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# How Can International Commercial Courts Become an Attractive Option for the Resolution of International Commercial Disputes?

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# HOW CAN INTERNATIONAL COMMERCIAL COURTS BECOME AN ATTRACTIVE OPTION FOR THE RESOLUTION OF INTERNATIONAL COMMERCIAL DISPUTES?

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ABSTRACT

*Arbitration has dominated the landscape of the resolution of international commercial disputes (that is, private disputes involving transnational connections). Nevertheless, the last fifteen years have witnessed a proliferation in the establishment of new commercial courts in several countries, with the aim of attracting international commercial disputes. This article makes the novel argument that such attempts are unlikely to render adjudication an attractive alternative to arbitration. For the new international commercial courts to fully realize their potential and produce a sustainable market of adjudication, some mechanism is needed to secure the enforceability of jurisdiction clauses and the judgments delivered by courts in other jurisdictions.*

*Although such mechanism is provided by the 2005 Hague Convention on Choice of Court Agreements, this convention has failed to gain international support. This is puzzling given that this convention adopts the same principles that enabled the success of the 1958 New York Arbitration Convention—namely enforcing party choice of forum and facilitating enforcement of the resolution's outcome. This article provides the first attempt to analyze the reasons for this failure. To this end, it compares the political and legal conditions under which the two conventions were conceived, showing how the differences in these conditions have led to lower international acceptance of the Hague Convention.*

*This article supports this analysis by focusing on the most recent ratification of the Hague Convention by the UK. We advance the novel argument that this case study demonstrates the important role played by the legal community in the ratification process. We show that, ironically, the UK's decision to quit the EU in order to restore national sovereignty was a major reason leading to its ratification of the Hague Convention, thus giving up fundamental principles of common law that had granted English courts broad discretion as to whether to enforce jurisdiction clauses.*

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## I. INTRODUCTION

For decades, arbitration has been the primary method for resolving international commercial disputes—namely private disputes that have a transnational connection, such as when the parties are from different jurisdictions, when a foreign law is applicable, or when a contract has to be performed in another country. Empirical studies show that recourse to international commercial arbitration has grown dramatically over the years.[1]

Obviously, arbitration has its own advantages over adjudication. It offers a more flexible and expeditious process, more party control over the process and the

1. *See* TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 341 (Christopher R. Drahozal & Richard W. Naimark eds., 2005) (precisely because arbitration is private judging there is relatively little systematic information about it, but some empirical work show that the caseloads of the major international arbitral institutions nearly doubled between the years 1993 and 2003); *see also* Paul Friedland & Stavros Brekoulakis, *2018 International Arbitration Survey: The Evolution of International Arbitration*, QUEEN MARY UNIV. LOND., https://perma.cc/AN9P-8R4S (last visited May 9, 2023) (their findings include: "97% of respondents" surveyed prefer international arbitration to resolve cross-border commercial disputes, 99% would choose or recommend international arbitration in the future).

applicable law, hearings are conducted in private, and the judgments are confidential.[2]

To be sure, however, it is not merely the classic advantages of arbitration over adjudication that enables international commercial arbitration to dominate the market for resolving international disputes. Rather, it is primarily the availability of an effective international order that enables arbitration to provide a binding process whose outcome is enforceable.[3] Thanks to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (also known as the New York Convention, NYC), signed and ratified so far by more than 170 countries, national courts are generally required to enforce arbitration agreements and arbitral awards. That is, bar a few exceptions, national courts should usually refrain from adjudicating a dispute subject to an arbitration agreement, and they should enforce arbitral awards regardless of where the arbitration process was conducted.[4]

The lack of a similar international arrangement, guaranteeing the enforceability of jurisdiction clauses (aka "choice of court clauses") and foreign state-courts judgments, has rendered adjudication a far less attractive method for resolving international commercial disputes. Until recently, the main state court that has offered a credible alternative to arbitration was the London Commercial Court (LCC). Established in 1895, the LCC was originally intended to adjudicate domestic commercial disputes, rather than international ones. Over time, however, the LCC started to gain significant international status in the light of the business sophistication of its judges and lawyer, its independence and respect for the rule of law, and its forthcoming attitude towards foreign litigations.[5] Not only does the LCC have a broad subject

2. *See* GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 71 (2009) ("there are a number of reasons why arbitration is the preferred means of resolving international commercial disputes . . . . [B]usinesses perceive international arbitration as providing a neutral, speedy and expert dispute resolution process, largely subject to the parties' control, in a single, centralized forum, with internationally-enforceable dispute resolution agreements and decisions. While far from perfect, international arbitration is, rightly, regarded as generally suffering fewer ills than litigation of international disputes in national courts . . . .").

3. *See* Janet Walker, *A Comparative Perspective on International Commercial Courts, in* INTERNATIONAL COMMERCIAL COURTS 116 (Stavros Brekoulakis ed., 2022) ("… in respect of the enforcement of judgments, a key competitive advantage of international arbitration has been the widespread enforceability of arbitral awards in comparison to the patchwork of local and regional legal provisions for the enforcement of national court judgments.").

4. *See* PHILIPPE FOUCHARD ET. AL. ON INTERNATIONAL COMMERCIAL ARBITRATION para. 203 (Emmanual Gaillard & John Savage, eds. 1999). NYC, Article II (3) requires national courts to refer the parties to arbitration unless they find that the arbitration agreement is "null and void, inoperative or incapable of being performed," *id.* The underlying principle that the parties to an arbitration agreement are required to honor their undertaking to submit to arbitration any dispute covered by their arbitration agreement is given effect by the mandatory requirement on national courts to refer the parties to arbitration when presented with a valid arbitration agreement, *id.* It follows that national courts are prohibited from hearing the merits of such dispute, *id. See also* Antonias Dimolitsa, *Separability and Kompetenz-Kompetenz*, *in* IMPROVING THE EFFICIENCY OF ARBITRATION AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 217 (A.J. van den Berg ed., 1999).

5. Pamela K. Bookman, *The Adjudication Business*, 45 YALE J. INT'L L. 227, 234 (2020) ("For a long time, the London Commercial Court was the prototypical— and indeed only—example of an old school international commercial court. Over time, that chamber became recognized for its judges' business sophistication, independence, and respect for the rule of law, as well as for its development of English law (and the flexible, but predictable, common law system) and its welcoming attitude toward foreign litigants. The London Commercial Court is particularly attractive to foreign parties because of

matter jurisdiction that encompasses a wide variety of commercial disputes, it also enjoys the good reputation of the English system, both for the robustness of its procedures and the quality of its substantive laws.[6] Moreover, the LCC operates in a politically stable environment and its process is conducted entirely in English, which is the most common language used in international commerce.[7] Indeed, data from 2019 shows that 77% of the LCC's cases involved at least one foreign party, whereas 43%involved *only* foreign parties.[8] This means that the LCC is also willing to provide high quality adjudication services for disputes that have no connection whatsoever to the UK. In other words, as we shall later see, adjudication is perceived as a *product*, rather than a mere public service that aims at the local population.

The LCC became an international forum despite the lack of an adequate international arrangement that protects jurisdiction clauses referring disputes to the LCC, or facilitating its judgments. This can be explained, at least in part, by the existence of a regional arrangement, namely the Brussels Ia Regulation, which required European courts to give effect to jurisdiction clauses and enforce judgements of EU Member State.[9] According to this Regulation, the forum designated in a jurisdiction clause is obliged to hear the case when brought before it. It cannot decline to do so merely on the ground that a court of another forum is more appropriate or has more connections to the disputes.[10] So, within the EU, local courts have little discretion to adjudicate cases contrary to jurisdiction clauses. Likewise, the EU provides a mechanism for enforcing judgments given by one European court in other EU countries.[11]

The US equivalent of the LCC is the Commercial Division of the New York Supreme Court (NYCD). This state court was established in 1995 to adjudicate complex commercial disputes.[12] Like the LLC, NYCD offers a high quality and cost-

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its broad concept of jurisdiction, flexible procedural rules designed to accommodate complex commercial cases, and proclivity toward compelling parties to disclose) and the references there."). For the broad subject matter jurisdiction of the LCC, see JUDICIARY OF ENGLAND AND WALES, THE COMMERCIAL COURT REPORT 2017-2018, at 6 (2019) ("The jurisdiction of the Commercial Court is wide. It extends to any claim relating to the transaction of trade and commerce (including commercial agreements, import and export, carriage of goods by sea, land and air, banking and financial services, insurance and reinsurance, markets and exchanges, commodities, oil, gas and natural resources, the construction of ships, agency, arbitration and competition matters."). *See also* Robin Byron, *An Update on Dispute Resolution in England and Wales: Evolution or Revolution*, 75 TUL. L. REV. 1297, 1301 (2001).

6. *See* Bookman, *supra* note 5, at 246.

7. Thomas Jeanjean et al., *Why do you speak English (in your annual report)?* 45 INT'L J. ACCT. 200 (2010).

8. LEGAL EXCELLENCE, INTERNATIONALLY RENOWNED: UK LEGAL SERVICES 2020, THE CITY UK, at 7 (2020); RICHARD FENTIMAN, INTERNATIONAL COMMERCIAL LITIGATION, para. 1.1 (2d. ed. 2010); For more recent data, see LEGAL EXCELLENCE, INTERNATIONALLY RENOWNED: UK LEGAL SERVICES 2022, THE CITY UK, at 8 (2022) ("… in the first half of 2022, more than 70% of cases in the Commercial Court were international in nature.").

9. Brussels Ia Regulation 1215/2012, of the European Parliament and of the Council of 12 Dec. 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2012 O.J. (L351) 1 (Eur.).

10. *Id.* at art. 25; *see also* TREVOR HARTLEY, CHOICE-OF-COURT AGREEMENTS UNDER THE EUROPEAN AND INTERNATIONAL INSTRUMENTS, para. 8.33–8.34 (2013) (Brussels Ia Regulation, Art 31(2) requires any non-chosen court to give way to the exclusively chosen court as soon as the latter is seized. However, Brussels Ia Regulation, Art 25 (1) determines exemption for the obligation to enforce a jurisdiction clause when the clause "is null and void as to its substantive validity under the law of that Member State.").

11. *See* Brussels Ia Regulation, *supra* note 9, at art. 36–44.

12. *See* Bookman, *supra* note 5, at 237.

effective adjudication service, with a broad subject matter jurisdiction.[13] Given the economic power of the US, and the fact that many international corporations have property in the US, NYCD has become an international forum even without a regional or international arrangement that guarantees the enforceability of its judgments. NYCD judgments are easily enforceable within the US, rendering adjudication there effective and meaningful for the parties involved, as long as the defendant has property in the US. It must be noted, though, that unlike the LCC (and, as we shall see, unlike more recent commercial courts), NYCD's primary focus has been more on domestic litigation rather than attempting to attract completely foreign disputes that have no connection to the US. NYCD attracts a significant amount of litigation of all types, but most suits come from US parties.[14] NYCD has limitedincentives to attract foreign parties because of New York State's limited resources for subsidizing the judiciary.[15]

Obviously, an international commercial court yields various benefits for its country. Conducting a dispute in a local forum brings significant benefits to a country's GDP, for example by increasing the demand for legal services and their associated support services, (including paralegals, taxies, hotels, restaurants, etc.) and by encouraging foreign companies and investors to bring their business to that country.[16] An international commercial court can therefore help its country become an international hub for business, attract more international exposure, and enhance the international visibility and influence of its legal system.[17]

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13. Janet Walker, *Specialized International Courts: Keeping Arbitration on Top of Its Game*, 85 ARB. 2, 5 (2019); EVA LEIN ET AL., FACTORS INFLUENCING INTERNATIONAL LITIGANTS' DECISIONS TO BRING COMMERCIAL CLAIMS TO THE LONDON BASED COURTS 27 (Ministry of Justice 2015).

14. Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 50 (2008).

15. *See id*. at 49–59; Weixia Gu & Jacky Tam, *The Global Rise of International Commercial Courts: Typology and Power Dynamics*, 22 CHI. J. INT'L L. 443, 459 (2022) (these characteristics of the New York court lead to the fact that in the literature, especially in the European writing on the subject of commercial courts, the New York court is not considered as a model for the international commercial courts.).

16. *See* Erlis Themeli, *International Commercial Courts Competition in Europe: A Litigation Experience Approach*, *in* INTERNATIONAL BUSINESS COURTS: A EUROPEAN AND GLOBAL PERSPECTIVE 273, 284 (Xandra Kramer & John Sorabji eds., 2019) ("When the demand side of the international commercial market chooses a court, it is selecting not only a court but an entire civil justice system. The civil justice system includes court litigation, court bureaucracy the lawyers' service' laws and procedures, institutions, legal culture, notaries' service, bailiffs, work ethics and many others"); *see also id* at 286 ("… governments have direct and indirect benefits from competition. Direct benefits include increased court revenues from new international commercial cases, although this does not justify the desire to create an international commercial court. Courts usually do not make profit, as they are subsidized by the government. Therefore, direct benefits should not be the main motivation for governments to create an international commercial court. Indirect benefits seem more probable. They include higher revenues from expanding tax base of litigants, along with increased tax returns from the increased revenues of the lawyers, hotels, and restaurants that serve the litigants. Government's interests go even deeper. Most of them are aware that efficient court that can protect investments are a good business card for their jurisdictions; therefore, an investment in courts may bring considerable returns in the future."); LEGAL EXCELLENCE, INTERNATIONALLY RENOWNED: UK LEGAL SERVICES 2020, THE CITY UK, at 7 (2020) (figures are available annually in the U.K.).

17. There is motivation of legal system to "export" their law. This export trend characterized, of course, the colonial period, but it exists in various ways even today. Countries that are considered economically or politically hegemonic offer their substantive law as a model to other countries. This phenomenon manifested itself, for example, when Eastern European countries opened up to the West and had to adopt new constitutions as well as civil legislation appropriate to a free market.

Noting these benefits, additional countries have recently established international commercial courts (ICCs) that offer adjudication services, conducted fully, or mostly in English, and aimed at international disputes.[18] Dubai established its own ICC in 2006, Qatar in 2010, Singapore and Abu Dhabi in 2015, Kazakhstan in 2017, and China in 2018.[19] European countries have also established new courts for international commercialdisputes.[20] In 2018, France and Germany established their own ICCs, in 2019 the Netherlands followed suit, and in 2020 Germany established two more ICCs.

The increasing number of ICCs leaves no doubt that adjudication is now increasingly perceived as an international product rather than as a mere national service. However, arbitration still has the upper hand over these ICCs. The pressing question is: Why?

The developing market of ICCs faces a crucial challenge. In order to become an attractive alternative for resolving commercial parties, ICCs need an international instrument to ensure two important points: (1) that courts in other countries respect jurisdiction clauses referring disputes to these ICCs, and (2) that the judgments delivered by ICCs are enforceable in other jurisdictions. The Hague Convention on Choice of Court Agreements (HCCCA), conceived in 2005, sought to fill the gap and provide these two guarantees. Very much like NYC, it provides that domestic courts should usually give effect to jurisdiction clauses, and that member states should provide a mechanism for enforcing foreign judgments.[21]

Curiously, however, despite its manifest potential advantages, only a few countries have so far ratified or approved HCCCA: Mexico (2007), Singapore (2015), EU Member States (2015),[22] Montenegro (2017), and the United Kingdom (2020).[23]

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18. Janet Walker, *International Dispute Resolution in the 21st Century: The Revitalization of National Courts*, *in* LOOKING AHEAD; INTERNATIONAL LAW IN THE 21ST CENUTRY 95 (Canadian Council on International Law ed., 2002)) (as already argued, "the first few decades of the twenty-first century are likely to be recalled ... as decades in which national courts ... were revitalised to re-establish their attractiveness to those engaged in international commerce."). For a recent discussion of the ICCs and their aim to reshape the landscape of international commercial disputes, see Gu & Tam, *supra* note 15, at 445 ("The rapid global rise of ICCs is striking and stands as a game-changer in the arena of international dispute resolution institutions. It fundamentally reshapes the landscape of international legal adjudication by disrupting the traditional dichotomy between international litigation and arbitration as mutually exclusive dispute resolution service providers, and by challenging the conventional advantage of international arbitration in handling cross-border commercial disputes.").

19. For a description of these new international commercial courts, see Marta Requejo Isidro, *International Commercial Courts in the Litigation Market*, *in* MPILUX RESEARCH PAPER SERIES, NO. 2 6–10 (2019).

20. *Id.* at 13.

21. Convention on Choice of Court Agreements, arts. 5,8, June 30, 2005, 44 I.L.M. 1294, HAGUE CONF. ON PRIV. INT'L L. [hereinafter HCCCA], http://www.hcch.net/upload/conventions/txt37en.pdf (last visited June 20, 2023).

22. *See Declaration/Reservation/Notification,* HAGUE CONF. ON PRIV. INT'L L., https://www.hcch.net/ en/instruments/conventions/status-table/notifications/?csid=1044&disp=resdn (last visited June 20, 2023) ("The European Community declares, in accordance with Article 30 of the Convention on Choice of Court Agreements, that it exercises competence over all the matters governed by this Convention. Its Member States will not sign, ratify, accept or approve the Convention, but shall be bound by the Convention by virtue of its conclusion by the European Community."). Member States did not ratify HCCCA independently, *id.* They are bound by it based on the EU's approval of it, *id.* Within the EU, it is the Brussels I Regulation that governs the enforcement of jurisdiction clauses, and not HCCCA, *id.*

23. The countries that have signed the HCCCA but have not ratified are: US (2009) Ukraine (2016); Chine (2017); North Macedonia (2019); Israel (2021) (for the status table of Contracting Parties that are bound by the HCCCA and Contracting Parties that are not members of the Convention see the HCCCA's website at https://www.hcch.net/en/instruments/conventions/status-table/?cid=98).

Compared with the impressive success of NYC, HCCCA seems to have failed to attract a high number of counties. In so failing, it has also failed to position adjudication as a reliable alternative to arbitration in the context of international commercial disputes.

Unfortunately, while this failure has critical implications for the litigation landscape in the world of international commercial disputes, scholars have paid little attention to it. Against this background, this article provides a first attempt to analyze the relative failure of HCCCA in fostering the emerging market of adjudication. To this end, it investigates the incentives and disincentives that could motivate countries to sign-and- ratify, or to refrain from doing so. Furthermore, it examines the conditions that helped NYC gain international support, showing how such conditions may be relevant also to HCCCA. This discussion shows that two possible factors can induce states to sign-and-ratify HCCCA: (1) a suitable political climate; and (2) pressure from domestic interest groups, mainly the judiciary and the legal profession. The effect of these conditions is demonstrated through a discussion of the recent ratification of the HCCCA by the UK.

## II. THE EMERGING WORLD OF INTERNATIONAL COMMERCIAL COURTS

### *A. Dispute Resolution: The "Where" and "How" Questions*

The 20th century has witnessed a huge change in the means of transportation, by which humans, goods, ideas, and business are easily transported around the globe. The development of rapid and inexpensive transportation has generated greater international trade, which in turn generates more transnational disputes in need of resolution. One of the primary uncertainties facing parties to such disputes resolves around the identity of the forum in which the dispute will be resolved. Absent any agreement between the parties, each of them is likely to attempt to bring the case in a court that is most convenient or otherwise favorable to them. Such a court will then have to decide whether it has jurisdiction over the case, with reference to its own rules and often based on the doctrine of *forum non conveniens*: whether it has sufficient connections to the dispute, in terms of the nationality of the parties, the applicable substantive law, accessibility to evidence, and so on.[24]

This creates a serious uncertainty for the parties. The location for resolving the dispute (the "where") and the type of resolution (the "how": arbitration versus adjudication) may have crucial implications for the ability to litigate the case effectively and fairly. Both the "where" and the "how" are likely to influence the procedural

24. The *forum non conveniens* doctrine is well recognized principle in jurisdictional thinking in the common law legal systems. For an in-depth discussion on the *forum non conveniens* doctrine, see R. A. BRAND & S.R. JABLONSKI, FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS (2007). The content of the *forum non conveniens* doctrine is not identical throughout common law systems, and in each system is continually changing. There is no statutory or judicial explicit list of predetermined considerations to weigh in determining the appropriateness of a forum. Also, there is no statutory or judicial guidance on how much weight each of the considerations should be given. For the excesses of the *forum non conveniens* regime, in terms of the time, expense and judicial resource spent in litigating questions about the appropriate forum see Vedanta Resources PLC. v. Lungowe [2019] UKSC 20, para. 6–14.

and substantive laws governing the dispute. Different sets of laws are likely to impact the outcomes and affect the ways in which they are reached. Moreover, the applicable procedural law is specifically important for the parties. For one thing, transnational disputes often require procedural flexibility to enable a better presentation of the evidence and legal arguments. For another, procedural rules affect the cost of litigation and the convenience of conducting legal proceedings in that forum.

Thus, parties to a transnational dispute have good reasons to reach a pre-dispute agreement over the "where" and the "how" in order to reduce uncertainty to a minimum and ensure that, behind the veil of ignorance, the tribunal will be fair and convenient for both parties. Indeed, empirical studies show that forum selection (whether arbitration agreements or jurisdiction clauses) is prevalent in commercial contracts; parties do not prefer to rely on local rules of jurisdiction or of conflict-of-laws.[25] Obviously some uncertainty is inevitable whenever a dispute has connections to more than one country, each with a different set of procedural and substantive laws and practices, including conflict-of-laws rules. But forum selection aims to mitigate such uncertainty and increase predictability and efficiency in the enforcement of the parties' rights and obligations.[26]

While parties are better off reaching *any* agreement on the "how," several considerations may encourage them to enter arbitration agreements rather than agree on a national court of a given country. One such consideration is that the parties to arbitration are free to shape the procedural rules that should govern the process, and they are not bound by local sets of procedural law that govern state courts. Admittedly, the national law of the country where the arbitration process takes place might influence some aspects of the management of the arbitration. In a similar vein, national courts often afford the parties some degree of control over the process. Nevertheless, there can be no doubt that parties retain a much higher degree of freedom and control over the arbitration process, which a formal legal process simply cannot afford.

Moreover, the identity of the tribunal that determines the dispute may also affect the applicable substantive law. In the case of national courts, each forum applies its own choice of law rules that determines which substantive law will govern the claim. While, in principle, local courts may agree to apply the foreign law chosen by the parties, this is often complicated because local judges are usually not accustomed with foreign laws.[27] By contrast, in arbitration parties have more freedom to choose

25. *See, e.g.,* Theodore Eisenberg & Geoffrey Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 VAND. L. REV. 1975, 1983–1994 (2006); Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CORNELL L. FAC. PUBL'N. 1475, 1504 (2009); Mark C. Weidemaier, *Customized Procedure in Theory and Reality*, 72 WASH. & LEE L. REV. 1865 (2015).

26. Scherk v. Alberto-Culver Co., 417 U.S. 506, 516–17 (1974) ("Such uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict- of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. … [Absent such agreements, one enters] the dicey atmosphere of … a legal no-man's-land [which] would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.").

27. *See* Shahar Avraham-Giller, *A Contractual Approach to Choice of Law Rules for Forum Selection Clauses,* AKRON L. REV. (forthcoming 2023) (on the tendency of American courts to apply the law of

the substantive law (and therefore choose an arbitration institution that is familiar with these laws.)

### *B. The Paradigm Shift in Adjudication: from Public Service to a Marketable Product*

Arbitration has dominated the landscape of international dispute resolution for over 50 years.[28] Notwithstanding the difficulty of examining empirically private institutions, the available data shows that the caseloads of the major international arbitral institutions nearly doubled between 1993 and 2003.[29] The increasing demand for arbitration has been facilitated by NYC, which guaranteed that arbitration agreements and arbitral awards are enforced. The lack of an equivalent international instrument for adjudication enabled arbitration to dominate the market.

In 2005, however, HCCCA concluded, adopting NYC's approach to the treatment of adjudication clauses and the enforcement of court judgments.[30] Since around that time, several ICCs have been established, with a common model that aims at international commercial disputes: flexible and relatively efficient procedures, a broad subject matter jurisdiction that appeals to large audiences, and the employment of English as the language in which the proceedings are conducted.[31]

Naturally, differences exist among the different ICCs. They have different scopes of jurisdictions, different procedural particularities, different policies on fees, and different combinations of judges. Furthermore, and perhaps more importantly, there are differences in the rationales for their establishments.[32] Bookman, for example, divides ICCs into two major categories based on the motives for their establishment.[33] The first category, what she calls "Investment-Minded Courts," includes courts that were established with the primary purpose of attracting investment into

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the forum (lex fori) in the context of interpretation of jurisdiction clauses and even in view of the existence of a choice of law clause in the contract).

28. *S*ee THOMAS HALE, BETWEEN INTERESTS AND LAW 25–26 (2015) (on the problem of identifying the landscape of international commercial disputes and their resolutions) ("… the universe of cases is partially impossible to define. Not only is transnational arbitration dispersed across of arbitral institutions in dozens of countries, some of it is ad hoc, not connected to any institution at all. So we do not know how many disputes are settled through [transnational commercial arbitration], nor can we reliably measure how many are settled through other types of institutions, such as public courts, mediation, or ad hoc settlements and negotiations. And of course, the total universe of disputes, and, at the broadest level, the universe of deals that might lead to disputes, is unknown.").

29. *See* TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 341 (Christopher R. Drahozal & Richard W. Naimark eds., 2005) (for the American Arbitration Association and its leading International Centre for Dispute Resolution, it actually tripled).

30. *Compare* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Oct. 6, 1958, 330 U.N.T.S. 4739 [hereinafter NYC] *with* HCCCA, *supra* note 21.

31. Bookman,*supra* note 5. *See also* Themeli, *supra* note 16, at 289 (as Themeli explains, some of the international commercial courts claim that they allow litigants more control over the process). For example, the Netherlands Commercial Court (NCC) declares that it offers "Active case management in consultation with the parties: typically a conference will be scheduled to discuss issues, motions, fact-finding and a timetable, " *see Key Features,* NETHERLANDS COMMERCIAL COURT (NCC), https://www.rechtspraak.nl/English/NCC/Pages/key-features-NCC.aspx (last visited May 10, 2023).

32. *See* Gu & Tam, *supra* note 15 (for a recent research that aims to create a new typology to classify different ICCs worldwide).

33. Bookman, *supra* note 5, at Part II.

the hosting country.[34] The availability of such courts seeks to reassure foreign investors and the international financial world that local investments will be protected. At least for the meantime, these courts do not advertise themselves as litigation destinations for all global disputes. Instead, they seek to repatriate disputes involving locals.[35] This category of ICCs includes Qatar International Court and Dispute Resolution Centre, Dubai International Financial Center Court, Kazakhstan Astana International Financial Center Court and Abu Dhabi Global Market Court.[36]

The second category is "Litigation Destinations Courts."[37] These courts offer themselves as candidates for jurisdiction clauses in commercial contracts, and as a potential venue for litigating commercial disputes that are not contract-based.[38] They have a broad jurisdiction and many do not require any local connection between the case and the forum state as a basis for jurisdiction.[39] Such countries are not merely interested in offering a venue to protect investments in their jurisdiction. They offer themselves as a reliable hub for litigation, not just for business.[40] This category includes the Singapore International Commercial Court and the European commercial courts in Germany, France and the Netherlands.[41]

While Bookman's typology is purpose-based, Gu and Tam offer a different, generation-based typology. In their view, the first generation of ICCs ("ICCs 1.0"

34. *Id.* at 240.

35. *Id*. (discussing these type of ICCs, "… establishing English-language, common-law-based courts that employ foreign jurists, are friendly to arbitration, and seek to establish themselves as state-of-the-art dispute resolution centers to attract foreign investment and assure international constituencies of their legitimacy.").

36. *Id.* at 241. Taking the Qatar International Court (QIC) for example, this court was established in 2009 as part of the Qatar Financial Centre, *id.* The QIC Court is open to claims regardless of their connection with Qatar if the parties choose the QIC in their contract, *id.* The Court operates in English (although parties can request to have proceedings in Arabic), it follows common law procedures and parties can choose the substantive law applicable to their claims, *id. See also* Walker, *supra* note 13, at 7.

37. Bookman, *supra* note 5, at 246.

38. *Id.*

39. *Id.*

40. Bookman, *supra* note 9, at 246.

41. *See generally id.* For the European ICCs, see: in France - The International Chamber of the Paris Court of Appeal; in Germany – the Frankfurt International Chamber for Commercial Matters, the Commercial Courts in Stuttgart and Mannheim; and in the Netherlands - The Netherlands Commercial Court, *id.* Bookman offers a third category, which includes China's two ICCs established in 2018, one in Shenzhen and another in Xi'an, *see* Gu & Tam, *supra* note 15. These two courts were established with a very specific purpose, to resolve disputes arising from investments related to the Belt and Road Initiative, *see id.* at 239. *See also* Zhengxin Huo & Man Yip, *Comparing the International Commercial Courts of China with the Singapore International Commercial Court*, 68 INT'L & COMPAR. L. Q. 903 (2019) (On the history of the establishment of the Chinese International courts). *See also International Commercial Litigation and Diversified Dispute Resolution*, CHINA INT'L COMMERCIAL CT.,http://cicc.court.gov.cn/html/1/219/193/195/index.html (Jun. 28, 2018) (explaining that the CICC's objective is "to try international commercial cases fairly and timely in accordance with the law"). For a critical view on Bookman's typology, see Gu & Tam, *supra* note 15, at 451 ("Bookman's typology … takes into account the economic and political motivations which underlie the establishment of ICCs. Under this categorization, the CICC established by China was separately discussed … . While this typology has the benefit of considering the underlying motivations of various ICCs, the scope of "legal hubs" … is vaguely defined. Arguably, the QIC and the DIFC Court can also be categorized as aspiring legal hubs, given their status as jurisdictional carve-outs in the U.A.E. This unique status surmounts the pre-existing legal restraints in the Middle East Islamic law that may not be favorable to trade and commerce (for example, the legal prohibition against riba (interest charged on loans)). Moreover, such classification ultimately boils down to the question of what qualifies a legal hub, which is an elusive concept largely driven by the state's marketing or image work.").

in their terminology) refers to those traditional ICC giants in "established jurisdictions," namely the LCC and NYCD.[42] These are domestic courts that are well-recognized internationally, with a high volume of international cases and high-quality judgments that are cited around the world. The second generation of ICCs ("ICCs 2.0") include the second wave of ICCs established in "emerging jurisdictions," which aim to enter the adjudication market, often with a specific geographical focus[43]. Among other things, they do not entirely rely on domestic judges; rather, they use a combination of domestic and foreign judges. Examples include the ICCs of Abu Dhabi, Dubai, Kazakhstan, Qatar, and Singapore.[44]

Be that as it may, it is now acceptable to say that the establishment of ICCs in all forms and shapes over the past fifteen years has formed an international market for litigation.[45] This reflects a paradigm shift in the perception of adjudication: from a traditional view of adjudication as a public service, towards a new conception of it as a product that has an economic value that can be leveraged by the state to improve its economic and political status. Although every legal system governed by the rule of law must offer a dispute resolution mechanism for the enforcement of substantive law, it would be naïve to ignore the potential of a high quality legal system to attract foreign litigants and foreign investments.[46]

In the light of this paradigm shift, it is important to notice the corollary move from the traditional concept of "forum shopping" toward a new concept of "forum selling." The former, which often has negative connotations, focuses on the litigants' point of view, and their search for a most favorable court in term of procedural and/or substantive law.[47] The latter, however, focuses on the attempt of states

42. *See generally* Gu & Tam, *supra* note 15 (unlike most of the discourse in the field, Gu and Tam consider NYCD as an ICC).

43. Gu & Tam, *supra* note 15, at 473–82.

44. *Id*. Gu and Tam further describe "third-generation ICCs", which includes specialized commercial courts triggered by specific political events or commercial projects, such as post-Brexit European ICCs and the Chinese ICCs that deal with the Belt and Road Initiative, *id.*

45. *See, e.g.,* ERIN A. O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET (2009); Donald Earl Childress III, *General Jurisdiction and the Transnational Law*, 66 VAND. L. REV. EN BANC 67 (2013); William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979).

46. *See, e.g.,* DOUGLASS C. NORTH, STRUCTURE AND CHANGE IN ECONOMIC HISTORY (W.W. Norton & Company 1982); R. H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960) (classic political economy literature highlights the role of state in providing institutional foundation for market relations, especially the rule of law). For the use of the definition 'litigation market', see Isidro, *supra* note 19, at 30. *See also* Eva Lein et al., *Factors Influencing International Litigants' Decisions to Bring Commercial Claims to the London Based Courts*, MINISTRY OF JUSTICE para. 4.5 (2015) ("international litigation is increasingly perceived as a competitive market where litigation centres promote themselves through intensive marketing and improved quality and speed of their court services.").

47. In the context of forum shopping, a forum can be convenient for the plaintiff due to more convenient rules of procedure that apply in it (e.g., broader disclosure, or rather more limited, a preferred cost regime, etc.). Also, the choice of forum may be affected by the identity of the substantive law that will apply to the dispute in light of the forum's choice of law rules. It has been argued that the forum shopping allows the plaintiff to choose a forum that reflects only her unilateral interests and it is not the appropriate forum, in the sense of proximity to the dispute, to discuss the claim. Therefore, from the point of view of defendants and perhaps of the public resources, forum shopping is a negative practice. But the position that forum shopping is unavoidably a negative phenomenon is not acceptable by all. First, in most legal systems the jurisdiction rules do not reveal a perception that legal jurisdiction is necessarily exclusive. It is usually parallel, meaning that legal systems acknowledge the existence of a number of possible forums - both internally and internationally - and the possibility of choosing between them. Beyond that,

to become attractive forums in terms of procedural and/or substantive law, thus increasing the chances to be chosen by commercial bodies as agreed forums for settling their disputes.[48]

## III. THE FAILED PROMISE OF HCCCA

The sustainability of the emerging market of ICCs, and of the idea of forum selling, depend on two primary conditions: that the parties' choice of forum is respected, and that the judgments delivered by ICCs are enforceable.

### *A. Choice of Forum*

Parties need to have a reasonable degree of certainty that their choice of a given ICC will be respected. This requires two things. First, that the chosen ICC exercises jurisdiction over the dispute based on the litigants' agreement, without considering other factors—such as whether it is a convenient forum with sufficient connections to the dispute. Secondly, that other courts abstain from adjudicating a dispute contrary to a jurisdiction clause.

Respecting the parties' choice of jurisdiction makes sense from the perspective of contracts law and its core principle of freedom of contract. Although jurisdiction clauses impose costs and burdens on state courts—which justifies giving the state

there are also benefits to forum shopping. It defends access to justice, a right whose importance is highly recognized by legal systems, by increasing the forums available to the plaintiff to file his claim. forum shopping encourages enforcement of legal provisions through litigation; It also stimulates legislative reforms, by sharpening the gaps in legal arrangements between different forums, which encourage application to one forum over the other. Due to the negative connotations associated with the phrase forum shopping, some call the process of selecting the forum in a positive context "forum selection", *see* Geert Van Calster, *Brexit and the Competition of Dispute Resolution Fora in Europe: Whither the Rush to English Courts Post Withdrawal?*, *in* INT'L COMMERICAL CT. & GLOB. GOVERNANCE 501, 502 (Stavros Brekoulakis & Georgios Dimitropoulos eds., 2022) ("The coinciding phenomenon of selecting one particular court rather than another is referred to as 'forum selection' if one is inclined to see the attractive side of this competition. Alternatively, those who take issue with the practice tend to refer to it as 'forum shopping'"). For a discussion of the benefits of forum shopping, see Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. 579, 613 (2016).

48. For forum selling see Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241 (2016); Jonas Anderson, *Court Capture*, 59 B.C.L. REV. 1543 (2018); Gerhard Wagner, *The Dispute Resolution Market*, 62 BUFF. L. REV. 1085 (2014). In relation to civil law countries, see Stefan Bechtold et al., *Forum Selling Abroad*, 19–3 USC LEGAL STUD. RES. PAPERS SERIES 1 (2019). In relation to arbitration, see Daniel Klerman, *Forum Selling and Domain-Name Disputes,* 48 LOY. U. CHI. L. J. 561 (2016). *See also* Xandra E. Kramer & John Sorabji, *International Business Courts in Europe and Beyond: A Global Competition for Justice?,* 1 ERASMUS L. REV. 1(2019). On judges 'advertising' their services, comparing the USA and Germany, see Stefan Bechtold, Jens Frankenreiter & Daniel Klerman, *Forum Selling Abroad*, 19–3 USC LEGAL STUD. RES. PAPERS SERIES 1 (2019). More generally see *US Litigation Today: Still a Threat For European Businesses or Just a Paper Tiger?*, *in* SCHULTHESS VERLAG (Andrea Bonomi & Krista Nadakavukaren Schefer eds., 2018). It is important to note that the discussion deals with competition in the field of commercial civil disputes arising from the pre-selection of the parties of the forum. There can be competition in other contexts. For example, in tort cases. In this kind of cases there are various considerations that affect the choice of the forum by the parties, *see* Isidro, *supra* note 19, at 31 (2019) ("The degree of competition among jurisdictions from the consumers' perspective varies depending on the type of litigation. In the area of civil liability, the traditional competitor of Europe has been the US. User preferences are determined based both on procedural elements— which favour of the US because of trial by jury, generous disclosure, the availability of collective redress tools — and substantive factors — again in favour of the US with the possibility of being granted treble and punitive damages awards.").

some powers to have a say concerning its jurisdiction—there is no significant *a priori* ground for depriving parties of the freedom to agree, in advance, on the forum that should determine the dispute between them, if and when it breaks out.[49]

At a minimum, respecting the parties' choice of forum makes economic sense from a commercial point of view. The parties' choice of a specific jurisdiction, *a priori* and behind the veil of ignorance, is an indication that the chosen court is best suited for their needs and is most convenient for them. Furthermore, respecting their choice lends the contract a higher degree of certainty, and thus a better ability to assess its economic value and inherent risks.[50] A legal practice that respects such clauses better enables the parties to assess their risks and be in better position to make plans and predict the outcomes of their actions.[51]

### *B. Judgment Enforceability*

The second condition for a sustainable market of ICCs is the enforceability of their judgments. If a judgment given in one country is not enforceable in other countries where the debtor has assets, the judgment will be of no value and the parties will have no reason to choose to litigate in such a forum in the first place.

Generally speaking, foreign judgments have no independent legal effect abroad.[52] Principles of territorial sovereignty do not allow for an automatic enforcement of foreign judgments. The logic is straightforward. Enforcement requires the application of governmental powers, which involves the state's monopoly over the

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49. The discussion of the efficiency of the civil procedure has received comprehensive and in-depth attention in the law and economic literature. In contrast, the field of private international law did not receive much attention from the perspective of the economic analysis of the law. Also, in a number of essays devoted to the economic analysis of law in the field of private international law, the main focus of the writers was choice of law. For writing that discusses economic analysis of the rules of choice of law, see generally Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883 (2002); Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277 (1990); Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151 (2000). As an exception for this tendency see Christian Kirchner, *An Economic Analysis of Choice-of-Law and Choice-of-Forum Clauses*, *in* AN ECONOMIC ANALYSIS OF PRIVATE INTERNATIONAL LAW 44 (Jürgen Basedow, Toshiyuki Kono & Giesela Rühl eds., 2006).

50. Because the choice of law rules that that will govern the case are those of the forum hearing the dispute, consent to a forum subjects the dispute to the choice of law rules of that agreed forum.

51. Shahar Avraham-Giller, *The Court's Discretionary Power to Enforce Valid Jurisdiction Clauses: Time for a Change?*, 18 J. PRIV. INT'L L. 209, 228–29 (2022); Christian Kirchner, *An Economic Analysis of Choice-of-Law and Choice-of-Forum Clauses*, *in* AN ECONOMIC ANALYSIS OF PRIVATE INTERNATIONAL LAW 44, 49–50 (Jürgen Basedow et al. eds., 2006).

52. TAMBOULAKIS DROSSOS, COMPARATIVE RECOGNITION AND ENFORCEMENT: FOREIGN JUDGMENTS AND AWARDS 1–3 (2022). Interesting to note, is that one special feature of the Dubai ICC, is a mechanism by means of which the DIFC Courts transform their own judgments into arbitral awards, *see* Stephan Wilske, *International Commercial Courts and Arbitration — Alternatives, Substitutes or Trojan Horse?*, 11 CONTEMP. ASIA ARB. J. 153, 163 (2018) ("The idea is that following a money judgment of the DIFC Courts, the judgment creditor would be able to demand payment of the judgment sum and, if payment were not made pursuant to that demand for any reason, a judgment creditor would be able to consider an enforcement dispute to have arisen and could refer the dispute to arbitration at the DIFC-LCIA Arbitration Centre, or any other arbitration center. It is ironic for a court judgment to become an arbitral award rather than the other way around. Certainly, at the drafting of the New York Convention such artificial avenue had not been envisaged. This triggers questions as to whether parties to the New York Convention would really allow the enforcement of court judgments they would normally not enforce simply because they had turned into arbitral awards.").

use of force. When it comes to the enforcement of private rights, modern states require national courts to supervise the use of power by the state: the state can use its powers only after a national court has granted its approval.[53] Thus, it runs against national sovereignty to "receive orders" from a foreign court. Before it can be enforced in a given country, a foreign judgment must therefore be examined by a national court, and only when found compatible with the conditions stipulated by national law for recognition will itbe formally recognized.

Most countries have laws that regulate the recognition and enforcement of foreign judgments. However, such national laws vary substantially from one country to another, and tend to be highly complex, lacking certainty of enforcement.[54] The available enforcement procedures tend to be too cumbersome, bureaucratic, and inefficient. As such, the existence of different enforcement procedures in different countries fails to provide the certainty and stability needed for efficient international trade. Unsurprisingly, therefore, customary international law does not recognize any binding principles or rules mandating the recognition and enforcement of foreign judgments.

### *C. The Guiding Principles of HCCCA*

Obviously, the two conditions discussed above are related: parties are likely to choose forums whose judgments are enforceable in as many places as possible. How can that be ensured?

HCCCA was concluded in 2005 after decades of negotiation at the Hague Conference on Private International Law.[55] It was designed to promote international trade and investment by encouraging judicial co-operation in multi-jurisdictional litigation, and the enforcement of foreign judgments. To this end, the HCCCA followed the successful model of NYC. It stipulates that when a jurisdiction clause

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53. *See, e.g.*, TAMBOULAKIS DROSSOS, COMPARATIVE RECOGNITION AND ENFORCEMENT: FOREIGN JUDGMENTS AND AWARDS 1, 2 (2022) ("Absent treaty or supranational commitments, recognition and enforcement is then solely a matter for national law, as foreign decisions have no independent legal effect without being deferred to or incorporated by some way into the enforcing State. In the extreme, national law can insist that if disputants want to progress a matter, they must retry it within the confines of the enforcing State's jurisdiction.").

54. *Id.*; *see also* Ralf Michaels, *Recognition and Enforcement of Foreign Judgments*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW para. 5 (2009) ("Contemporary laws neither reject nor require generally the recognition of foreign judgments; instead, detailed rules have emerged."); Adrian Briggs, *Recognition and Enforcement of Judgments (common law)*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1480–85 (2017).

55. RONALD A. BRAND & PAUL M. HERRUP, THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS 3 (2008). It is also relevant to mention the Hague Convention of 2019 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, *id.* This Convention also covers judgments rendered on a number of non-consensual grounds, as well as non-exclusive choice of court agreements, asymmetric dispute resolution agreements and trust jurisdiction clauses whilst HCCCA covers judgments rendered in an exclusive jurisdiction clause, *id.* The complementary nature of the Conventions also extends to their wording with several articles of the 2019 Judgments Convention being copied from HCCCA and extensive reference in the 2019 Convention's explanatory report to HCCCA's explanatory report, *id.* However, in the basis of this article is the free market in deciding the forum which allows the possibility of ICCs to thrive and the choice of the parties regarding the exclusive forum is in the scope of the HCCCA alone, *id.* For the connection between the two conventions and argument about their relationship with NYC see Lucas Clover Alcolea, *The 2005 Hague Choice of Court and the 2019 Hague 187 Judgments Conventions: Rivals, Alternatives or Something Else?*, 6 MCGILL J. DISP. RESOL. 187 (2019–2020).

satisfies certain requirements, the designated court *must* adjudicate the case.[56]This means that the designated court has no discretion to decline jurisdiction on the ground of *forum non conveniens* (i.e. on the ground that another forum is more appropriate for the resolution of the dispute).[57] In the same vein, other courts in Contracting States *must* refuse to seize jurisdiction over the dispute even if they would have had jurisdiction under their national laws were it not for the existence of a jurisdiction clause.[58]

Both in design and in effect, the ambition of the drafters was, to a large extent, to replicate the success of NYC.[59] The common assumption was that HCCCA would "achieve for litigation what NYC has achieved for arbitration".[60] Surprisingly, however, this has not happened. Despite the potential of HCCCA to improve the

56. HCCCA, *supra* note 21, at art. 5(1).

57. *Id.* For the background of the Article see TREVOR HARTLEY, FORUM SELECTION AGREEMENTS UNDER THE EUROPEAN AND INTERNATIONAL INSTRUMENTS para. 8.19-8.28 (2013). The main exception for this rule is that the chosen court need not to hear the case where the jurisdiction clause is null and void under its law, including its choice-of-law rules, *see* TREVOR HARTLEY & MASATO DOGAUCHI, CONVENTION OF 30 JUNE 2005 ON CHOICE OF COURT AGREEMENTS, EXPLANATORY REPORT para. 3 (Permanent Bureau of the Conference ed.), http://www.hcch.net/upload/expl37e.pdf [hereinafter Explanatory Report]. In another place, the Convention provides that a State may declare that its courts may refuse to determine disputes to which an exclusive jurisdiction clause applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute, *see* HCCCA, *supra* note 21, at art. 19. This provision does not give the court discretion, but gives it very little freedom to decide whether, or nor, to enforce a jurisdiction clause only when the dispute is not related to the designated forum, *id.*

58. The Convention lays down five specific exceptions to this rule, *see* HCCCA, *supra* note 21, at art. 6. The first exception is where the clause is null and void on any contractual ground under the law of the State of the chosen court, *see* Explanatory Report, *supra* note 57, para. 149. The second exception is where a party lacked the capacity to enter into the agreement under the law of the State of the court seized, *see id.* These two exceptions are fairly standard and relate directly to the validity of the jurisdiction clause, *see id.* para. 148. *See also* HARTLEY, *supra* note 57, para. 8.36. The third exception is where giving effect to the jurisdiction clause would lead to a "manifest injustice" or would be "manifestly contrary to the public policy of the State of the court seized", *see* HCCCA, *supra* note 21, at art. 6c. This exception is intended to set a high threshold, *id.* It refers to that State's basic norms or principles, and it does not permit the court seized to hear the case simply because the chosen court might violate, in some technical way, a mandatory rule of the State of the court seized, *see* Explanatory Report, *supra* note 57, para. 153. This exception could cover the exceptional case where one of the parties would not get a fair trial in the foreign State, perhaps because of bias or corruption. This exception can also be seen as ordinary contractual treatment since the extreme situations mentioned regarding it would have prevented the enforcement of a clause in ordinary contractual contexts, *see* Explanatory Report, *supra* note 57, para. 152; *see also* HARTLEY, *supra* note 57, para. 8.39–8.40. The fourth exception is where for exceptional reasons beyond the parties' control, the agreement cannot reasonably be performed. Hague Convention on Choice of Court Agreements art. 6d Jun. 30, 2005, 44 ILM 1294. This exception is intended to apply to cases where it would not be possible to bring proceedings before the chosen court. According to the Explanatory Report, this exception could be regarded as an application of the doctrine of frustration, *see* Explanatory Report, *supra* note 57, para. 154; *see also* HARTLEY, *supra* note 57, para. 8.41. The fifth exception is where the chosen court has decided not to hear the case. Its purpose is to avoid a denial of justice. This exception is a specific case of a frustration of a contract and therefore is not a unique solution that deviates from accepted contractual principles Hague Convention on Choice of Court Agreements art. 6e Jun. 30, 2005, 44 ILM 1294; Explanatory Report, supra note 57, para. 155.

59. Andrea Schulz, *The Hague Convention of 30 June 2005 on Choice of Court Agreements*, 2 J. PRIV. INT'L L. 267 (2006).

60. Herbert Kronke, *Introduction: The New York Convention Fifty Years on: Overview and Assessment, in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION (Herbert Kronke ed.).

commercial appeal of ICCs and thus foster international trade, very few countries have bothered to sign, and yet fewer to ratify.[61] Notably, the two major players in international trade, the US and China, have not ratified it. While both have signed it, the acceptable assumption is that neither country will complete the process of ratification.[62] At least as far as the US is concerned, this state of affairs is rather surprising considering that the US was a major initiator for the drafting of HCCCA.[63]

### *D. HCCCA's Legal Limitations*

To better understand the limited success of HCCCA compared with NYC, attention should be drawn to two legal limitations that are unique to HCCCA. First, due to political and historical reasons, the scope of HCCCA was considerably restricted. While it applies to "civil or commercial matters, "[64] it leaves out several matters relevant to international commerce, most importantly carriage of goods, intellectual property and some other fourteen matters.[65]

By contrast, NYC does not provide a default list of excluded topics. It leaves it to the contracting states to determine on an ad-hoc basis which types of claims are arbitrable.[66] Indeed, several topics are usually considered beyond the realm of arbitration. These include insolvency, real and intellectual property issues involving registration, family law, criminal law, succession, and rights in rem.[67] But in some

61. *See also* S. I. Strong, *International Commercial Courts in the United States and Australia: Possible, Probable, Preferable?,* 115 AJIL UNBOUND 28, 31 (2021) ("The first comparison involves international commercial arbitration, which is currently considered the preferred means of resolving cross-border business disputes. On the surface, international commercial litigation and international commercial arbitration are becoming increasingly similar as a result of various initiatives from the Hague Conference on Private International Law, including the Hague Principles on Choice of Law in International Commercial Contracts (Principles), the Hague Convention on Choice of Court Agreements (HCCCA), and the recently promulgated Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (Judgments Convention). All three instruments seek to emulate the personal autonomy and procedural efficiency generated by the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) in the area of international commercial arbitration. However, the Hague initiatives have failed to garner anywhere near as much state support as the New York Convention, which has 156 signatories as compared to signatories for HCCCA …").

62. For a debate on the Chinese consideration, see Wei Cai & Jonathan Kolieb, *Between National Interests and Global Business: China's Possible Reservations to the Hague Convention on Choice of Court Agreements*, 11 J. INT'L DISPUTE. SETTL. 295 (2020). For the discussion on the problems of ratification by the US approach of the US, see William J. Woodward Jr., *Saving the Hague Choice of Court Convention*, 29 U. PA. J. INT'L L. 657 (2008).

63. On the history of the negotiation and the dominant role of the U.S, see BRAND & HERRUP, *supra* note 55, at 6.

64. *See* HCCCA, *supra* note 21, at. Art. 1(1).

65. *Id*. *See also* ARTHUR VON MHEREN, ADJUDICATORY AUTHORITY IN PRIVATE INTERNATIONAL LAW 372 (2007) ("The list of excluded matters is vast and mirrors the difficult and tenacious negotiations in The Hague. According to Article 2(1) the Convention does not apply to consumer contracts and employment contracts. Art. 2(2) further exempts the following matters from the scope of the application: …". And he continues that "the fact that the Convention excludes many important matters from its scope of application can be deplored. Certainly, it will reduce the impact of the Convention and its role in international civil litigation").

66. *See* NYC, *supra* note 30, at art. V(2)(a) & V(2)(b).

67. Michael Hwang, *Commercial Courts and International Arbitration— Competitors or Partners?*, 31 ARB. INT'L 193, 195 (2015) ("… we also need to be reminded of the doctrine of arbitrability. There are some issues which are simply beyond the capability of arbitral tribunals to resolve. Insolvency, real, and intellectual property issues involving registration, family law, criminal law, succession, and rights

countries these areas are becoming increasingly scarce. A Contracting State can continuously broaden or narrow the list of topics in its forum, as it deems suitable at a given point of time[68]. For example, in the US, which has signed and ratified NYC, the US Supreme Court has enforced arbitration agreements in an increasing number of public and quasi-public law claims related to contracts, including anti-trust, securities fraud, and employment discrimination claims.[69]

The exclusion of several subject matters, in advance, from the scope of HCCCA allows no such flexibility. States are not at liberty to adapt the list to future circumstances according to the wording of the HCCCA. A jurisdiction clause pertaining to a dispute whose subject matter is excluded from HCCCA will not enjoy the protections offered by HCCCA regardless of the wish of the parties. Member states would not be obliged under HCCCA to enforce such clauses, and judgments delivered by the designated court would not be enforceable under HCCCA. In such circumstances, parties are likely to turn away from adjudication and choose arbitration instead.

A second legal limitation of HCCCA is the requirement that, for the Convention to apply to a jurisdiction clause, such a clause must be an exclusive one, which not only confers jurisdiction upon a given court but also excludes the jurisdiction of all other courts.[70] However, in some industries, it is common for commercial bodies to agree on what are known as "asymmetric arbitration clauses" or "unilateral option arbitration clauses."[71] According to such a clause, the parties limit themselves to bringing court proceedings in a particular jurisdiction, while at the same time allowing one or more parties to choose to refer the dispute to arbitration

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in rem are generally considered beyond the realm of arbitration. But even in these areas, where parties claim entitlement to certain rights against other parties and there is an arbitration agreement in place to resolve all disputes in connection with these rights, it may be possible for an arbitral tribunal to determine those rights as between the parties and then to make an order to compel the losing party to take such actions as are necessary to vest the rights adjudicated by the tribunal in the other party.").

68. The Contracting States can use the doctrine of overriding mandatory provisions to determine that specific issues cannot be referred by the parties to arbitration. For a detailed discussion on the use of overriding mandatory provision to reject the validity of arbitration clauses in different legal issues by European courts see Jan Kleinheisterkamp, *Legal Certainty, Proportionality and Pragmatism: Overriding Mandatory Laws in International Arbitration*, 67 INT'L & COMP. L.Q. 903 (2018).

69. O'HARA & RIBSTEIN, *supra* note 45, at 102.

70. Exclusive jurisdiction clauses are sometimes referred to as "mandatory" as non-exclusive clauses are sometimes referred to as permissive forum selection clauses, *see* Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform*, 67 WASH. L REV. 55, 56 (1992) ("Some civilian commentators use the term 'derogation agreement' to describe exclusive forum agreements, [and] 'prorogation agreement' to describe non-exclusive forum agreements."). Another type of forum selection clauses is those which give one party only a choice about the forum in which proceedings may be brought, *id.* These are known as asymmetric or unilateral optional forum selection clauses and are commonplace, particularly in international financial agreements, *see* Mary Keyes & Brooke Adele Marshall, *Jurisdiction Agreements: Exclusive, Optional and Asymmetrical*, 11(3) J. PRIV. INT'L L. 345 (2015). On the possible problem of interpretation as an exclusive or non-exclusive jurisdiction clause see DICEY ET AL., THE CONFLICT OF LAWS para. 12-102 (15th ed., 2012). Another type of jurisdiction clauses is those which give one party only a choice about the forum in which proceedings may be brought, *see id.* The common opinion is that the Choice of Court Convention does not apply to unilateral optional jurisdiction clauses, *see* BRAND & HERRUP, *supra* note 55, at 16–17. This means that hybrid jurisdiction clauses, which are very common in the financial sector, are not governed by the Convention, *id.*

71. Bas van Zelst, *Unilateral Option Arbitration Clauses: An Unequivocal Choice for Arbitration Under the ECHR?*, 25, 1 MAASTRICHT J. EUR. COMP L. 77, 77–86 (2018).

instead.[72] Asymmetric arbitration clauses are often used in specific industries, such as finance and construction, where one party wishes to be sued only in its forum of choice (usually its local jurisdiction), but conversely wants the flexibility to enforce securities and pursue assets against the other party wherever possible.[73]

While HCCCA does not apply to such clauses, NYC does because an asymmetric arbitration clause satisfies the conditions required by NYC art. 2. Thus, if a party chooses to bring a legal action before a designated or non-designated court, HCCCA will not apply. This means that a designated court is under no obligation to exercise its jurisdiction and a non-designated court is free to seize jurisdiction. What is more, judgments of the designated court will be denied the enforcement facilities offered by HCCCA. By contrast, if the relevant party applies the option of arbitration, NYC will apply. This means that the other party will be barred from seeking to adjudicate the dispute, and the arbitral awards will be enforceable under NYC. In these circumstances, it is safe to assume that the parties are far more likely to choose to arbitrate than to adjudicate.

## IV. COMPARISON WITH NYC'S SIGN-AND-RATIFY HISTORY

It is important *not* to attribute HCCC's failure to gain international support to the two legal limitations described in the previous section. After all, HCCCA endorses the same principles endorsed in other successful international and regional instruments, such as NYC for arbitration and the Brussels Ia Regulation for litigation within the EU. Furthermore, despite the described limitations, HCCCA offers the first and only international instrument that provides a comprehensive arrangement that can enable adjudication to become a reliable alternative to arbitration. A doctrinal analysis cannot, therefore, explain the failure of a convention so crucial for the success of the ICCs established over the last two decades.

### *A. Doctrinal Quality, Ratification Pace, and Economic Power*

There can be no dispute about the success of NYC.[74] The acceptable view is that the convention has succeeded because it provides a useful legal framework that ensures the enforcement of arbitration agreements and arbitration awards.[75] However, a content-based account that focuses solely on the doctrinal quality of a convention's content cannot entirely account for its international reception. The experience with HCCCA shows that even though HCCCA applies principles similar

72. *Id.*

73. Norbert Horn, *The Development of Arbitration in International Financial Transactions*, 16 ARB. INT'L 279, 280–86 (2000); William W. Park, *Arbitration in Banking and Finance*, 17 ANN. REV. BANK L. 213, 216 (1998); Stefano Cirelli, *Arbitration, Financial Markets and Banking Disputes*, 14 AM. REV. INT'L ARB. 243, 268 (2003).

74. *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 21 (Wolters Kluwer 2d ed. 2001) (as Gary Born wrote in the second edition of his International Commercial Arbitration: Commentary and Materials, quoting International Court of Justice (ICJ) Judge Stephen Schwebel, "It works."); *see also* Linda Silberman, *The New York Convention After Fifty Years: Some Reflections on the Role of National Law*, 38 GA. J. INT'L & COMP. L. 26, 26 (2009).

75. Silberman, *supra* note 74, at 26; U.N. Commission on International Trade Law Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Guide by the Secretariat (Sept. 2016), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2016_guide_on_the_convention.pdf.

to those applied by NYC and the Brussels Ia Regulation regarding the enforceability of jurisdiction clauses and judgments, it still failed to gain sufficient international support.

It might be tempting to think that it is still too early to evaluate the success or failure of HCCCA. Arguably, based on the ratification history of NYC, the slow pace of HCCCA ratification does not necessarily suggest that HCCCA would not be ultimately ratified by as many countries as NYC.

It is true that the first years following the conclusion of NYC were characterized by lack of enthusiasm among key countries. Even a decade after it was opened for signature, NYC was only ratified by 34 countries.[76] By the end of its second decade, 20 more countries joined, and another 23 joined in the subsequent decade.[77] During the 1990s a tipping point was reached as 50 countries joined within a ten-year span, and subsequently 20 more brought the total membership to more than 170 (nearly the same as the World Trade Organization!).[78]

Nevertheless, the slow pace of countries joining HCCCA is still worrying. To begin with, the joining pace is far slower than that of NYC. As of now, 18 years after its conclusion, only 29 countries have signed and ratified HCCCA, compared with 54 countries at the equivalent stage of NYC.[79] Secondly, one should expect a faster pace of joining HCCCA in the light of the existence of NYC and its success in fostering arbitration agreements. Thus, the "ratification-pace account" must also be rejected.

Finally, it might be thought that economic powers may influence the ratification frequency. On this approach, private actors may induce their governments to join international agreements, such as NYC, depending on their market power. Furthermore, a government's decision to ratify may depend on such factors such as the country's dependence on trade, the nature of trade, the level of trade with pro-arbitration countries, trade competition with countries embracing arbitration, and so on.[80] However, empirical work has refuted this account. No economy-based pattern could be found to explain why some countries (such as France or India) joined NYC immediately, while others (such as the UK, Singapore, and Brazil) waited several years before joining.[81]

### *B. Background Conditions and Domestic Legal Communities*

To better understand the ratification prospects of HCCCA, it would be useful to look at the background conditions against which NYC was conceived and subsequently operated. Recent work in political science has suggested that the success of

76. HALE, *supra* note 28, at 149–50.
77. *Id.*
78. *Id.* at 149.
79. Thomas Hale, *The Rule of Law in the Global Economy: Explaining Intergovernmental Backing for Private Commercial Tribunals*, 21 EUR. J. INT'L RELS. 483, 485 (2015).
80. *See* HALE, *supra* note 28, at Ch. 2. Hale argues that we can compare different dispute settlement institutions in terms of their neutrality, authority, and efficiency, *id.* This is the demand side, *id.* Depending on the market conditions they face, companies will prefer different amounts of neutrality, authority, and efficiency, meaning different types of dispute settlement institutions, *id.* These preferences then become the basis of institutional "supply," by the governments, *id.*
81. *Id.* at 149–50.

NYC is best explained by reference to two main accounts: geo-political background and the nature and dynamic of the arbitration world.[82]

The first account focuses on the fact that NYC was concluded shortly after World War II. Arguably, the dire consequences of the War led the victorious powers, especially the United States, to move for a reintegrative and cooperative model of international trade. Such powers considered the economic crises and beggar-thy-neighbor policies that characterized the pre-War era as part of the causes for the War. Moreover, such powers believed that vibrant and socially just market economies were the best defense against communism. Several international economic institutions were therefore established in order to facilitate and promote international trade—such as the International Monetary Fund (IMF), the World Trade Organization, the International Bank for Reconstruction and Development (later the World Bank). According to this analysis, the conclusion of the NYC was part of this historical phase, and part of the treaties (such as the General Agreement on Tariffs and Trade which laid the foundation for WTO) that sought to encourage international trade and facilitate the operation of the emerging international organization.[83]

The second account is more specific, focusing of the dynamic and sociology of the world of international commercial arbitration. Empirical work conducted by Thomas Hale has found that the impetus for the ratification of NYC came primarily from networks among national and international legal communities, especially those that practice arbitration.[84] He found that a country's decision to ratify was

82. *See generally id.*; FRANCINE MCKENZIE, GATT AND GLOBAL ORDER IN POSTWAR ERA (2020).

83. MCKENZIE, *supra* note 82 ("There was widespread belief that the condition of the world economy, as well as economic relations between states, would be critically important to the postwar order. A peaceful world had to be prosperous; at the very least, economic instability, poverty, and the gap between have and have-not states would have to be alleviated. Officials in the United States and Britain designed three organizations that were intended to stabilize currencies, promote industrial development, and liberalize world trade as interconnected parts of a secure and expanding global economic order: the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (usually referred to as the World Bank), and the International Trade Organization (ITO)." However, it should be noted that in the period immediately after the Second World War there was still hostility among countries towards arbitration and the receptivity regarding a new treaty was the result of a process, *see*: ALEC STONE SWEET & FLORIAN GRISEL, THE EVOLUTION OF INTERNATIONAL ARBITRATION: JUDICIALIZATION, GOVERNANCE, LEGITIMACY 62 (Oxford University Press 2017) ("Immediately following the end of the Second World War, the ICC began working in earnest to reform the kaleidoscope of institutions that poorly served to coordinate state law and the arbitral order. At the national level, indifference and hostility to arbitration remained common.").

84. HALE, *supra* note 28, at 149–50. As Hale describes, though the NYC proposed by a specific business group (the ICC), it was the legally oriented elements of this organization – which had developed in the intervening decades – that shaped it, *id.* There were no business campaigns in favor of the treaty, *id.* Indeed, business groups in the UK opposed the treaty, and those in the United States were at best ambivalent or vague, *id.* Still, the negotiations that took place in spring and summer 1958 brought a wide range of countries together to devise an instrument that would allow for the mutual enforcement and recognition of arbitral awards, *id.* After a set of negotiations that read more like a legal seminar than an exercise in interstate bargaining, they created the NYC, *id.* Though the practical effect of this treaty was consistent with the needs of international business, they did little to create it, *id.* In the context of this legal network, Hale explains the unique dynamics of the relevant legal expert in the case of the NYC, *id.* According to Hale, the realm of international commercial disputes, the legal experts who perform internarial commercial arbitration can be seen as a closed community, sharing a common culture, *id.* The lawyers that teach and practice arbitration (either as arbitrators or advocates for parties) compose a highly specialized and organized sub-community, *id.* Arbitration requires a unique set of skills and expertise that other lawyers, even those in commercial practice, may not acquire, *id.* There are also strong social linkages between arbitration lawyers, with many of the most elite groups acting as a kind of club, *id.*

influenced by the strength oits arbitration community and by the participation of national legal experts in a variety of international institutions that relate to arbitration.[85] Relatedly, national ratifications were also influenced by the strength of the legal field.[86] Countries with strong judiciaries—a proxy for the strength of the legal field more broadly—were likely to ratify more quickly than those with weaker judiciaries.[87] Similarly, countries whose legal systems belong to the same legal tradition or that have similar origins were more likely to ratify as more and more of their peers did. This is part of the process of integration of legal norms among and within legal systems, which depends on the strength of the local legal community and the intensity of its interactions with other communities abroad.[88]

As we shall now see, the sets of factors that have facilitated the sign-and-ratify process of NYC do not apply in the context of HCCCA. The background geo-political conditions surrounding the conclusion and the aftermath of HCCCA, and the legal communities relevant to HCCCA, are entirely different that those relevant to NYC. This may account for the slow sign-and-ratify process of HCCCA. However, the UK example will subsequently demonstrate that the existence of a suitable political climate, combined with a significant role by domestic legal groups, can render ratification more likely.[89]

### *1. Political Background*

The political background surrounding HCCCA is entirely different than that which fostered the sign-and-ratify process of NYC. While global transportation and trade are greater nowadays, the enthusiasm for globalization and liberalism that characterized the period following WWII and bred support for NYC has evaporated, especially throughout the period following the conclusion of HCCCA.

The US' decision not to ratify HCCCA is a striking example for a seclusive approach in the field of private international law. Although the US led the negotiation of HCCCA, it has not yet ratified the Convention.[90] This decision is part of a more general approach that US courts have adopted in the field of private

Arbitrators tend to attend conferences with other members of this club, serve on arbitral panels with members of this club, and recommend that their clients select members of the club as arbitrators, *id.* These lawyers are often strong advocates of arbitration over litigation, seeing it as a superior form of dispute resolution, *id*. at 77.

85. *Id*. at 94.

86. *Id.* at 94, 149–50.

87. *Id.* at 149–51.

88. *Id*. at 149–51. For the explanation of the factor of similarity between the legal system, *see also* Hale, *supra* note 79, at 31 ("I consider whether countries are more likely to ratify the NYC once other countries with the same legal origin do so, creating spatial weight variables to measure the extent to which a county's legal system peers participate in the NYC.").

89. On the difficulty with premature criticism of the HCOCA, see Lucas Clover Alcolea, *The 2005 Hague Choice of Court and the 2019 Hague 187 Judgments Conventions: Rivals, Alternatives or Something Else?,* 6 MCGILL J. DISP. RESOL. 187, 192 (2019-2020) ("… despite NYC's age, the number of countries party to the Convention continues to grow, with six new accessions occurring in the last two years. Therefore, it is evident that the territorial scope of NYC is presently far superior to that of the Hague Conventions, but, as noted above, this is an unfair comparison given the relative youth of the latter. It is worth noting that it was decades before NYC could be considered as having quasi-global coverage, and several major economies did not accede until the 1970s and 1980s. For example, the USA acceded in 1970, the UK in 1975 and Canada only acceded in 1986.").

90. O'HARA & RIBSTEIN, *supra* note 45, at 105–06.

international law.[91] Indeed, several studies have shown that US courts employ various legal doctrines in order to dismiss cases, at least in part, because of their "foreignness, " including restrictions on personal jurisdiction, a wider application of the *forum non conveniens* doctrine, and the presumption against extraterritoriality.[92] With this in mind, an international convention whose primary purpose is to increase the mobility of foreign disputes and confer upon foreign parties the power to force domestic forums to adjudicate their dispute merely because the parties want them to do so, is inconsistent with the reclusive approach of US courts.

### *2. The Role of Legal Experts*

We submit that the difference in audience influences the sign-and-ratify rate. In arbitration, the groups that mostly engage with NYC and have interest in its effective operation are commercial bodies (the disputants), lawyers who represent in arbitrations, arbitrators, and organizations that regulate their activities.[93] In other words, the individuals and entities involved are all private and, driven by their private interests, they are capable of exerting sufficient pressure on their governments to facilitate arbitration. In the case of HCCCA, however, the relevant groups are slightly different. While they include commercial bodies and lawyers who

91. There has been additional explanation that attributing this decision to the division of powers between the states and the federal government, *see* for example Strong, *supra* note 48, at 29 ("Development of a federal court dedicated to cross-border business disputes is problematic at both the constitutional and sub- constitutional levels. The biggest constitutional concern involves jurisdiction. While difficulties involving personal jurisdiction could be overcome on the basis of consent, subject matter jurisdiction would have to be addressed legislatively through the creation of a new tribunal under either Article I or Article III of the Constitution. This is not impossible, since the US federal system is already home to a number of specialized Article I courts, most notably the US Bankruptcy Courts, and one specialized Article III first-instance court, the US Court of International Trade. However, Congress is generally loath to create specialized tribunals, preferring instead to rely on generalist judges. Various sub-constitutional concerns also exist. Unless the new court adopts its own unique procedural rules, disputes will be subject to the Federal Rules of Civil Procedure, including Rule 26 on discovery. While US practitioners characterize broad discovery as a necessary evil, international actors view US-style discovery with horror and will likely avoid any dispute resolution mechanism that incorporates such procedures. Individual litigants could adopt bespoke procedures as a matter of contract, but US-style discovery is inextricably linked to US substantive law, which makes it difficult to eliminate discovery altogether or to limit it severely. Concerns about discovery could therefore prove fatal to the development of a US-based international commercial court, since one of the main purposes of such courts is to take advantage of the substantive law of the forum state."). Another explanation rests on the view that US courts are attractive enough even without being part of an international order, *id.* This reasoning also explains the refusal of the US to join the project of the new ICCs, *id.* For example, Strong argues that since the Convention is not a significant enough legal tool at this stage, there is no point in establishing commercial courts to use it, *id.* He argued that the US, and Australia, have so far chosen not to set up international commercial courts as these countries believe in the strength of their courts system to attract parties to a commercial dispute even without the establishment of a unique international commercial court and, according to him, the proof is that Australia exports judges to such international courts, *see id.*, at 28. The federal structure also explains the difference between the LCC and the New York Commercial Division, *see* Gu & Tam, *supra* note 15, at 459.

92. Bookman, *supra* note 5, at 1085.

93. *See* Hale, *supra* note 79, at 509–10 ("There is also an organizational field of private international law, of which transborder commercial arbitration is an important component, … This field includes the lawyers who represent firms in transborder commercial disputes, the arbitrators who often judge them, and the private arbitral institutions that manage these cases. It also includes associations of arbitrators, the schools that train them, and the international institutions that create hard or soft international law in this area, such as UNCITRAL and UNIDROIT.").

represent in courts, they do not include private adjudicators, but, rather, the judiciary. As a public agency, restricted by public interest considerations and absent urgent needs, the judiciaries are less likely to be passionate about exerting pressure on their governments. Surely, public interest considerations do favor broadening the offer spectrum by opening up additional options for adjudication. But in the absence of an urgent need for such a change, the public incentives do not seem to be sufficiently strong to bring about a widespread sign-and-ratify process across the board.[94]

Moreover, empirical studies show the choice of forum is usually influenced by the lawyers rather than their clients.[95] It has been more difficult, however, to establish the precise reasons that motivate lawyers to choose particular courts rather than others. A number of empirical studies have found that the lawyers' choice of court or of an arbitration institution is influenced by the lawyers' familiarity and experience with these platforms.[96] Lawyers used to litigating before a certain court or an arbitration institution tend to re- choose that forum without considering the relevant factors each and every time.[97] The consistent choosing of a given forum by leading lawyers encourages others to follow suit even without prior experience with that forum. The popularity of a given destination indicates to potential customers that the chosen forum is a well-recognized forum that offers a well-established legal infrastructure.[98]

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94. Themeli, *supra* note 16, at 281–82 ("International commercial courts and their competition improve the rule of law and court standard. In particular, some argue that a good commercial court makes a jurisdiction more attractive to investors. Government consider that an international commercial court may provide investing companies with a further incentive. From this perspective, governments and court administration can be likened to suppliers that offer court litigation as a good to companies and lawyers that act as the demand."). For the role of governments see also *id*. at 287 ("… courts indeed provide dispute resolution and related services, but governments are the entities that create and maintain the courts. Moreover, governments are also responsible for the economic climate, the infrastructure, and public safety, which are goods that influence choice of court. Therefore, governments should be considered as the ultimate supplier of the whole ecosystem in which international commercial courts are embedded.").

95. *See* Erlis Themeli, *Matchmaking International Commercial Courts and Lawyer's Preferences in Europe*, 12 ERASMUS L. REV. 70 (2019); Themeli, *supra* note 16, at 283 ("The interaction between lawyers and the company produces the output of the demand side. The dynamics between lawyers and clients are such that lawyers wield considerable power, and they are the true decision-makers in these interactions.").

96. *See* Themeli, *supra* note 16, at 273 (arguing that litigation experience is similar to consumer experience, which might be seen as the consumer's journey in which direct and indirect interaction established with the procedure and the goods they consume).

97. *Id.*

98. Themeli, *supra* note 16, at 288. ("For example, statistics show that many lawyers and companies choose to litigate in English courts. Other lawyers or companies that have similar cases might do the same to increase their litigation experience by taking full advantage of the existing social environment. The presence of lawyers may be even more important in the event that they have a top-notch reputation, work for large law firms, or represent famous clients. Everyone would like to litigate in these courts."). There is another possible explanation. Briggs argues, in a colorful language, that practitioners who draft forum selection clauses often put less thought into it than in the drafting of other contractual stipulations. *See* ADRIAN BRIGGS, AGREEMENTS ON JURISDICTION AND CHOICE OF LAW, 112 (2008) (statement of Dr. Adrian Briggs) ("Experience suggests that when English lawyers draft jurisdiction agreements, less attention is devoted to the task than will have been invested in setting out the performance obligations of the contract: contracts are drafted to be performed, not broken, after all. It sometimes appears that by the time they reached the jurisdiction agreement, the drafters were out of time, energy, fresh coffee and

We submit that these findings shed light on the design of the litigation landscape for international commercial disputes. For nearly five decades, the market for commercial disputes resolution has been organized in a way where disputes commonly referred to arbitration, or to the LCC, which also receives a respectable share of the market.[99] Longstanding familiarity with the LCC and with the arbitration institutions and their practices seems to have reduced the incentives of lawyers to press for joining HCCCA. Commercial lawyers seem to manage quite well with the present state of affairs, and so they do not exert pressure on their government to join HCCCA and, as a result, open up further, less familiar options.

### *C. Lessons from the UK's Accession to HCCCA*

The EU joined HCCCA in 2015.[100] As a result, all Member States are bound by it, including the UK, until Brexit.[101] By leaving the EU, the UK would no longer be bound by HCCCA. Thus, the UK government independently joined HCCCA in October 2020, during the transition period.[102] As it happened, HCCCA came into force simultaneously as the UK finally left the EU on January 1st, 2021.[103]

In this section, we investigate the crucial impact of Brexit on the UK's decision to ratify HCCCA, alongside its exit from the EU. This investigation demonstrates the importance of the role of the political background and the role of the legal community in the ratification of HCCCA by the UK.

As noted earlier, the LCC has long been a popular destination for resolving international disputes.[104] For example, data from the Singapore Academy of

clean shirts; and the quality of the work suffered accordingly."). For a different argument, there is a lack of attention in consumer and commercial contracts, *see* Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts*, 43 J. LEGAL STUD. 1, 1 (2014); Victoria C. Plaut & Robert P. Bartlett, III, *Blind Consent? A Social Psychological Investigation of Non-Readership of Click-Through Agreements,* 36 L. & HUM. BEHAV. 293, 295–98 (2012); OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014); Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 546 (2014).

99. In this context, it is certainly possible to imagine the role of the community that engages in arbitration in preserving its power, *see* Hale, *supra* note 79, at 510–11 ("In the realm of transborder commercial disputes, the private arbitration community can be seen as a transnational epistemic community. The lawyers that teach and practice arbitration (either as arbitrators or advocates for parties) are a highly specialized and organized sub- community of lawyers. They typically specialize in arbitration cases, building a unique set of skills and expertise. These lawyers are often strong advocates of arbitration over litigation, seeing it as a superior form of dispute resolution. They also, of course, stand most to gain, materially, from increased reliance on arbitration. These epistemic communities act like 'normative interest groups' within the larger organizational field of law.").

100. *See* HCCCA, *supra* note 21.

101. *See* Andrew Dickinson, *Back to the Future: The UK's EU Exit and the Conflict of Laws*, 12 J. PRIV. INT'L L. 195, 197–98 (2016).

102. *United Kingdom joins 2005 Choice of Court and 2007 Child Support Conventions,* HAGUE CONF. ON PRIV. INT'L L. (Sept. 28, 2020), https://www.hcch.net/en/news-archive/details/?varevent=751.

103. *Brexit: Withdrawal Agreement to be fully operational on 1 January 2021*, EUR. COMM'N (Dec. 17, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2478.

104. *See* Calster*, supra* note 47, at 503–04 ("English courts work fast by comparison with many of their European counterparts. Judgments are published transparently and almost instantly; many European States struggle to publish properly the case law even of their courts of appeal, let alone first-instance courts. The English court system in commercial cases has not stopped innovating since the introduction of the London Commercial Court in 1895. The London Courts continue [sic] to try out various new procedures and areas of specialization in a tireless way against which even the most modern continental

Law for disputes in Asia for 2015 indicate that 52% of the contracts drafted in English in the Middle East and North Africa chose London as the agreed jurisdiction for disputes.[105]

The dominance of the LCC in the world of international commercial disputes is the result of active initiatives taken by the English legal community to encourage foreign disputes to be resolved in English courts. For example, a brochure published in September 2007 by the Law Society of England and Wales—entitled "England and Wales: The Jurisdiction of Choice"[106]— praised English law as *the* law for international contracts and English courts as *the* place for the settlement of international commercial disputes. What is more, it bluntly presented the English legal system as a more superior legal system than those in civil law countries.[107]

In 2016, the UK voted for Brexit, and on 31 December 2020, it actually left the EU.[108] The decision to leave was motivated by various socio-political reasons. One of the prominent objectives was to restore national sovereignty.[109] At the face of it, Brexit would release English courts from the obligations under the Brussels Ia Regulation and under HCCCA, which applied to it as long as it was a member of the EU.[110] At first glance, the UK's decision to ratify HCCCA as part of its preparations for Brexit is puzzling. Not only does it run against the Brexit spirit of sovereignty, but it also undermines fundamental principles of common law, according to which English courts are free to decide whether to exercise jurisdiction over an international commercial dispute.

It is true that English courts will usually respect jurisdiction clauses unless there are strong reasons to decide otherwise,[111] but the very existence of judicial discretion

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business courts pale. English civil procedure rules harbor a number of most interesting and relevant ways to speed up procedure, such as in particular the case-management conference at which parties and the judge streamline the core issues to be discussed in the case. The possibility of application for summary proceedings enables courts quickly to process cases which have no proper chance of success. Provisional measures are issued fast and creatively, with a high expectation for counsel to come to court with clean hands and under full and frank disclosure. Awarding costs against the losing party, and flexibly allowing third party funding, all arguably assist in the bringing of cases which otherwise might not be brought.").

105. At the end of 2016 the percentage had dropped to 25%, whereas the corresponding figure for the DIFC Courts had increased to 42%.

106. THE LAW SOC'Y, ENGLAND AND WALES: THE JURISDICTION OF CHOICE (2007).

107. Gisela Rühl, *The Resolution of International Commercial Disputes – What Role (if any) for Continental Europe?,* SYMPOSIUM ON GLOBAL LABS OF INTERNATIONAL COMMERCIAL DISPUTE RESOLUTION 11 (2021). Rühl mentioned that not surprisingly, the brochure was not met with enthusiasm on the European Continent, *id.* German lawyers decided to fight back by publishing their own brochure entitled "Law- made in Germany", *id.* It advertised the alleged advantages of German law and German courts vis-à-vis English law and English Courts, *id.* This episode was cynically called "the battle of the brochures", *id. See also* Stephan Vogenauer, *Regulatory Competition Trough Choice of Law and Choice of Forum in Europe: Theory and Evidence*, EUR. REV. PRIV. L. 13, 30.

108. *See also Brexit*, *supra* note 103.

109. ROBERT SCHERTZER & ERIC TAYLOR WOODS, THE NEW NATIONALISM IN AMERICA AND BEYOND: THE DEEP ROOTS OF ETHNIC NATIONALISM IN THE DIGITAL AGE 147–78 (2022).

110. Dickson, *supra* note 101, at 197.

111. *Compare* Donohue v. Armco [2002] 1 Lloyd's Rep. 425 (HL), para. 24 ("If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, … the English court will ordinarily exercise its discretion… to secure compliance with the contractual bargain, … the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation …"), *with* Bremen v. Zapata Off-Shore Co. 407 US 1, 12–13 (1972) ("a freely negotiated private international agreement, unaffected by fraud, undue

is a unique and longstanding feature of common law.[112] Brexit would have restored judicial discretion as to whether to give effect to jurisdiction clauses and whether to enforce foreign judgments. By ratifying HCCCA, the UK have forsaken such discretion altogether in relation to disputes that fall under the Convention and countries that have also ratified HCCCA.

This article argues that a closer examination shows that Brexit was perceived by the English legal community as posing a serious threat to the international position of LCC and its ability to attract foreign commercial disputes. Simply, by leaving the EU, the UK no longer enjoyed the benefits of the Brussels Ia Regulation or HCCCA. This meant that the enforcement of LCC's judgments abroad would become more complex.[113] Specifically, the UK would no longer enjoy the strong mechanism established by the EU under the Brussels Ia Regulation for the enforcement of judgments rendered in any EU Member State in any other EU Member State.[114] Some European lawyers seized on the opportunity and started to call for diverting disputes from LCC to the emerging European new commercial courts in the Netherlands, Germany, and France.[115]

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influence, or overweening bargaining power, such as that involved here, should be given full effect."); *see also* Carnival Cruise Lines, Inc. v. Shute, 499 US 585, 596 (1991) (for the contractual analysis of jurisdiction clauses); ALEX MILLS, PARTY AUTONOMY IN PRIVATE INTERNATIONAL LAW 91 (2018).

112. The legal position in civil law legal tradition determines that the court has limited discretion in the context of jurisdiction. According to this tradition, if the rules for the establishment of jurisdiction are met, the court must exercise its jurisdiction and hear the claim. If the rules are not met, the court must dismiss the claim. *See e.g.* PIERRE MAYER & VINCENT HEUZÉ, DROIT INTERNATIONAL PRIVÉ (9th ed., 2007). The strongest expression of judicial discretion in the common law tradition in jurisdictional issues is the *forum non conveniens* doctrine. In this legal tradition, an accepted principle is that, the court has jurisdiction over a defendant who has been served with the claim form. However, the doctrine of *forum non conveniens* permits a defender to request that a court should decline to exercise jurisdiction because there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice. Additional expressions of the court's discretion in jurisdictional issues are in the context of jurisdiction clauses and *lis alibi pendens*. Dicey, *supra* note 70, para. 12–042.

113. *See* Calster*, supra* note 36, at 511–12 ("I do not believe that continental judges will somehow use this renewed 'freedom' (see, however, the caveat of bilateral conventions) routinely or even liberally to refuse to recognize UK judgments. I appreciate that continued adherence to the rule of law must not be taken for granted. However, it is most unlikely that the UK legal order and the functioning of the UK courts post Brexit would be of such nature seriously to change from a substantive point of view the overall reception which continental courts give to UK judgments even outside of the Brussels regime. Clearly there will be instances where such judgments will be refused recognition – as they can be under the current rules, for instance using the order public exception, or for judgments which were issued in spite of concurrent proceedings in an EU court. That latter element is of course more conceivable now that the UK will no longer be using identical jurisdictional rules, including the guillotine-like *lis alibi pendens* regulation in Brussels Ia. One very important commercial area of note in this respect is the English 'Schemes of arrangement' (and since June 2020, the 'Restructuring Plan'). These are restructuring mechanisms that have been used in great numbers by continental corporations and enforced on the continent on sometimes unwilling creditors. The UK courts have been relying for years on *arguendo* cover of these schemes under Brussels Ia, which largely insulates them from jurisdictional scrutiny, and even recalcitrant creditors have not pushed the point too vigorously.").

114. Fentiman, *supra* note 8, at Ch. 2 (enforcement risk is a constituent part of litigation risk and has to be factored into the costs associated with entering into a particular cross border commercial transaction. It may be defined as the risk that a judgment debtor with worldwide assets will disperse or conceal those assets, and the risk that a judgment obtained in one court will be unenforceable elsewhere.).

115. *See also* Xandra E. Kramer and John Sorabji, *Int'l Business Courts in Europe and Beyond: A Global Competition for Justice?*, 12 ERASMUS L.R. 1 (2019).

English lawyers and judges were naturally perturbed by such a prospect.[116] This led members of the legal profession and the judiciary to advocate the ratification of HCCCA as part of the UK's preparations for Brexit. HCCCA offered the golden path for preserving the status of LCC. Since the EU and its members had already signed and ratified HCCCA, by ratifying HCCCA the UK unilaterally restored the position of its LCC.

Ironically, it was the political decision to restore sovereignty which forced the UK to choose to give up more judicial discretion. By replacing the Brussels Ia Regulation with HCCCA, the UK forsake judicial discretion not only in relation to EU countries but also in relation to any country that had ratified HCCCA or will ratify it in the future.

There is ample evidence that supports our account. During the preparations for Brexit, concerns were explicitly raised that Brexit would adversely impact the attractiveness of LCC as an international dispute resolution center in view of existing competition from the newly established LCCs.[117] According to a 2018 Thompson Reuters report, English lawyers believed that their workload would decrease after Brexit.[118] In the same vein, a command paper and explanatory memorandum published by The Ministry of Justice and laid before Parliament in 2018 stated that *"* [T]here is widespread support among commercial law stakeholders, such as the Bar Council of England & Wales, Law Society … for the UK to continue to participate in [HCCCA]."[119]

The call by practitioners to join the HCCCA found support in the British government. In an Impact Assessment Report issued in October 2018 by the Ministry

116. Dickinson, *supra* note 101, at 201–07; Mukarrum Ahmed, *BREXIT and English Jurisdiction Agreements: The Post-Referendum Legal Landscape*, EUR. BUS. L. REV. 989.

117. *See e.g.* Gu & Tam, *supra* note 15, at 457 ("Apart from that fierce competition, the LCC's leading position is further undermined by the uncertainty caused by Brexit. A 2018 report by the European Parliament suggested that, after Brexit, commercial parties might be forced to consider alternatives to the LCC. Indeed, the Portland Commercial Courts Report 2021 confirms that prediction, showing that the proportion of LCC litigants from EU member states declined from 14.9% in 2016–17 to only 11.5% in 2020–21. Given that the UK will be precluded from relying on the Brussels Regime, a mutual judicial recognition and enforcement regime inter se the EU member states, the enforceability of judgments rendered by the English courts in EU member states will be in doubt going forward. 68 However, an English judgment with valid choice-of-court agreements may arguably be enforced in EU member states via the Convention of 30 June 2005 on Choice of Court Agreements ('Hague Convention') given that the UK is still a signatory to the Hague Convention. In any event, the significant level of uncertainty as to the impact of Brexit on the LCC could possibly compromise its core values of predictability and legal certainty."); *See also* Wilske*, supra* note 52, at 161 ("Indeed, in the course of BREXIT discussions, it became apparent, that London could lose its attractiveness. The impact of BREXIT on the European judicial scenery is already visible. 38 In leaving the EU the UK will be precluded from the EU regime for the mutual recognition of judgments. In the future, applications for the recognition and enforcement of English judgments will have to be filed in each Member State of the EU resulting in additional time and cost for the parties involved. Notably, some of the novel features of international commercial courts such as the international composition of the bench and a right of audience for foreign legal counsel are nonexistent in London Commercial Court proceedings. This might be a chance for new rivals to achieve a competitive edge vis-à-vis the English role model of an international commercial court.").

118. *UK law firms expect long-term decline in work in the event of 'no-deal' Brexit*, THOMPSON REUTERS (Apr. 19, 2018), https://www.thomsonreuters.com/en/press-releases/2018/april/uk-law-firms-expect-long-term-decline-in-work-in-the-event-of-no-deal-brexit.html.

119. Explanatory Memorandum of the Choice of Court Agreements (Hague Convention 2005 Etc) (EU Exit) Regulations 2018 , Ministry of Justice, https://assets.publishing.service.gov.uk/media/5b9a781040f0b678935fcd80/Explanatory_memoranda_-_Hague_2005_SI_-_Final.pdf (last visited Feb. 8, 2023).

of Justice as part of the legislative process for the incorporation of HCCCA into UK domestic law, it was stated:

> The UK has a strong reputation as the leading global centre for the provision of international legal services. By complying with the international legal obligations of the 2005 Hague Convention, as embedded in domestic legislation, the UK can ensure that the UK legal services sector can continue to be at the forefront of cross-border litigation in civil and commercial matters.[120]

Likewise, in a statement made in May 2019 by Lord Burnett of Maldon, Lord Chief Justice of England and Wales, he stressed that the UK's legal community must strive to continue to preserve the English legal system as a product for foreigners and as a means for promoting local interests.[121] He further stressed the need to resolve the uncertainty that would arise for foreigners conducting legal proceedings in the UK in the post-Brexit era.[122]

The ratification decision allows the UK to continue to be part of an international arrangement that ensures certainty in the treatment of jurisdiction clauses and therefore reassure parties who choose the UK as a forum for resolving disputes . It can even be said that, in a way, HCCCA preserves the LCC's supremacy in the international market of commercial courts because LCC is the most senior and, at the moment, still a more attractive to commercial courts than most of the ICCs. Thus, although the accession to HCCCA deprives English judges of the broad discretion they could have had at common law, as to whether or not to give effect to a foreign jurisdiction clause, this is a price worth paying simply because a large amount of jurisdiction clauses refer cases to the LCC rather than to other ICCs. So, it is in the UK's national interest to ensure that such clauses are given effect. Since the EU had already signed and ratified HCCCA, UK's decision to follow suit ensured that Brexit would not interrupt the flow of disputes to the LCC.

## V. CONCLUSION

HCCCA has failed to do to adjudication what NYC has done to arbitration. Although it borrows the same principles that have operated successfully through NYC in the field of arbitration, adjudication is still a less attractive option for resolving international commercial disputes. The proven quality of its proposed

120. *Impact Assessment For The Civil Jurisdiction And Judgments (Hague Convention On Choice Of Court Agreements 2005) (Eu Exit) Regulations 2018*, LEGISLATION.GOV.UK, https://www.legislation.gov.uk/ukia/2018/143/pdfs/ukia_20180143_en.pdf (last visited Apr. 18, 2023).

121. The Right Hon. the Lord Burnett of Maldon, *English Law on the World Stage: London International Dispute Week,* LORD CHIEF JUST. OF ENG. & WALES 1 (May 8, 2019).

122. *Id.* ("In this environment we all must recognize that we are providing a service and operate in an international market for legal services. There are many other jurisdictions, both common law and civilian, that are well able to satisfy the needs of the international commercial community. We are far from unique in being able to offer a first-rate service. The overall service provided by our lawyers, our arbitrators and our courts must remain attractive if London is to maintain its position. To some degree, there is uncertainty. Others will be talking this week about the impact of Brexit on London as a venue for dispute resolution. Uncertainty itself has a damaging impact on much commercial activity but once uncertainty recedes so too, I expect, will this concern.").

mechanism has not been sufficient to encourage countries to sign and ratify. The modest number of countries signing and ratifying HCCCA is not just unfortunate, it is also surprising. Most countries are already familiar with NYC and its mechanism for enforcing arbitration agreements and arbitration awards. For those which had joined NYC, joining HCCCA would have been a natural decision to make.

This article has shown that the limited international endorsement of HCCCA has crucial implications for the litigation landscape in international commercial disputes. It adversely undermines the prospects for a sustainable and more diverse market for international commercial litigation. It also limits the ability of the several commercial courts established over the last 15 years or so to attract larger portions of international commercial disputes.

Drawing on the background conditions and factors that helped NYC, this article offers two explanations for why HCCCA has not achieved the expected international support: a political climate that is less conducive to international cooperation in private international law, and legal communities that lack high motivation to press their governments to join.