from different jurisdictions as well as high-value claims. They therefore promise judges and the surrounding justice systems an enhanced and worldwide reputation. Lastly, the research identifies forum shopping and the voluntary jurisdiction of international commercial courts as complementary explanations for the courts' forum selling practices. International and national jurisdiction rules that allow parties to choose any court they prefer and permit forum shopping create a fertile ground for forum selling. In addition, the fact that most international commercial courts lack compulsory jurisdiction, and their jurisdiction depends on choice of court agreements, limits the number of incoming cases and turns caseload into an existential issue.

After first exploring why international commercial courts engage in forum selling, the research then identifies three main forum selling techniques: namely, engaging in marketing; casting a wide jurisdiction net; and emulating some of the most valuable features that characterise international commercial arbitration.

The first forum selling technique is forum marketing, which is defined as the use of strategic communication and advertising by forum selling courts. International commercial courts do not make themselves more attractive to prospective litigants simply by taking part in forum selling; they actively reach out to litigants and promote their procedural traits by engaging in forum marketing. The reasons behind forum marketing are largely similar to those behind forum selling. However, certain reasons that underlie forum marketing are different from the common ones that prompt courts to engage in forum selling, and they are intrinsic to international commercial courts. The courts' voluntary source of jurisdiction, the jurisdictional overlap with other courts and dispute resolution methods, and the fact that international commercial courts are reputation sensitive lead them to take part in forum marketing. They do this by employing various techniques: for instance, adopting brand names; associating their reputation with the established reputation of the cities and the buildings hosting them; seeking the endorsement of internationally renowned legal figures; creating a network with other jurisdictions and commercial courts; and showcasing their procedural innovations through academic literature and case law. In addition, some of the courts' innovative features are limited in scope, and therefore contribute mainly to the marketing of international commercial courts by sending signals of quality and familiarity to foreign litigants.

The second forum selling technique used by international commercial courts involves rules and case law that facilitate the establishing of jurisdiction. Although different courts opt for different rules and interpretations, what these all have in common is that they enable international commercial courts to cast a wide jurisdiction net, and may therefore function as a forum selling technique. The research identifies three case-attracting mechanisms found among the SICC, the NCC, the CICC, the Paris International Chambers, and the German Chambers for International Commercial Disputes. These mechanisms are the increased emphasis on choice of court agreements; the transfer jurisdiction; and the adoption of party-controlled jurisdictional requirements. The SICC and the NCC prioritise choice of court agreements over other jurisdictional requirements; the SICC, the CICC, and the Paris International Chambers accept cases transferred by the ordinary courts; and the SICC allows parties to agree that their dispute is international or commercial despite the absence of objective international or

commercial elements. Although the European international commercial courts base their jurisdiction on objectively international disputes, various provisions leave some leeway for parties to 'create' an international dispute simply by their mutual agreement. The research also illustrates how the DIFC Courts have used a broad array of jurisdiction rules that facilitate the establishment of their jurisdiction, and have in addition pursued an overly expansive interpretation of these rules. As such, the DIFC Courts are an extreme illustration of a forum selling court.

The third and last forum selling technique involves the courts' arbitration-like features. In order to engage in forum selling and to compete effectively with international commercial arbitration, international commercial courts emulate some of arbitration's most valued features. Therefore, while arbitration is claimed to have become increasingly judicialised, international commercial courts and their arbitration features display an opposite trend: the 'arbitralisation' of public courts and justice. In particular, parties before the SICC and the NCC may, upon agreement, disapply national rules of evidence; parties before the SICC and the DIFC Courts may apply to prove foreign law on the basis of submissions; parties before the SICC may be represented by a foreign lawyer, and apply for proceedings to be conducted in private and confidentially; and parties before the DIFC Courts may apply for a court judgment to be converted into an arbitral award. Although different international commercial courts offer parties a variety of options, they all similarly reflect a more party-centric approach as well as the increasing significance of party autonomy in civil procedure. Just as in international commercial arbitration, where parties may design proceedings by their agreement, international commercial courts offer parties a broad array of procedural options.

Forum selling alters the meaning of established doctrines and prioritises specific doctrines over others. It therefore has normative implications and reshapes civil procedure. Forum selling encourages international commercial courts to engage in marketing. and thereby adds to the traditional notion of court publicity the idea that courts and judges have to become more visible to prospective litigants. Furthermore, forum selling encourages international commercial courts to prioritise party autonomy over other procedural requirements. Party autonomy facilitates forum selling and is therefore prioritised, while the *forum non conveniens* doctrine or the territoriality principle impede forum selling and are pushed aside. Similarly, some international commercial courts downplay the significance of formal requirements on choice of court agreements in order to immunise agreements against any validity objections and to

preserve their own jurisdiction. By placing increased emphasis on party autonomy, forum selling accelerates the broader trend relating to the increasing role of party autonomy in civil procedure and the corresponding diminishing role of territoriality. Forum selling additionally illustrates how civil procedure rules, especially rules on international jurisdiction, may not only facilitate international commercial courts in attracting cases but also promote the corresponding aim of the countries hosting the courts to attract foreign investment and dispute resolution. Forum selling therefore turns civil procedure from being a field commonly regarded as highly technical and 'apolitique' into a politically laden field of law, just like every other field of law.

Finally, the research examines the implications of forum selling as regards access to justice, and thereby answers the question as to whether forum selling in the context of international commercial courts leads to a race to the top or a race to the bottom. For that purpose, the study draws a distinction between contractual and non-contractual disputes, arguing that in non-contractual disputes forum selling results in exorbitant jurisdiction rules and pro-claimant approaches. As to contractual disputes, the research argues that the forum selling done by international commercial courts may enhance access to justice by increasing judicial specialisation, speeding up trials, and encouraging procedural innovations. However, under certain circumstances, forum selling may also undermine access to justice. In particular, expansive jurisdiction rules and case law may undermine the parties' agreement on the chosen court. The joining of third parties to international commercial courts' proceedings against their will may undermine their right to a fair trial. In addition, the parallel judicial appointments and professional activities of international judges may give rise to conflicts of interest and call into question the judges' independence and impartiality. Lastly, the ability of the parties to agree on the conduct of proceedings privately and confidentially at the SICC excludes public access to court trials and undermines the role of courts as public institutions. However, even if the above circumstances are exceptional, and therefore forum selling does not pose a serious risk to the parties' right to a fair trial, forum selling nevertheless has negative externalities with regard to third parties and, more significantly, to society at large. From a broader societal standpoint, forum selling signals the commodification of civil justice, and it minimises the public role of courts by viewing them as the means to achieve economic gains.

Samenvatting

De afgelopen jaren zijn internationale handelsrechtbanken, ook wel internationale business rechtbanken genoemd, in Europa en Azië als paddenstoelen uit de grond geschoten. Hoewel de oprichting van internationale handelsrechtbanken in Europa begon met oudere initiatieven om grensoverschrijdende handelsgeschillen te verbeteren, werd hun oprichting versneld door Brexit en met het doel om geschillen weg te halen uit Londen. In Frankrijk zijn de internationale kamers van het Tribunal de Commerce en de Cour d'Appel de Paris respectievelijk in 2011 en 2018 ingehuldigd. In 2017 richtte Duitsland een kamer voor internationale handelsgeschillen op binnen de regionale rechtbank van Frankfurt am Main. In mei 2018 werd een soortgelijke kamer opgericht binnen de regionale rechtbank van Hamburg, en in november 2020 werden handelsrechtbanken opgericht binnen de regionale rechtbanken van Stuttgart en Mannheim. In januari 2019 opende de Netherlands Commercial Court (NCC) haar deuren voor potentiële procespartijen. Meer oostelijk van Europa zien we dat de meeste internationale handelsrechtbanken in Azië ouder zijn dan hun Europese tegenhangers. In 2005 heeft Dubai de Dubai International Financial Centre (DIFC) rechtbanken opgericht binnen de DIFC, een speciale economische zone die tot doel heeft buitenlandse investeringen aan te trekken. Andere door investeringen aangestuurde internationale handelsrechtbanken die in speciale economische zones zijn gevestigd, zijn de Qatar International Court (QIC) (2009), de Abu Dhabi Global Market (ADGM) Courts (2015), en de Astana International Financial Centre (AIFC) Court (2018). In 2015 heeft Singapore de Singapore International Commercial Court (SICC) opgericht met als doel een Aziatische hub voor geschillenbeslechting te worden. Ten slotte heeft China in 2018 de China International Commercial Courts (CICC) opgericht om geschillen te beslechten die voortvloeien uit het 'Belt and Road Initiative'.

Internationale handelsrechtbanken zijn nationale rechtbanken die zich richten op grensoverschrijdende handelsgeschillen. Naar het voorbeeld van de London Commercial Court en de internationale handelsarbitrage, hebben deze nieuwe 'soorten' rechtbanken verschillende kenmerken die hen onderscheiden van de gewone rechtbanken. Sommige internationale handelsrechtbanken gebruiken bijvoorbeeld Engels als gerechtstaal, terwijl andere rechters met een buitenlandse nationaliteit benoemen; deze rechters worden dan "internationale rechters" genoemd.

De internationale handelsrechtbanken zijn een veelbesproken onderwerp geworden in de academische literatuur. Een aanzienlijk deel van het onderzoek heeft zich toegespitst op de

wereldwijde verspreiding van deze rechtbanken en op hun innoverende kenmerken op het gebied van gerechtelijke administratie en procedurevoorschriften. Hoewel in de literatuur wordt erkend dat de internationale handelsrechtbanken, in tegenstelling tot de gewone rechtbanken, de uitdrukking zijn van een concurrentiestrijd tussen civiele rechtssystemen en dat het hun bedoeling is zaken aan te trekken, is er weinig bekend over de wijze waarop dit streven daadwerkelijk vorm geeft aan de regels, de rechtspraak en de praktijken van de rechtbanken. De vraag of en hoe internationale handelsrechtbanken aan forum selling doen, is nog niet onderzocht.

Dit onderzoek bestudeert de internationale handelsrechtbanken vanuit een nieuw perspectief: dat van forum selling. Het beantwoordt de belangrijkste onderzoeksvraag: *Op welke manier doen internationale handelsrechtbanken aan forum selling, en wat zijn de implicaties van forum selling met betrekking tot de burgerlijke rechtsvordering en de toegang tot de rechter?* Op basis van interviews met advocaten en rechters en van de bestudering van jurisprudentie en academische literatuur presenteert het onderzoek een vergelijkende analyse van de wijze waarop verschillende internationale handelsrechtbanken zichzelf aantrekkelijker maken voor potentiële procespartijen, en identificeert het forum selling-technieken. Ten slotte bespreekt het onderzoek hoe forum selling de civiele procedure hervormt, en bekijkt het de implicaties van forum selling met betrekking tot de toegang tot de rechter. Op basis van deze analyse herbekijkt het onderzoek de bestaande theorieën over forum selling, en verfijnt het deze in de specifieke context van internationale handelsrechtbanken.

Er worden tal van redenen aangevoerd om te verklaren waarom internationale handelsrechtbanken aan forum selling doen. Deze rechtbanken maken deel uit van een breder overheidsbeleid om het ondernemingsklimaat te verbeteren, buitenlandse investeringen aan te trekken en geschillenbeslechting tot stand te brengen. Het onderzoek betoogt dat de economische redenen achter de oprichting van internationale handelsrechtbanken functioneren als motieven voor forum selling en de rechtbanken ertoe aanzetten aan forum selling te doen. Bovendien vindt forum selling zijn verklaring in sommige kenmerken van de rechtbanken. Hogere griffierechten en de zaakafhankelijke beloning van internationale rechters bij sommige internationale handelsrechtbanken kunnen de rechtbanken en hun rechters ertoe aanzetten over te gaan tot forum selling. Deze economische motieven verklaren echter niet volledig waarom internationale handelsrechtbanken aan forum selling doen. Ook reputatiemotieven liggen aan forum selling ten grondslag. Omdat internationale handelsrechtbanken zich vooral richten op

grensoverschrijdende geschillen waarbij partijen uit verschillende jurisdicties betrokken zijn en op vorderingen met een hoge waarde, beloven zij de rechters en de omringende rechtssystemen een verbeterde en wereldwijde reputatie. Ten slotte identificeert het onderzoek forumshopping en de vrijwillige bevoegdheid van internationale handelsrechtbanken als aanvullende verklaringen voor forum selling. Internationale en nationale bevoegdheidsregels die partijen toestaan om de rechtbank van hun keuze te kiezen en die forumshopping mogelijk maken, creëren een vruchtbare bodem voor forum selling. Bovendien beperkt het feit dat de meeste internationale handelsrechtbanken geen verplichte rechtsmacht hebben, en hun rechtsmacht afhankelijk is van forumkeuzeovereenkomsten, het aantal inkomende zaken en maakt het de werklast tot een existentieel probleem.

Na eerst te hebben onderzocht waarom internationale handelsrechtbanken aan forum selling doen, identificeert het onderzoek vervolgens drie belangrijke forum selling: namelijk marketing, een breed jurisdictienet werpen, en enkele van de meest waardevolle kenmerken van internationale handelsarbitrage emuleren.

De eerste forum selling techniek is forum marketing, dat wordt omschreven als het gebruik van strategische communicatie en reclame door rechtbanken. De internationale handelsrechtbanken maken zichzelf niet aantrekkelijker voor potentiële procespartijen door gewoon aan forum selling te doen; zij benaderen procespartijen actief en promoten hun procedurele kenmerken door aan forum marketing te doen. De redenen voor forummarketing zijn grotendeels vergelijkbaar met die voor forum selling. Bepaalde redenen die aan forummarketing ten grondslag liggen, verschillen echter van de gebruikelijke redenen die rechtbanken ertoe aanzetten aan forum selling te doen, en zijn specifiek voor internationale handelsrechtbanken. De vrijwillige bron van bevoegdheid van de rechtbanken, de bevoegdheidsoverlapping met andere rechtbanken en geschillenbeslechtingsmethoden, en het feit dat internationale handelsrechtbanken reputatiegevoelig zijn, brengen hen ertoe aan forummarketing te doen. Zij doen dit door gebruik te maken van verschillende technieken: bijvoorbeeld het aannemen van merknamen; het associëren van hun reputatie met de gevestigde reputatie van de steden en de gebouwen waarin zij zijn gevestigd; het zoeken van de steun van internationaal bekende juridische figuren; het creëren van een netwerk met andere rechtsgebieden en handelsrechtbanken; en het onder de aandacht brengen van hun procedurele innovaties door middel van academische literatuur en jurisprudentie. Sommige van de innovatieve kenmerken van de rechtbanken zijn bovendien beperkt in reikwijdte, en dragen daarom voornamelijk bij

aan de marketing van internationale handelsrechtbanken door aan buitenlandse procespartijen signalen van kwaliteit en vertrouwdheid af te geven.

De tweede forum selling techniek die door de internationale handelsrechters wordt gebruikt, omvat regels en jurisprudentie die de vaststelling van de rechterlijke bevoegdheid vergemakkelijken. Hoewel verschillende rechtbanken voor verschillende regels en interpretaties kiezen, hebben zij gemeen dat zij de internationale handelsrechters een breed bevoegdheidsnet toekennen. Dit zou kunnen worden gekenmerkt als forum selling techniek. Het onderzoek identificeert drie mechanismen om zaken aan te trekken die worden aangetroffen bij de SICC, de NCC, de CICC, de Paris International Chambers en de German Chambers for International Commercial Disputes. Deze mechanismen zijn de toegenomen nadruk op forumkeuzeovereenkomsten, de overdracht van rechtsmacht, en de vaststelling van door de partijen bepaalde vereisten inzake rechtsmacht. De SICC en de NCC geven voorrang aan forumkeuzeovereenkomsten boven andere bevoegdheidsvereisten; de SICC, de CICC en de Paris International Chambers aanvaarden zaken die door de gewone rechtbanken zijn overgedragen; en de SICC staat partijen toe overeen te komen dat hun geschil internationaal of commercieel is ondanks de afwezigheid van objectieve internationale of commerciële elementen. Hoewel de Europese internationale handelsrechtbanken hun bevoegdheid baseren op objectief internationale geschillen, laten diverse bepalingen partijen enige speelruimte om een internationaal geschil te "creëren" door dit in hun overeenkomst te bepalen. Het onderzoek illustreert ook hoe de DIFC-rechtbanken gebruik hebben gemaakt van een breed scala van bevoegdheidsregels die de vestiging van hun rechtsmacht vergemakkelijken, en bovendien een al te ruime uitlegging van deze regels hebben gehanteerd. Als zodanig zijn de DIFC-rechtbanken een extreme illustratie van rechtbanken die gebruik maken van forum selling.

De derde en laatste forum selling techniek heeft betrekking op arbitrage-achtige kenmerken van rechtbanken. Om aan forum selling te doen en doeltreffend met internationale handelsarbitrage te concurreren, imiteren internationale handelsrechtbanken een aantal van de meest gewaardeerde kenmerken van arbitrage. Terwijl wordt beweerd dat arbitrage steeds meer een zaak van de rechter is geworden, vertonen de internationale handelsrechtbanken en hun arbitragekenmerken een tegengestelde tendens: de "arbitralisering" van de openbare rechtbanken en justitie. De volgende voorbeelden illustreren deze arbitralisering: partijen voor de SICC en de NCC kunnen met instemming nationale bewijsregels buiten toepassing laten; partijen voor de SICC en de DIFC-rechtbanken kunnen verzoeken om buitenlands recht te

bewijzen op basis van ingediende stukken; partijen voor de SICC kunnen zich laten vertegenwoordigen door een buitenlandse advocaat en verzoeken om een procedure in beslotenheid en vertrouwelijkheid; en partijen voor de DIFC-rechtbanken kunnen verzoeken om een rechterlijke beslissing om te zetten in een arbitraal vonnis. Hoewel verschillende internationale handelsrechtbanken partijen een verscheidenheid aan opties bieden, weerspiegelen zij alle een meer partijgerichte aanpak en het toenemende belang van partijautonomie in civiele procedures. Net als bij internationale handelsarbitrage, waar partijen de procedure in onderling overleg kunnen vormgeven, bieden internationale handelsrechtbanken partijen meerdere procedurele opties.

Forum selling wijzigt de betekenis van gevestigde doctrines en geeft voorrang aan specifieke doctrines boven andere. Forum selling heeft derhalve normatieve implicaties en geeft een nieuwe vorm aan het burgerlijk procesrecht. Forum selling moedigt internationale handelsrechtbanken aan om aan marketing te doen, en voegt daardoor aan het traditionele begrip van publiciteit van de rechtbank het idee toe dat rechtbanken en rechters zichtbaarder moeten worden voor potentiële procespartijen. Bovendien moedigt forum selling de internationale handelsrechters aan om partijautonomie voorrang te geven boven andere procedurele vereisten. Partijautonomie vergemakkelijkt forum selling en krijgt daarom voorrang, terwijl de *forum non conveniens* doctrine of het territorialiteitsbeginsel forum selling belemmeren en terzijde worden geschoven. Evenzo bagatelliseren sommige internationale handelsrechtbanken het belang van formele vereisten voor forumkeuzeovereenkomsten, om overeenkomsten te beschermen tegen eventuele geldigheidsproblemen en om hun eigen bevoegdheid te behouden. Door meer nadruk te leggen op partijautonomie, versnelt forum selling de bredere trend dat partijautonomie een steeds grotere rol speelt in het burgerlijk procesrecht terwijl territorialiteit een steeds kleinere rol speelt. Forum selling illustreert bovendien hoe regels inzake internationale bevoegdheid uit het burgerlijk procesrecht, niet alleen internationale handelsrechtbanken kunnen helpen om zaken aan te trekken, maar ook de landen waar de rechtbanken zijn gevestigd kunnen helpen om buitenlandse investeringen en geschillenbeslechting aan te trekken. Forum selling verandert het burgerlijk procesrecht dus van een gebied dat gewoonlijk als zeer technisch en "apolitiek" wordt beschouwd, in een politiek geladen rechtsgebied, net als elk ander rechtsgebied.

Ten slotte bestudeert het onderzoek de implicaties van forum selling voor de toegang tot de rechter, en beantwoordt het zo de vraag of forum selling in de context van de internationale

handelsrechtbanken leidt tot een race naar de top of een race naar de bodem. Daartoe wordt in de studie een onderscheid gemaakt tussen contractuele en niet-contractuele geschillen, waarbij wordt betoogd dat forum selling bij niet-contractuele geschillen leidt tot exorbitante bevoegdheidsregels en een 'pro-claimant' benadering. Wat contractuele geschillen betreft, wordt in het onderzoek betoogd dat forum selling door internationale handelsrechtbanken de toegang tot de rechter kan verbeteren door de gerechtelijke specialisatie te vergroten, processen te versnellen en procedurele innovaties aan te moedigen. Onder bepaalde omstandigheden kan forum selling de toegang tot de rechter echter ook ondermijnen. Met name expansieve bevoegdheidsregels en rechtspraak kunnen de overeenstemming tussen de partijen over de gekozen rechterlijke instantie ondermijnen. De voeging van derden tegen hun wil in procedures voor internationale handelsrechtbanken kan hun recht op een eerlijk proces ondermijnen. Voorts kunnen de parallelle rechterlijke benoemingen en beroepsactiviteiten van internationale rechters aanleiding geven tot belangenconflicten en vragen doen rijzen omtrent de onafhankelijkheid en onpartijdigheid van de rechters. Ten slotte sluit de mogelijkheid voor de partijen om in de SICC privé en vertrouwelijk een proces te voeren, de toegang van het publiek tot de processen uit en ondermijnt zij de rol van de rechtbanken als openbare instellingen. Maar ook al zijn bovengenoemde omstandigheden uitzonderlijk en vormt forum selling dus geen ernstig risico voor het recht van de partijen op een eerlijk proces, toch heeft forumverkoop negatieve externe gevolgen voor derden en, nog belangrijker, voor de samenleving in het algemeen. Vanuit een breder maatschappelijk oogpunt wijst forum selling op de vercommercialisering van de civiele rechtspleging, en het minimaliseert de publieke rol van de rechterlijke instanties door deze te beschouwen als een middel om economische winst te behalen.

Curriculum Vitae

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