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International Commercial Courts
in the Litigation Market

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INTERNATIONAL COMMERCIAL COURTS IN THE LITIGATION MARKET

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Abstract: The expression ‘international commercial courts’ refers to national judicial bodies set up in the last fifteen years in several jurisdictions throughout the world to suit the specific demands of international commercial litigation. The courts and the proceedings before them share unique features often imported from the common law tradition and the arbitration world, with a view to providing for a dispute resolution mechanism tailored to the subject-matter. This notwithstanding, there is no single model of international commercial court: rather, each of them presents its own distinctive characteristics. This paper summarizes the main traits of several international commercial courts in Asia, Middle East and Europe. At a second stages, it explores their relationship with international arbitration, on the one hand, and among them, on the other, at a time when dispute resolution mechanisms in competition is seen as an incentive for the improvement within justice systems at a global level, and the term ‘litigation market’ has become common place. In this context, elements such as the language of the process, the possibility of being represented by foreign lawyers, or the existence of a network of instruments for the enforcement of decisions abroad, may prove decisive in the choice of the users to file claim with a court (and which one), or going to arbitration.

Keywords: Commercial cross-border litigation; litigation market; international commercial courts; international arbitration

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1 Introduction

International commercial disputes are principally settled via arbitration or before the public courts. A relevant divergence between these two methods of dispute resolution is that, as a rule, judicial proceedings unfold according to non-dispositive, general and pre-established procedural rules, mostly designed for domestic settings (as opposed to cross-border ones). Only by way of exception are the parties allowed to deviate from the legal provisions, and only some legal systems include procedural-related provisions that take the international nature of a controversy into account.¹ The situation has graphically been described as a 'market failure':² a failure the lawmaker is trying to overcome by establishing specific courts, chambers or divisions for international commercial litigation.

The expression 'international commercial courts' refers to judicial bodies set up in several jurisdictions throughout the world in the last fifteen years to properly address the particularities of international commercial litigation.³ In comparison to other national public courts, international commercial courts have unique features often imported from the arbitration world. The 'international' qualifier refers to the type of issues dealt with by the courts, and (sometimes) also to their composition, but not to their origin or their nature: on the contrary, international commercial courts are created by national laws and integrated into their local justice systems.

In what follows we will first describe the most outstanding features of the already existing or planned international commercial courts: the scope of their jurisdiction, the procedural particularities reflecting the cross-border nature of their cases, or/and those meant to meet the demands of quickness; their policy on fees. In the second part we will address the relationship of the international commercial courts with arbitration, as well as among themselves, in a context where the term 'litigation market' is used without bias, and the idea of different dispute resolution mechanisms in open competition is regarded as a positive impetus for improvement and innovation within justice systems at a global level. The paper does not intend to be exhaustive but rather to provide an initial approach, based to a large extent in the letter of the law.

2 The Establishment of Specific Courts for International-Commerce-Related-Litigation: a Current Trend

International commercial courts are neither exclusive to this millennium nor to a particular part of the globe, although it is true that they have proliferated recently, especially in some geographical areas. The paradigm is to be found in the London Commercial Court, created already in 1895. International commercial courts have recently been set up in Asia and Europe; the debate over the opportunity of

* This paper is part of a broader document of research on international commercial dispute resolution, still unpublished.

¹ F. Gascón Inchausti, M. Requejo Isidro, 'EU Procedural Law Study: Mutual Trust General Report', EU Publications, 2017, Chap. 1: <https://publications.europa.eu/en/publication-detail/-/publication/531ef49a-9768-11e7-b92d-01aa75ed71a1/language-en> (all websites have been last visited January 7, 2019).

² K. Ramesh, 'International Commercial Courts: Unicorns on a Journey of a Thousand Miles', Doha, Qatar, May 13, 2018, para. 3: https://www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/international-commercial-courts-unicorns_23108490-e290-422f-9da8-1e0d1e59ace5.pdf.

³ Chief Justice Sundaresh Menon, 'International Commercial Courts: Towards a Transnational System of Dispute Resolution', Dubai International Financial Centre ('DIFC') Courts Lecture Series 2015 (Opening Lecture), Dubai, January 19, 2015: <https://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/opening-lecture--difc-lecture-series-2015.pdf>.

such a court has reached other jurisdictions, e.g. Australia;⁴ at the regional level the question has just been addressed by the EU Parliament.⁵ All international commercial courts share the common goal of addressing the demands of international commercial litigation; not surprisingly this has led to many commonalities, but each international commercial court presents nonetheless some unique features.

2.1 Asia and the Middle East, First Approach

Since the beginning of the XXI century several dispute resolution centers in the Middle East and Asia have been equipped with courts specially designed to resolve international commercial cases: in the United Arab Emirates, the *Dubai International Financial Centre Courts* (DIFC Courts) and the *Abu Dhabi Global Market Courts* (ADGM Courts)⁶; in Qatar, the *Civil and Commercial Court of the Qatar Financial Centre* (QFC Courts)⁷; in Singapore, the *Singapore International Commercial Court* (SICC)⁸.

In July 2018 the Chinese Supreme People's Court was bestowed with the faculty to create international commercial courts; to the best of our knowledge at least two have already been established, one in Shenzhen and another in Xi'an.⁹ Due to the lack of literature other than in Chinese - at least so far- the Chinese international commercial courts will not be dealt with here.¹⁰

Broadly speaking, international commercial courts share a number of elements, the most relevant being the use of English as the language of the process and the fact that they all seek inspiration in the common law tradition, both at the procedural and substantive level. Echos the Woolf's reforms proposed in 1997 and introduced in England by the Civil Procedure Rules in 1998 are easy to identify. These changes were meant to promote more resources to ADR, make litigation more affordable, introduce less complex procedures, and provide speedy justice.¹¹ Interestingly, many of the 1998 reforms were already in practice at the London Commercial Court. Substantive English law is directly

⁴ See Chief Justice Marilyn Warren, 'An Australian international commercial court', (2016) 90(7) ALJ 453. An initiative for the establishment of an international commercial court was taken in Spain in 2016. It was dropped soon afterwards, though, for a legislative amendment would have been needed which seemed quite unlikely to succeed at the time. For a brief assessment regarding Italy see R. Caponi, 'Corti commerciali internazionali ovvero corti internazionali d'impresa', *Foro Italiano*, anno 2018, parte V, col. 297, under 9 (followed by a further theoretical reflection).

⁵ EU Parliament resolution of 13 December 2018 with recommendations to the Commission on expedited settlement of commercial disputes (2018/2079(INL)).

⁶ <https://www.adgm.com/doing-business/adgm-courts/home/>

⁷ <https://www.qicdrc.com.qa/>

⁸ <https://www.sicc.gov.sg/>

⁹ It is worth noting that no international commercial court as such has been established in Hong Kong - although a Commercial list exists for insurance, banking and general financial disputes, and complicated commercial cases involving high amounts are directed thereto. Judges dealing with the commercial list have expertise in commercial disputes and are usually bilingual in both Chinese and English.

¹⁰ The applicable procedural rules apply as of December 5, 2018. They are available (in Chinese) here: <http://cicc.court.gov.cn/html/1/218/149/192/1122.html>. For a first description in English: W. Sun, 'International Commercial Court China: Innovations, Misunderstandings and Clarifications', Kluwer Arbitration Blog, July 4, 2018, <http://arbitrationblog.kluwerarbitration.com/2018/07/04/international-commercial-court-china-innovations-misunderstandings-clarifications/>. M. S. Erie, 'The China International Commercial Court: Prospects for Dispute Resolution for the Belt and Road Initiative', <https://www.asil.org/insights/volume/22/issue/11/china-international-commercial-court-prospects-dispute-resolution-belt>, August 31, 2018; S. Wilske, 'International Commercial Courts and Arbitration — Alternatives, Substitutes or Trojan Horse?', 11(2) *Contemp. Asia Arb. J.* 153, 174-180. The Chinese international commercial courts seem to be 'court[s] of limited jurisdiction built within the existing hierarchy of PRC courts'. How they will work in practice is still uncertain.

¹¹ The main reforms were the idea of pre-action protocols, judicial case management, and ADR. In his interim report of 1994 Lord Woolf addressed as well the role of information technology.

integrated in the legal system in Abu Dhabi through the Application English Law Regulation 2015; common law rules have been 'transplanted' and codified in Dubai; local law inspired by Sharia and the civil law tradition is put aside. In addition, the composition of the courts is not limited to local judges but open to international figures following the practice of common law countries of appointing members of sister jurisdictions. As of January 2019, the DIFC Courts have six foreign judges and three from the Emirates; the courts of the QFC have ten foreign judges and just one local judge; the ADGM Courts include eight foreign judges; in Singapore, at least fifteen of thirty five members come from elsewhere.

Further common features comprise the allocation of generous management powers to the court; representation and legal advice not being necessarily confined to national lawyers; a broad use of forms to initiate a claim and respond to it, to challenge it, or to request authorization to appeal. Procedural rules are clear, brief, and compiled in easily accessible documents; the basic regulatory corpus is often accompanied by 'orders', 'practice directions', or 'guidance notes' complementing and providing guidance on its application.¹²

Beyond the common aspects each of the mentioned international commercial court presents indeed individual characteristics. The courts have been operating in the international landscape only for a short period: definitive conclusions can therefore not yet be drawn, but it seems plausible that these singular data are decisive for the success -or lack thereof- of each single court.

2.2 *Separate Analysis*

Dubai: the Dubai International Financial Centre Courts

The official establishment of the international commercial courts in the Dubai International Financial Centre (DIFC) was 2004;¹³ however, they were not fully operational until 2006. The DIFC Courts operate a Court of First Instance and a Court of Appeal to hear and determine claims in civil or commercial matters (no definition is provided of 'civil and commercial' claims). In 2007, a Small Claims Tribunal was established as a Tribunal of the DIFC Courts with power to hear and determine claims within the jurisdiction of the DIFC Courts not exceeding 500,000 EAD (just over 100,000 euros), and claims related to employment contracts. It is worth noting that since 2017 the DIFC courts and the Dubai Future Foundation are working on the creation of the 'Courts of the Future', to monitor disruptive technology, such as cars without drivers, drones, blockchain and cyber security within the jurisdiction of the DIFC.

In the beginning the DIFC Courts did not focus on the resolution of international cases *per se*, but were rather conceived to support the economic activities of the Dubai International Financial Centre: an onshore financial centre located in Dubai City, independently regulated with its own civil and financial administration, legal system and judiciary.¹⁴ As a consequence, until 2011 the DIFC Courts' jurisdiction

¹² See for instance the Singapore International Commercial Court Practice Directions, 'a set of procedural guidelines regulating all proceedings in the Singapore International Commercial Court ('SICC)': <https://www.supremecourt.gov.sg/rules/practice-directions/singapore-international-commercial-court-practice-directions/>; or the Practice Directions for the ADGM Courts: <https://www.adgm.com/doing-business/adgm-courts/adgm-courts-procedures/practice-directions/>.

¹³ See the DIFC LAW No.10 of 2004, providing for the independent administration of Justice in the DIFC: https://www.difc.ae/files/1914/5448/9176/Court_Law_DIFC_Law_No.10_of_2004.pdf.

¹⁴ From the point of view of arbitration the Centre also works autonomously, i.e. separated from 'mainland Dubai'. Arbitrations based in the Centre are supervised by the DIFC Courts.

was confined to disputes with physical links with the Centre; from 2011 it was extended to disputes lacking physical connection with the Centre, if so agreed by the parties pre- or post-dispute.¹⁵

In line with the foregoing, from the start the DIFC Courts were not so much intended to reproduce a successful model of international commercial litigation, as to separate - and complement at the same time - the local legal system of the Emirates, based on Sharia and the tradition of civil law and with Arabic as the official language. Conversely, the DIFC Courts found inspiration in the common law world and made of English a preferred choice: today, the authoritative text of the procedural rules is the English one; the whole of proceedings are conducted in English; orders and decisions to be served in the Emirates must indeed be translated, but if there is divergence between several versions, the English one prevails (Court Rules Part 2 -Authentic Texts and Language of Proceedings).¹⁶

Statistics from the Singapore Academy of 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 seat of jurisdiction for disputes; at the end of 2016 the percentage had dropped to 25%, whereas the corresponding figure for the DIFC Courts had increased to 42%.¹⁷ In 2017, 54 disputes involving AED 471, 212, 695 were discussed before the Court of First Instance; the Small Claims Court handled almost 400 cases.¹⁸ These achievements of the DIFC Courts may firstly be explained by their opening to offshore litigation in 2011. Secondly, parties have been attracted by the appeal of a judicial service characterized by courts with broad management powers 'to deal with cases justly', where 'justly' means: (1) ensuring that the parties are on an equal footing; (2) saving expense; (3) dealing with cases in ways which are proportionate (a) to the amount of money involved, (b) to the importance of the case, (c) to the complexity of the issues; and (d) to the financial position of each party; (4) ensuring that cases are dealt with expeditiously and fairly; and (5) allotting to particular cases an appropriate share of the Courts' resources, while taking into account the need to allot resources to other cases (Courts Rules, Part 1, 1.6). Other relevant traits are the possibility of being represented by foreign lawyers - registered with the Dispute Resolution Authority Academy of Law;¹⁹ caveats to the general rule of publicity and transparency (Part 35-Court Rules, regarding the hearing; Part 28, for the documents); the invitation to the parties to participate in the schedule of the process (Part 26 Court Rules); the possibility to choose the law applicable to the merits (Article 6 Law No.12 of 2004 in respect of The Judicial Authority at Dubai International Financial Centre as amended), with a special treatment given to foreign law (the court has the discretion to apply the rules on evidence in the way it considers most appropriate according to the circumstances of the matter: Part 29 Court Rules). Besides, in determining a matter or proceeding the DIFC Court may consider decisions made in other jurisdictions for the purpose of making its own resolution (Chapter I, Part 6, s. 30 (2), DIFC LAW No.10 of 2004.)²⁰

¹⁵ See Law No. (16) of 2011 Amending Certain Provisions of Law No. (12) of 2004 Concerning Dubai International Financial Centre Courts; Law No.12 of 2004 in respect of The Judicial Authority at Dubai International Financial Centre as amended: https://www.difccourts.ae/wp-content/uploads/2017/10/Dubai12of2004_amended2011.pdf

¹⁶ The rules are reproduced here: <https://www.difccourts.ae/court-rules/>

¹⁷ Source: <https://www.difccourts.ae/wp-content/uploads/2018/03/Thomson-Reuters-Answers-Magazine.pdf>.

¹⁸ DIFC Courts, Annual Review 2017, <https://annualreview.difccourts.ae/#case-statistics>. No information is given as to the nature of the cases (whether on- or offshore).

¹⁹ See DRA Order No. 1 of 2016 in Respect of Rights of Audience and Registration in Part II of the Academy of Law's Register of Practitioners (<https://www.difccourts.ae/2016/09/20/dra-order-no-1-2016-respect-rights-audience-registration-part-ii-academy-laws-register-practitioners/>);

²⁰ https://www.difc.ae/files/1914/5448/9176/Court_Law_DIFC_Law_No.10_of_2004.pdf

In addition to the foregoing, all judicial decisions of the DIFC Courts benefit from bilateral and multilateral instruments on recognition and execution signed by the Arab Emirate after registration with one of the Emirate's courts - a step which nevertheless requires a translation into Arabic (Article 7 Law No.12 of 2004 in respect of The Judicial Authority at Dubai International Financial Centre as amended). Memoranda of understanding (MoU) or of guidance (MoG) have been signed with other courts, ministries or law firms operating abroad to facilitate the reciprocal enforcement of judgments.²¹ Moreover, since 2015 parties have been given a unique possibility, namely that of 'converting' a DIFC Court's decision into an arbitral award, on the terms indicated by the DIFC Courts, Amended Practice Direction No 2 of 2015: 'If parties who have submitted (or have agreed to submit) to (or are bound by) the jurisdiction of the DIFC Courts wish further to agree that any dispute arising out of or in connection with the non-payment of any money judgment given by the DIFC Courts may, at the option of the judgment creditor ... be referred to arbitration under the Arbitration Rules of the DIFC LCIA Arbitration Centre, they may to that end adopt an arbitration clause in the terms of the recommended arbitration agreement'. 'Convert' appears between quotation marks to underline that there is no real transformation of the judgment, but rather a submission to arbitration of any dispute in relation to its enforcement arising once the judgment has been given (including of course lack of voluntary compliance of the debtor even if it is due to lack of liquidity and not to a disagreement on the merits).²² The possibility of referring to arbitration, which is indeed not free from conceptual doubts,²³ entails that the judicial decision will finally adopt the form of an arbitral award, and as a consequence the New York Convention 1958 will most probably apply to its recognition and enforcement abroad.

The DIFC Court publishes its fees in detail on its website.²⁴ Very succinctly: they range between 5% of the value of the claim – from a minimum of USD 1500 for claims not exceeding USD 500,000, up to USD 130,000 for claims worth more than USD 50 million. Additional amounts are to be paid for other services such as hearings, the use of IT facilities, for delayed presentation of documents required by the court, for filing an appeal and in relation to enforcement.

Qatar: Civil and Commercial Court of the Qatar Financial Centre

Unlike the DIFC, the Qatar Financial Centre (QFC) is not really a free zone but a financial services platform. In spite of this the Qatar Civil and Commercial Court, operational since 2010 in a First Instance Circuit and an Appellate Division - in connection to the QFC, is comparable to the DIFC Courts in a number of aspects. To start with, like the DIFC Courts those of the QFC are open to offshore claims upon choice by the parties (this was actually so from the very beginning). Similarly, their *leitmotiv* is to offer a jurisdictional service independent from the local one, although English is not the exclusive

²¹ MoU provide for cooperation - judicial, or broader: see for instance the Memorandum of Understanding between Abu Dhabi Judicial Department and The Dubai International Financial Centre Courts Concerning Judicial Cooperation, of April 2017. MoG provide a detailed explanation on the requirements and procedures for enforcing foreign judgments in the signing jurisdiction; they offer businesses additional certainty should a contractual dispute arise (see instance the Memorandum of Guidance (MoG) on Understanding the Enforcement of Money Judgements between the Federal Court of Malaysia and DIFC Courts). The practice of MoU or MoG is also known to the other international commercial courts in the area: see for instance the MoU on the enforcement of judgments of November 16, 2017 between the Ras Al Khaimah Courts and the ADGM Courts.

²² <https://www.difccourts.ae/2015/05/27/amended-difc-courts-practice-direction-no-2-of-2015-referral-of-judgment-payment-disputes-to-arbitration/>. The wording 'convert' was used for the first time by Chief Justice M. Hwang, 'Commercial Courts and International Arbitration – Competitors or Partners', (2015) 31 Arb. Intl. 193.

²³ D. Demeter, K.M. Smith, 'The Implications of International Commercial Courts on Arbitration' (2016) 33 Journal of International Arbitration 441, under 4.

²⁴ <https://www.difccourts.ae/fees/>

language before the QFC Courts - proceedings can also be conducted in Arabic, and the Court shall 'pay due respect to the fact that Arabic is the official language of the State' (Article 3 QFC Civil and Commercial Court Regulations and Procedural Rules).²⁵ Just like for the DFIC Courts, the overriding objective of the QFC Courts is to 'deal with all cases justly', which means to ensure that proceedings are carried out expeditiously and effectively; preserve equality of arms of the parties; ensure that cases are dealt with in a way proportionate to the amount of money involved, to their importance, to the complexity of the issues, and to the financial position of each party (Article 4). The proceedings are based on international best practices, modelled to a significant extent on those followed in England and Wales. The Court is bestowed with broad powers 'to take all steps that are necessary or expedient for the proper determination of a case' (Articles 10). This formula is taken up all through the Civil and Commercial Court Regulations and Procedural Rules, translated into the adoption of guidelines -'case management directions'- for the management of proceedings at all stages.

In the QFC courts, substantive rules have been adopted drawing inspiration from the common law; judges are thus allowed to rely on precedents taken from any jurisdiction following that legal tradition. Parties may nonetheless choose a different applicable law and their selection will prevail as long as it is not contrary to the public policy of Qatar (Article 11). Legal representation by foreign professionals is possible (Article 29). Decisions of the first instance are usually final, for an appeal is only admitted exceptionally (Article 35). Regarding confidentiality, Article 28 (3) simply provides for the publicity of the hearing as a rule, adding a court faculty to direct that all or part of the hearing should be in private 'where there is a good reason to do so'. Judgments are published on the website. Digital technology is more and more present: documents can be filed through an e-filing system or emailed to the court registry; the Court may operate virtually, with parties, lawyers, witnesses and judges appearing remotely from anywhere in the world.²⁶

We have found no information on the number of cases the QFC Courts have so far dealt with. Some difficulties related to the length of proceedings have been disclosed, though: at the end of 2016 a case in the first instance took one to two years; inefficiencies in the conduct of proceedings, in particular regarding the time to appoint experts and the slowness of the latter in presenting their reports, were seemingly at the root of the problem. The problem may have been solved with the establishment of the eCourt - Qatar International Court and Dispute Resolution Centre (QICDRC) Case Management System.²⁷

According to information published on the QFC website, 'There are no fees associated with bringing a case to Court', a feature making the QICDRC unique in the Gulf region, as well as internationally.

Abu Dhabi: Abu Dhabi Global Market Courts

Abu Dhabi is the largest of the seven emirates of the United Arab Emirates. As in Dubai, the Abu Dhabi Global Market Courts were established at the same time as another international financial center- the

²⁵

http://www.qicdrc.com.qa/sites/default/files/s3/wysiwyg/qfc_civil_and_commercial_court_regulations_date_of_issuance_15_december_2010_0.pdf.

²⁶ See, on the Qatar International Court and Dispute Resolution Centre (QICDRC) Case Management System and the eCourt: https://nacmnet.org/wp-content/uploads/QATAR_Final-Submission.pdf.

²⁷ See note 26.

Abu Dhabi Global Market (ADGM), in 2013.²⁸ The ADGM court comprises a court of first instance and another of appeal, operative since May 2016 for civil and commercial litigation of any amount;²⁹ similar to the other courts in the region labour law disputes also fall under the court's jurisdiction. International jurisdiction may be based on a choice by the parties. The language of the process and of the documents is English; legal representation by a foreign lawyer authorized to practice in any jurisdiction and having more than five years of practice is allowed.³⁰ The publicity of the hearing is the rule according to s. 98(1) *ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015*; the court may nevertheless order that a hearing is held in private under specific circumstances; it may also decide the non-disclosure of the identity of a party or of a witness.

As in the other courts in the area, the judges of the ADGM Courts enjoy broad management powers, including agreeing with the parties on a 'roadmap' for the optimal organization of a specific case from the beginning. Since it was established, and increasingly from April 2018, the institution offers a service of digital process management through an eCourt platform: users can start, manage and track their files from anywhere in the world; they can file documents and receive notifications related to the progress of their case by SMS. Electronic evidence is included in the archive without additional cost; judicial hearings may be carried out through videoconferences. In December 2018, a fully digitized tailored hearing room was launched. In spite of the foregoing, as of today the number of ADGMC cases is limited: in the first instance, in 2018 it only reached 13; the total between 2016 and January 18, 2019 is 21. Only three decisions have been given.³¹

The fees to access the first instance, Civil Division, range from 2.5% of the value of the claim for claims between 100,001 and 500,000 USD; up to 55,000 USD for those of more than 10 million, with an additional 0.15%. The fee is USD 2,500 for claims of USD 100,000 or less.³² Additional fees are due for other services such as the physical presentation of the documents -instead of using the e-filing system; or a court hearing.

Singapore: Singapore International Commercial Court

The Singapore International Commercial Court (SICC) was established in 2015 as a division of the Singapore High Court and thus a part of the Singapore Supreme Court.³³ It was specifically created to solve international commerce disputes in view of the exponential growth of transnational commerce

²⁸ The applicable rules are the *ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015* (as amended):

http://adgm.complinet.com/net_file_store/new_rulebooks/a/d/ADGM_Courts_Regulations_2015_Amended_18_December_2018.pdf. They are complemented by Practice Directions addressing specific aspects: see for instance on 'case management' the *Practice Direction 5 - Case Management and Papers for Trial*, <https://www.adgm.com/media/402303/pd-5-case-management-and-papers-for-trial-clean-11-dec2018.pdf>.

²⁹ A 'small claims' division deals with disputes of a value equal or lesser than 100,000 \$. Beyond this amount disputes go to a Civil Division: see *Divisions and Jurisdiction (Court of First Instance) Rules 2015*: http://adgm.complinet.com/en/display/display_main.html?rbid=4503&element_id=5648. There is no positive definition of 'civil and commercial' claims in the law.

³⁰ S. 219 *ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015*.

³¹ See <https://www.adgm.com/doing-business/adgm-courts/cases/court-of-first-instance/>, and <https://www.adgm.com/doing-business/adgm-courts/judgments/court-of-first-instance/>.

³² <https://www.adgm.com/media/308673/adgm-courts-schedule-of-fees-final.pdf> - reviewed June 26, 2018.

³³ See *Supreme Court of Judicature Act (Cap 322)*, s. 18A to 18M: <https://sso.agc.gov.sg/ACT/SCJA1969..>

in Asia; for this reason, although embedded in the local judicial structure the SICC presents distinctive characteristics with respect to the local courts³⁴.

The SICC is part of a strategy to make Singapore, already a main hub for arbitration beyond the region,³⁵ a focal point for cross-border dispute resolution. In addition, it intends to address some of the weaknesses of arbitration: not only regarding the service offered to the users, but also from the perspective of legislative development and harmonization. Regarding the first prong, it has been said that 'the coercive jurisdiction of a court may be necessary in a multiple party dispute; the subject matter of the dispute may not be amenable to arbitration (such as special torts arising from contract, international intellectual property or trust disputes); and the New York Convention, while wide in its reach, may not be fully effective for enforcement in some countries.'³⁶ Regarding the second prong, it has been observed that international commercial courts provide an opportunity for the harmonization of substantive legal principles and civil procedures, whereas arbitration does not.³⁷ To date, the SICC has dealt with some thirty cases and its case law has already served the development of the law of the country with regard to contractual liability.³⁸

The SICC offers the services of experienced professionals, adding to its ranks judges and experts from different countries and legal traditions: Australia, the United Kingdom, Hong Kong, but also France and Japan (and Austria, in the past). Its international jurisdiction is very broad: parties can opt-in to the SICC, but the court can also deal with disputes without a choice of court clause by transfer from another court after consulting the parties (Rules of the Supreme Court, O. 110, r. 7, r. 12); the chances of ensuring the flow of cases is thus increased. According to r. 1 of the Rules of the Supreme Court, O. 110, the commercial character of a controversy may result from objective factors, but also from the agreement between the parties. A claim is international in nature for jurisdictional purposes if (alternatively) the parties to the claim have their places of business in different States; none of the parties to the claim have their places of business in Singapore; at least one of the parties to the claim has its place of business in a different State from a) the State in which a substantial part of the obligations of the commercial relationship between the parties is to be performed, or b) the State with which the subject matter of the dispute is most closely connected. In addition, a claim is international in nature if the parties expressly agree that the subject-matter of the claim relates to more than one State.

Party autonomy plays an important role in the proceedings: the parties can choose the law applicable to the merits; foreign law is considered to be proper law -and not a fact; the SICC may order that any question of foreign law be determined on the basis of submissions, without requiring formal proof by

³⁴ For instance regarding service abroad (*Rules of the Court* O. 110 r. 6(2), or the non-application of the *forum non conveniens* doctrine (*Rules of the Court* 110 r 8 (2), at least in the case of an exclusive choice of court clause). The *Rules* implement the *Supreme Court of Judicature Act (Cap 322)*; they can be accessed at <https://sso.agc.gov.sg/SL/SCJA1969-R5>. They are in turn complemented by the *Singapore International Commercial Court Practice Directions*, 'a set of procedural guidelines regulating all proceedings in the Singapore International Commercial Court ('SICC'). All users of the SICC are expected to comply with the SICC Practice Directions'.

³⁵ The *Singapore International Arbitration Centre* exists since 1991. According to the Queen Mary/White Case Survey 2018 Singapore is one of the preferred seats for international arbitration, together with Paris, London and Geneva.

³⁶ Report of the Singapore International Commercial Court Committee, November 2013, para. 16 (<https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Annex%20A%20-%20SICC%20Committee%20Report.pdf>).

³⁷ Report of the Singapore International Commercial Court Committee, November 2013, para. 11, 13. Chief Justice Sundaresh Menon, para. 14, 15.

³⁸ See <https://www.sicc.gov.sg/hearings-judgments/judgments>.

experts or cross-examination.³⁹ The parties are allowed to participate in the design of the procedural rules relevant to their case: a bulk of procedural rules shaped for litigation with a foreign element applies by default, but the parties are entitled to discard and replace some provisions regarding evidence.⁴⁰ In addition, the parties may agree *ex ante* to waive their rights to object to the SICC's jurisdiction on several basis (e.g., natural forum or multiplicity of proceedings), as well as any recourse against the judgments⁴¹ and orders and/or the recognition or enforcement of such judgments and orders.⁴²

Legal representation by a foreign lawyer is allowed, although only when lawsuits lack any connection with the forum, or when foreign law applies.⁴³ On confidentiality, rule no. 30 of Order 110 of the Rules of the Court authorizes the SICC to grant a confidentiality request upon application of one of the parties; in doing so the Court may have regard to whether the case is an offshore case and to any agreement on the issue between the parties. A confidentiality order will typically indicate that no person must reveal or publish any information or document relating to the case; an order that the case be heard *in camera*; or an order that the Court file be sealed. Only under very exceptional circumstances will the actual existence of a dispute, the fact that the party was involved in the proceedings or the judgment remain confidential.

On the duration of the proceedings, available data indicate that in the first case before the SICC (*BCBC Singapore Pte Ltd & Anor v PT Bayan Resources TBK & Anor*),⁴⁴ the claim was originally filed with the High Court of Singapore, which transferred it to the SICC on March 4, 2015; the hearing took place in November 2015, and the judgement was given on May 12, 2016 - just one year after the transfer from the High Court, and less than six months after the hearing. In *Teras Offshore Pte Ltd and Teras Cargo Transport (America) LLC*,⁴⁵ the decision was given only fifteen days after the hearing. In *Telemidia Pacific Group Ltd & Anor v Yuanta Asset Management International Ltd & Anor*,⁴⁶ the judgment, of some 200 pages, was issued fourteen months after the case was transferred to the SICC, and four months after the hearing. It is worth mentioning that to the extent that the SICC is integrated in the Supreme Court, it benefits from an electronic filing system established in 2000 which allows for judicial documents to be prepared and filed electronically. In order to keep the system flexible to meet new demands the Supreme Court has worked on expanding the capabilities of the electronic filing facility with the implementation of an integrated electronic litigation system ('eLitigation').

Fees to access the SICC in the first instance and on appeal, as well as the expenses associated with the hearing, are detailed in the Rules of Court O. 110, r. 47 and 48. The amount varies depending on the number of judges involved: a claim before a single judge costs slightly more than 3000 dollars; it

³⁹ S. 18K, 18L, *Supreme Court of Judicature Act (Cap 322)*, *Rules of the Court* O. 110, r. 25, r. 28.

⁴⁰ *Rules of the Court*, O. 110, r. 23.

⁴¹ Such possibility, unheard of in Europe, exists in international arbitration upon conditions regarding the right to contest the validity of the award: M. Scherer, L. Silbermann, 'Limits to party autonomy in international commercial arbitration', in F. Ferrari (ed.), *Limits to Party Autonomy in International Commercial Arbitration*, NYU, 441-492.

⁴² See the document on recommended model clauses *Singapore International Commercial Court Model Clauses*, versions as at 7 June 2018, on the website of the SICC. See as well para. 139 of the *Singapore International Commercial Court Practice Directions*, November 2018.

⁴³ *Supreme Court of Judicature Act (Cap 322)*, s 18M, and *Rules of the Court*, O. 110 r. 25.

⁴⁴ [2016] SGHC(I) 01.

⁴⁵ [2016] SGHC(I) 02.

⁴⁶ [2016] SGHC(I) 03.

increases to 4950 dollars if there are three judges. An appeal before a formation of two judges attracts a fee of 7,000 dollars, and before five judges, the fee is 17500 dollars.

2.3 *Europe, First Approach*

In the EU, Germany, Belgium, France Ireland and the Netherlands have launched -or have announced the intention to do so- a judicial body for international commercial litigation, with a specific procedure - or deviations from the 'normal' procedural rules -, and with English as the language of the proceedings - completely or partially.

The idea of creating courts or, rather, chambers devoted to international commercial litigation, is indeed not new in Europe: the London Commercial Court, whose international reputation is beyond doubt,⁴⁷ was created as early as 1895, according to the description on the website page of the UK Judiciary, on 'demands from the City of London and the business community for a tribunal or court manned by judges with knowledge and experience of commercial disputes which could determine such disputes expeditiously and economically, thereby avoiding tediously long and expensive trials with verdicts given by judges or juries unfamiliar with business practices.'⁴⁸ Today the court deals with disputes in relation to international trade, commodities, banking and financial services, insurance and arbitration awards. The proceedings in the Commercial Court are governed by the Civil Procedure Rules and Practice Directions; a Commercial Court Guide provides guidance for efficient conduct of litigation in the Commercial Court.⁴⁹

The European initiatives towards international commercial courts have mostly materialized in the last two years. The underlying reason seems to be very different from the one supporting the establishment of international commercial courts in the Middle East and Asia: Brexit.⁵⁰ Unquestionably, London remains the essential hub for the settlement of cross-border commercial conflicts; the percentage of European disputes compared to those from other parts of the world appeared to have diminished after the Brexit referendum, but the latest analysis reveals a reversal of the trend between March 2017 and April 2018. According to a study covering eight years -between 2008 and 2016- in about 80% of all commercial cases before the London Commercial Court at least one of the parties is a foreigner, while almost 50% of all claims involve only foreigners, originating from the five continents.⁵¹ The value of disputes is regularly of the order of 6 to 7 digits, relating mainly to

⁴⁷ In the words of R. Caponi, under 8: 'la regina'.

⁴⁸ <https://www.judiciary.uk/you-and-the-judiciary/going-to-court/high-court/queens-bench-division/courts-of-the-queens-bench-division/commercial-court/about-us/>

⁴⁹ There are several editions of the Guide; it was last fully rewritten in 1999 alongside the introduction of the Woolf Reforms including the Civil Procedure Rules. The current edition - number 10th- is dated 2017: <https://www.gov.uk/government/publications/admiralty-and-commercial-courts-guide>

⁵⁰ Even in the EU MS where a specific chamber for international commercial had been set up prior to the Brexit referendum: see for Dublin, <https://www.lawlibrary.ie/media/lawlibrary/media/Secure/Promoting-Ireland-as-a-leading-centre-globally-for-international-legal-services.pdf>. For France, the Report on 'The Implications of Brexit on judicial cooperation in civil and commercial matters' of the Haut Comité Juridique de la Place Financière de Paris, January 30, 2017 (https://publications.banque-france.fr/sites/default/files/rapport_05_a.pdf) as well as the 'Canivet Report' of May 3, 2017 ('Préconisations sur la mise en place à paris de chambres spécialisées pour le traitement du contentieux international des affaires', Haut Comité Juridique de la Place Financière de Paris: https://publications.banque-france.fr/sites/default/files/rapport_07_f.pdf).

⁵¹ It should be noted however that the UK accounted for 267 litigants, and that the next most represented country was Kazakhstan (31), followed by the US and Russia, with 20 litigants.

the banking and financial sectors.⁵² The jurisdiction of the High Court of London is often based on a choice of court clause agreed under Article 25 of the Brussels Ibis Regulation.⁵³

Brexit may well change this situation: from April 2019, the United Kingdom may not have access to the benefits of the European Area of Justice and judicial cooperation in civil matters.⁵⁴ It is telling that since the announcement of Brexit almost 2000 English and Welsh lawyers have registered with the Law Society in Ireland, for fear of not being allowed to practice in the EU after Brexit otherwise.⁵⁵ Actual and potential parties to international civil disputes have started to consider other courts within the European Judicial Area. Jurisdictional clauses in financial contracts do not go exclusively for London any longer. As an example, in July 2018 ISDA published new French and Irish law versions of the ISDA Master Agreement, adding Paris and Dublin to the existing choices of forum: the accompanying explanation cannot be clearer: 'English law may become a third-country law after the UK withdraws from the EU, which means

English court decisions would no longer be automatically recognized and enforced across the EU and European Economic Area (EEA). That wouldn't be the case for French or Irish law court judgements under the new Master Agreements, reducing the steps involved in settling a contractual dispute with a EU/EEA counterparty.'⁵⁶

2.4 *Separate Analysis*

Germany: The Frankfurt Initiative and Beyond

The recent German initiatives for a chamber focused on international commercial disputes are actually not so innovative. On the one hand, precedents exist in highly specialized areas such as patents, where Düsseldorf, Mannheim and Munich stand out at the European level. On the other hand, in 2010 an attempt had already been made to encourage recourse to the courts of Cologne and Bonn - via a choice of forum clause - offering to the parties the possibility of litigating partially in English. The initiative was triggered by two factors: first, it had been noted that national courts and tribunals were dealing with fewer and fewer international commerce cases, even where a German party was involved; secondly, a brochure had been published in the UK advertising the 'legal services' of the City.⁵⁷ The 2010 attempt did not succeed, maybe because neither Cologne nor Bonn figures prominently in international commerce. In addition, by virtue of a limitation established by s. 184 of the *Gerichtsverfassungsgesetz* (GVG),⁵⁸ only the hearing could be held in English.

The 'Justice Initiative Frankfurt' has probably received the greatest media coverage among the Germans proposals, without being the only one; similar developments are taking place in Hamburg, Düsseldorf and Munich, and seemingly also in smaller cities such as Saarbrücken (where proceedings

⁵² *Portland Commercial Courts Report 2018*: <https://portland-communications.com/publications/commercial-courts-report-2018-portland/>

⁵³ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, December 20, 2012.

⁵⁴ On January 24, 2019, the fate of the Withdrawal Agreement was still undecided.

⁵⁵ Source: Law Society Ireland, reproduced at the *Frankfurter Allgemeine Zeitung*, January 28, 2019.

⁵⁶ <https://www.isda.org/2018/07/03/isda-publishes-french-and-irish-law-master-agreements/>.

⁵⁷ References below, note 114, 115.

⁵⁸ For an English translation: http://www.gesetze-im-internet.de/englisch_gvg/englisch_gvg.html#p0490.

would be held in French). The proposal arose in 2016 in an academic context with good connections to the judiciary and to the Ministry of Justice in the Land of Hesse; representatives of the legal profession and the Chambers of Industry and Commerce took part in the project expressing the needs, expectations and preferences of the main stakeholders.⁵⁹ The choice of Frankfurt is due both to its relevance as a commercial and financial hub -which explains why it is also the head office of many renowned law firms- and the commercial experience of its courts and judges - especially in the banking and finance sectors. In 2017, the initiative was endorsed by the Ministry; the chamber has been officially operational within the Frankfurt District Court since January 1, 2018, although the rules governing its functioning have not yet been enacted.⁶⁰

The Frankfurt international commercial chamber is in no sense an independent judicial body. On the contrary, it is embedded in the existing judicial structure and accommodates to the in-force legal framework. The commercial character of a dispute must therefore be identified in light of section 95 *Gerichtsverfassungsgesetz* (GVG), which defines it broadly but not to the point of admitting the simple agreement of the parties in this regard. Further requirements include that the claim not fall under the special jurisdiction of another chamber of the District Court Frankfurt/Main; that it is international; and that the parties have agreed on the jurisdiction of the Chamber and have declared in a timely manner (i.e. before the deadline for the statement of defence has expired) their willingness to plead in English and to waive their right to an interpreter.⁶¹ The main differences compared to other chambers in German courts is that the commercial one is staffed with clerks fluent in English; so are the professional judges, who will always chair; finally, the chamber also comprises lay judges from the business sector. The procedure follows the ZPO, but 'bringing out the best' of it by way of interpretation: in as much as possible it follows best practices of specialized courts, in particular that of patent litigation in Düsseldorf. As an example: the faculties of direction of the process attributed to the judge by s. 139 ZPO may be used to establish a 'road map' with the parties at the beginning of the proceedings, structuring the course of the litigation in an optimal and efficient way; the first hearing may work as a 'case management conference' with the parties.

The Frankfurt initiative has just materialized. Any assessment would be premature as, to the best of our knowledge, the first and so far only case has just arrived at the chamber. The choice to integrate the chamber within the pre-existing legal and judicial framework no doubt has positive connotations: no different fees are imposed, for instance. In addition, unlike in other EU countries, no legislative reforms have been required. However, a little bit of pessimism seems legitimate in view of several elements likely to work against the chamber's success. An essential hindrance lays with the language issue: the use of English is allowed only to a limited extent; the orders and judgments of the chamber must be drafted in German, with an English translation being optional but not alternative. Amendments to the current situation have been proposed to Parliament in 2012, 2016 and 2018; should the latest one succeed, the conduct of the entire process in English at the first and second

⁵⁹ For the history and an in-depth explanation of the functioning of the chamber see B. Hess, T. Boerner, 'Chambers for International Commercial Disputes in Germany - The State of Affairs', Rotterdam, July 10, 2018, pending publication in the *Erasmus Law Review*.

⁶⁰ Entwurf eines Gesetzes zur Einführung von Kammern für internationale Handelssachen (KfiHG), Bundestagdrucksache 19/1717, April 18, 2018: <http://dipbt.bundestag.de/doc/btd/19/017/1901717.pdf>

⁶¹ <https://ordentliche-gerichtsbarkeit.hessen.de/sites/ordentliche-gerichtsbarkeit.hessen.de/files/LG%20FFM%20Gesch%C3%A4ftsverteilung%202018%20Stand%2001.01.2018.pdf>, at 35. Schedule of Responsibilities of the Chambers of the District Court Frankfurt/Main 2018.

instances (not in the third instance, where such possibility would be left to the discretion of the Court) would be permitted, provided the parties agree thereto.⁶²

Other elements may equally work against the Frankfurt chamber. The first one is of a general scope in that it affects the whole German judiciary: Germany is still behind in terms of technological equipment; scholars acknowledge that there is much to be done in this regard.⁶³ Another one is related to the notion of 'international'. No definition appears in the German 2018 Bill on the *Kammer für Internationale Handelssachen*, although the requirement exists and some examples are provided in the commentary to section 114b of the draft of April 2018.⁶⁴ It is to be noted that in the Bill the direct agreement of the parties declaring a dispute international is not included.⁶⁵

France: Paris

A Chamber for International and European Law, now renamed 'Chambre Internationale', has existed within the Paris Tribunal de Commerce for some time already.⁶⁶ It was created to deal with disputes between French and foreign companies or between foreign companies; parties were allowed to use English, Italian or Spanish in the course of proceedings; witnesses could be examined in their native languages without the use of an interpreter. In practice, such possibilities were never used nor were they embedded into legal rules.

On February 2018, an International Chamber was inaugurated at the Cour d'Appel in Paris. This Chamber and the one at the Tribunal de Commerce are described and regulated through two *ad hoc* Protocols, applicable to claims filed after March 1, 2018.⁶⁷ According to the Protocol on the Chambre Internationale de Paris, the Chambre has jurisdiction, upon assignment of the 'chambre de placement', over claims of an economic and commercial nature and international dimension, in particular over those where provisions of foreign or EU law must be applied. In a non-exhaustive list the Protocols refer disputes relating to commercial contracts and to the termination of commercial relations, as well as claims in the area of transport, unfair competition, compensation derived from anti-competitive practices, and disputes with respect to financial instruments and products to the Chambers. There is no precise indication as to what 'international' means; from the wording of the Protocol on the Chamber in the Cour d'Appel it can only be inferred that submitting a contract to French law does not automatically eliminate its international character. Literature is not of much help either: the 'Canivet Report' of May 2017 simply takes up Muir Watt/Bureau's definition: 'L'internationalité est un critère

⁶² Above, note 60.

⁶³ B. Hess, 'The Justice Initiative Frankfurt am Main 2017', entry in *Conflictolaws.net*, March 31, 2017.

⁶⁴ Above, note 60.

⁶⁵ The examples are: the contract or contractual documents are written in English; one of the parties is domiciled abroad, or the parties agree that foreign law applies. A claim related to the internal affairs of a company may be considered as well as 'international' if the company's internal agreements and its correspondence are written in English, or the company's seat is abroad.

⁶⁶ A *Chambre de droit international* was created in 1995; a *Chambre de droit de l'Union Européenne*, in 1997. They merged in 2015.

⁶⁷ Protocole relatif à la procédure devant la chambre international du Tribunal de Commerce de Paris, de 7 de febrero de 2017; Protocole relatif à la procédure devant la chambre international de la Cour d'Appel de Paris, de 7 de febrero de 2018. It should be noted that the Protocols have no legally binding force. The Gazette du Palais July, 10, 2018, n° GPL329d9, at 8, has already reported one *audience de mise en état* and five *dossiers* pending.

connu en droit international privé qui se rapporte à une situation qui intéresse plusieurs systèmes juridiques ou qui met en cause les intérêts du commerce international.’⁶⁸

The most outstanding features of the Chambres refer to their composition, to the language of proceedings, and to certain particularities of the applicable procedural rules. The Chambres are composed of judges with expertise in international commerce, and anglophones. The linguistic regime combines the use of several languages, both in the first instance and in appeal: the *actes de la procédure* will be worded in French, but documents in English may be presented without translation. By default, the hearing will be held in French: the parties, witnesses, experts and foreign lawyers, may express themselves in English, although in this case simultaneous translation is required. The judgment will be given in French; it may be accompanied by a translation into English by a sworn translator - the costs of the proceedings, to be paid by the parties, will increase accordingly. Representation by a foreign lawyer is allowed provided he/she is accompanied by a colleague registered with the French bar - which means, again, doubling the costs.

From the perspective of the procedure, the Protocols rely to a large extent on the general rules of the *Code de la Procédure Civile*, with some adaptations. For instance, at the beginning of the proceedings the Chamber may agree with the parties on a compulsory procedural timetable taking into account the circumstances and the complexity of the case at hand, and including in particular the stages where an appearance of the parties is required, those of the hearing of potential experts, those of the pleadings and that of the deliberations. It is also possible to debate contradictory testimonies and expert opinions on the model of Anglo-Saxon cross examination; and to discuss the distribution of the costs.

Ireland: Dublin

The Dublin Commercial Division within the High Court was created in January 2004 in response to the economic growth experienced by the country since the 1990s, and to the consolidation of Dublin as a financial hub. At the time it was felt that the existing procedural background did not fit well with the economic development: commercial proceedings were onerous and long, while the system lacked the capacity to deal with the volume and specific requirements of complex litigation.

The Division was set up to provide efficient and effective dispute resolution in commercial cases. It should be noted that inclusion in the Chamber list is not automatic but discretionary, even if the dispute is ‘commercial’ in the sense of Rule 1 of Order 63A of the Rules of the Superior Courts.⁶⁹ The category includes proceedings based on contracts or on non-contractual liability -not being a claim or counterclaim for damages for personal injuries- derived from commercial transactions where the value of the claim is not less than 1 million euros; any application or proceedings under the Arbitration Acts 1954 to 1998, also with a minimum value of 1 million euros; intellectual property cases; proceedings related to the functions of the Registrar according to the Cape Town Convention or the Aircraft Protocol; proceedings in respect of any other claim or counterclaim, which the Judge of the

⁶⁸ H. Muir Watt, D. Bureau, *Droit international privé*, TUF, Thémis, 3^e éd, 2014, § 550, quoted in fn. 32 of the Canivet Report - above, note 50.

⁶⁹ Order 63A of the Rules of the Superior Courts, s. 5: <http://www.courts.ie/rules.nsf/8652fb610b0b37a980256db700399507/71b5764f57d3440980256f340064227a?OpenDocument>.

Commercial List, having regard to the commercial and any other aspect thereof, considers appropriate for entry in the Commercial List.

There is no legal definition of 'international' for the purposes of the Commercial Division. Indeed, it should be recalled that its creation was not triggered by the cross-border character of the litigation, but by the need to quickly and effectively resolve commercial cases of a certain economic size and complexity. Most of them are nevertheless likely to have a cross-border dimension.

One of the most relevant features of the Dublin Commercial Division is the swiftness with which cases progress to trial. A general rule bestows the judge with broad powers to give directions and make orders, including the fixing of time limits, for the conduct of proceedings entered in the Commercial List, as appears convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings. Further provisions set up a detailed case management system to speed up preparation for the trial, and to eliminate unnecessary costs and blocking strategies: written submissions must be lodged with the Registrar within strict time limits; severe sanctions for non-compliance are foreseen and indeed applied; IT possibilities are available, for instance to allow a witness to give evidence, whether from within or outside the State, through a live video link or by other means; documents may be served or exchanged electronically where the President of the High Court so permits.⁷⁰

In practice, the process management instruments have proved useful and operate satisfactorily.⁷¹ A high percentage of cases is resolved by agreement of the parties at a more or less advanced stage of the process: in 2017, of a total of 123 cases resolved, 45 settled either after entry, after the directions hearing, after the date of the hearing was set or at the hearing; 72 proceeded to a full hearing.⁷² Two years after the Division was established, 50% of cases in the Commercial list had been resolved in less than fourteen weeks, and 90% in less than a year. In 2012, the average was calculated at twenty weeks, with 25% concluded in three weeks, 50% in less than twelve, and 60% in less than fifty. It has not been possible to find out the origin of the disputes and their true international character so as to assess whether Ireland has really become an attractive place for litigating in the field. At any rate, the Irish Division has enjoyed from the outset the advantage of being located in a common law environment (after Brexit, Ireland will become the largest Common Law jurisdiction in the EU), with English as the native language.

Foreign lawyers do not have an automatic right of audience in Ireland. There are different rules for the qualification of foreign lawyers in Ireland depending on the jurisdiction in which they are qualified.

The Netherlands: Amsterdam

The proposal to create an international commercial court in The Netherlands started in July 2017 with the submission of a bill to the Parliament. One year later the text was pending approval in the Senate,

⁷⁰ Order 63A of the Rules of the Superior Courts, s. 6 ff.

⁷¹ For an introduction to the Chamber and its functioning from 2004 to 2014 see *A guide to Ireland's commercial court*: https://www.mccannfitzgerald.com/uploads/MCFG_Ireland%E2%80%99s_Commercial_Court.pdf.

⁷² R. Peeples, H. Nyheim, 'Beyond the Border. An International Perspective on Business Courts', *Business Law Today*, vol. 17, march 4, 2008; Oral presentation by Hon. Mr. Justice Peter Kelly, Fundação Francisco Manuel dos Santos, Lisboa, June 6, 2013. For figures related to the number of incoming and resolved cases from 2008 to 2017: <http://www.courts.ie/Courts.ie/Library3.nsf/pagecurrent/59879281937E527180257FF7005190C1?opendocument>.

which finally assented in December 2018. The court is expected to open its doors at the beginning of 2019.⁷³

The Netherlands Commercial Court (NCC) is integrated into the existing judicial structure: it consists of a special chamber within the District Court of Amsterdam, coupled with another one in the Court of Appeal. According to Article 1.3.1 Rules of Procedure the NCC has jurisdiction conditional upon four factors: the action relates to civil and commercial matters and is not subject to the jurisdiction of the Subdistrict Court or the exclusive jurisdiction of any other chamber or court; the matter concerns an international dispute; the parties have designated the Amsterdam District Court, or it has jurisdiction on other, objective, grounds; the parties have expressly agreed in writing for proceedings to be before the NCC District Court in English. The 'civil or commercial' nature of a claim is broad in scope, the opposite terms being 'criminal' and 'administrative'.⁷⁴ 'Civil and commercial' claims encompass contractual and non-contractual litigation, property and intellectual rights, construction or corporate matters. Some insolvency issues, such as the responsibility of the manager of a company are also included, and the same goes for family or inheritance litigation, although it is acknowledged that the NCC was not conceived with these types of cases in mind. The court can also deal with collective claims provided that the District Court of Amsterdam has international jurisdiction based on the domicile of one of the parties, or on the place where the harmful event occurred; with a request for a declaration that a collective agreement is binding *erga omnes* (including third parties), if the agreement is connected to the Netherlands an appeal may be filed with the Amsterdam Court of Appeal. An appeal against the annulment of an arbitral award can also be brought to the NCC conditional upon the agreement that the proceedings will be conducted in English before the Court of Appeal.

The 'international' test is also a broad one; according to the Explanatory Note to Article 1.3.1 (b) Rules of Procedure the defining criteria are multiple, very broad, and alternative to each other. A claim is international where one or more of the parties have their domicile in a foreign jurisdiction; where a treaty or foreign law is applicable to the dispute; if the dispute arises from an agreement prepared in a language other than Dutch; or where the dispute otherwise involves a relevant cross-border interest, such as shareholders, employees or revenue located in or linked to a foreign jurisdiction.

The NCC will not have an international composition - the judges are selected from among those currently sitting in Dutch courts. The language of the process, comprising the documents, the hearing and the judgment in the first and second instances (not the cassation), will be English if the parties so agree. In addition, translation of the documents into German or Dutch will not be required. The NCC applies the general procedural rules, adding nonetheless global best practices and giving parties the possibility to 'personalize' the procedure to some extent: for instance, they may enter into an agreement to depart from the statutory rules of evidence (Article 8.3 Rules of Procedure); make an evidentiary agreement on access to confidential documents (Article 8.4.2); or an agreement regarding costs (Article 10.2). A pre-process conference is possible to set the aspects that will be subject to debate, and a schedule.

Regarding representation, according to Article 3 of the 2018 Rules a party is not usually authorized to act *pro se* but must be represented by its lawyer who must be a member of the Dutch Bar (*advocaat*).

⁷³ For an introduction to the chamber and its history see <https://www.rechtspraak.nl/English/NCC>. The procedural rules in English - as of December 2018 'Rules of Procedure for the International Commercial Chambers of the Amsterdam District Court (NCC District Court) and the Amsterdam Court of Appeal (NCC Court of Appeal)', can be accessed from the same website.

⁷⁴ <https://www.rechtspraak.nl/English/NCC/Pages/key-features-NCC.aspx>

Acts of process, such as the submission of a claim or defence, must be carried out by a member of the Dutch Bar. Bar members of other Member States of the European Union, the European Economic Area or Switzerland may not carry out acts of process, but they may act for a party in other ways in accordance with Article 16e of the Advocates Act (i.e., in cooperation with a member of the Dutch Bar). Other visiting lawyers may not act for a party, but the court may allow them to speak at any hearing.

On confidentiality, Article 8.4.2 of the 2018 Rules allows for a confidentiality motion following Article 22 Code of Civil Procedure, and adds to it the already-mentioned faculty for the parties to make an evidentiary agreement on access to confidential documents -for instance creating a confidentiality ring, so that certain materials can be reviewed only by the parties' lawyers.

The NCC will be equipped with state-of-the-art IT. A specific system - known as eNNC - allows for communications and for the exchange of information and documents electronically; a virtual trial room will also be set up. According to the rules of procedure, unless the court indicates otherwise, communication with it as well as the submission of documents can only be done through the eNNC. It should be noted nevertheless that the implementation of the so-called KEI (*Kwaliteit en Innovatie rechtspraak*, or Quality and Innovation in the Legal System) program, meant to digitize and simplify court procedures, has been delayed;⁷⁵ as a consequence the NCC applies the Code of Civil Procedure in its current version, governing 'non-digital' proceedings.

In practice, the biggest obstacle to the success of the NCC will probably be cost-related. The chamber should be self-financed; as a consequence, a flat court fee of € 15,000 (NCC District Court) or € 20,000 (NCC Court of Appeal) is imposed. The fees issue was actually a major argument slowing down the adoption of the NCC founding act.

Belgium: Brussels

The process of establishing an international commercial court in Belgium - already officially named the Brussels International Business Court (BIBC) - has not yet been completed; like in The Netherlands, a legislative amendment is also required in Belgium. The initial bill was heavily criticised on the grounds of a potential lack of independence of the future judges and the expected economic consequences of the new court on the budget of the Ministry of Justice.⁷⁶ A new bill dated May 15, 2018, met severe opposition as well⁷⁷. The latest draft prepared by the House of Representatives was published on December 10, 2018.⁷⁸

There is no definition of 'commercial' in the latest Belgian Bill for the creation of the BIBC. The jurisdiction is delimited, however, by reference to the litigants: these can usually only be companies. Individuals as such may qualify, although if so the BIBC would only have jurisdiction over 'acts that are not manifestly unrelated to the company' (Article 20, which would amend Article 576/1 of the Code

⁷⁵ According to the information available as of January 18, 2019.

⁷⁶ *Avis d'Office* du Conseil Supérieur de la Justice, March 14, 2018, on the Avant-projet de loi instaurant la Brussels International Business Court: http://www.hrj.be/sites/default/files/press_publications/avis-bibc-fr.pdf.

⁷⁷ <http://www.lachambre.be/flwb/pdf/54/3072/54K3072003.pdf>.

⁷⁸ <http://www.dekamer.be/FLWB/PDF/54/3072/54K3072011.pdf>.

Judiciaire). The Bill takes up the general rule for all 'company courts'; in fact, it refers to the BIBC as a 'Tribunal de l'entreprise anglophone'.⁷⁹

Pursuant to the superseded Draft Law of May 2018 a dispute is international in nature if: (a) the parties have their place of business or habitual residence in different States; or (b) the place of execution of a substantial part of the obligations arising from the commercial relationship, or the place with which the subject matter under dispute has the closest connection, is outside the State in which the parties have their place of work or habitual residence; or (c) the parties have expressly agreed that the subject-matter of the dispute is connected to more than one country; or (d) the resolution of the dispute requires the application of a foreign law. In its *Avis* of October 15, 2018, the *Conseil d'Etat* argued that access to the BICB should be open only to objectively international relations, meaning those where the parties had already used the English language in the relationships from which the dispute arises.⁸⁰ In the latest version of the Bill, of December 10, 2018, section c) has been removed. Conversely, no requirement is included any longer regarding the use of English by the parties.

In some relevant aspects the Belgian initiative separates itself from the rest in the European area. According to the current text the BIBC will be composed of career judges and international trade professionals, not necessarily Belgians, who will act *ad hoc* - their appointment will be permanent in the abstract, but the court will only be active when a case so requires. Procedurally, the common rules are largely replaced by others inspired by the world of arbitration, especially by the UNCITRAL Model Law. The BIBC will have jurisdiction over international disputes between companies as a unique instance; no appeal will be possible - only cassation. Parties may decide to submit to the BIBC all disputes, or some of the disputes that have arisen or may arise between them in relation to a legal relationship, whether contractual or non-contractual. Cases may also be referred from another Belgian, foreign or international judicial body, including an arbitral tribunal, provided the parties agree to the transfer. The language of the process will be English although exceptions may apply, such as in the case of an intervention by third parties. The internationality of disputes under the jurisdictional scope of the BIBC accounts for the derogation to the common rule on the language of the process; however, as we have seen the question of when a case is international is still open.

The BIBC intends to be a self-financing institution. Presumably, parties will have to pay substantial court fees.

3 A Market of Competing Jurisdictional Services?

The existence of a global market of competing legal services is no longer in dispute.⁸¹ Open reference is also made to a 'litigation market',⁸² an area which is becoming global in parallel with the globalization

⁷⁹ It should be noted that the expression 'tribunal de l'entreprise' replaced 'tribunal del commerce' in 2018. The jurisdiction of such tribunals is defined on the basis of a very broad formal concept of 'entreprise', which includes individuals carrying out commercial activities, provided that the dispute at hand is related thereto.

⁸⁰ According to the *Conseil d'État*: 'C'est donc parce que la lingua franca du commerce international est l'anglais qu'il peut se justifier d'instaurer une juridiction étatique siégeant en anglais et répondant à des règles particulières'. *Sensu contrario*, should English not have been used, a court with the linguistic and procedural specialties of the projected BIBC would lack any justification.

⁸¹ Between 2010 and 2012 the LMU Munich sponsored a research program on Law as a product; the outcome has been published in H. Eidenmüller, *Regulatory Competition in Contract Law and Dispute Resolution*, C.H. Beck-Hart-Nomos, 2013. More recently, see for instance the Reportlinker report 'Legal Services Global Market Opportunities and Strategies to 2021', July 2018.

⁸² T. Evas, 'Expedited settlement of commercial disputes in the European Union. European Added Value Assessment', European Parliament Study - European Added Value Unit, PE 627.120 - December 2018, 10, 11.

of commerce itself, and where competition is seen as a positive element, i.e., as an external factor boosting improvement and innovation.⁸³ In this context, the capacity of the international commercial courts to attract caseloads justifying their existence will depend on the advantages they offer compared to a) other procedures in the same jurisdiction; b) other jurisdictions; c) arbitration. We will now address points b) and c), starting with the latter in view of the importance of arbitration in international commerce.

3.1 'Commercial courts and international arbitration—competitors or partners?'⁸⁴

Complementarity

The relationship between international commercial courts and international arbitration is not easy to define. True, they focus on the same type of disputes. Moreover, they tend to converge in both the offer and the characteristics of the service provided: while some of the international commercial courts' *modi operandi* is imported from the arbitration world, distinctive elements of public courts' proceedings nowadays also cross-over into the rules set up by arbitral institutions and a growing trend of arbitrators to mirror the judicial *savoir-faire* can be observed⁸⁵. In light of this it would be fair to conclude that international commercial courts and arbitration are competitors in international commercial dispute resolution.

And yet this initial perception is rejected by many scholars, who prefer to speak of complementarity: 'international commercial courts are not presented as replacements for, or a real threat to, international commercial arbitration; rather, they are often described as 'companions' to, not 'competitors' of, arbitration, in so far as they add to the range of options available to parties involved in international commerce.'⁸⁶ Along the same lines, Justice Quentin Loh of the Supreme Court of Singapore claimed in a 2014 speech at the opening of the Regional Arbitration Institutional Forum (RAIF) in Singapore that 'Arbitrators should not think of the SICC cannibalizing their work. Instead they should look upon it as an integral part of a vibrant dispute resolution hub (...). If Singapore succeeds in becoming the first dispute resolution hub of Asia, the foot will grow, hopefully enormously, your [i.e. arbitration practitioner's] share will also grow, hopefully enormously too, even though it forms a smaller percentage of the whole.'⁸⁷

Proof of the foregoing may be the peaceful coexistence in London of the London Commercial Court and the London Court of International Arbitration -and *de facto* of other arbitral institutions- as London

⁸³ It has not always been like this: in addition to some ethical concerns, competition among justice services has been deemed a negative phenomenon in that it may lead to a race to the bottom, or to the questioning the authority of the service providers - the judges. See G. Wagner, 'Dispute Resolution as a Product: Competition between Civil Justice Systems' (and the comment by D. Coester-Waltjen), in H. Eidenmüller, *Regulatory Competition in Contract Law and Dispute Resolution*, C.H. Beck-Hart-Nomos, 2013, 347-427.

⁸⁴The expression is borrowed from M. Hwang, (2015) 31 *Arb. Intl.* 193.

⁸⁵ The so-called 'judicialization' of arbitration: see for instance R. Gerbay, 'Is the End Nigh Again? An Empirical Assessment of the 'Judicialization' of International Arbitration', (2014) *The American Review of International Arbitration* 223, 230.

⁸⁶ A. Godwin, I. Ramsay, M. Webster, 'International Commercial Courts: The Singapore Experience', (2017) 18 *Melbourne Journal of International Law* 1, 5, following Chief Justices M. Warren and C. Droft, Commercial CPD Seminar Series, Melbourne, April 13, 2016.

⁸⁷ August 1, 2014, printed in the Singapore Institute of Arbitrator's September 2014 Newsletter, https://www.siarb.org.sg/images/Events/Newsletters/SIarb_Newsletter_Sep2014.pdf.

is a seat frequently chosen for arbitration proceedings. In Europe, proposals such as the German one for Frankfurt evince a broader strategy intended to turn the city into a hub for international dispute resolution: in this context, the strengthening of arbitration is put forward as a key element.⁸⁸ According to some international commercial courts' rules, the judges appointed to the court are allowed to act as arbitrators within the jurisdiction.⁸⁹ In the same vein, a common feature of the international commercial courts is their jurisdiction over claims for the annulment of arbitral awards given in international arbitrations based in the jurisdiction.

As a matter of fact, there is more to the question than meets the eye. In reality, the particular circumstances of each case will determine the parties' preference to submit to arbitration or to an international commercial court - and to which one among them, for international commercial courts differ notably. In the abstract, any enquiry into the relationship between the international commercial courts and arbitration must be carried out at two different levels: analysis relating to the users and analysis relating to the institutions. Under the first perspective the interplay between international commercial courts and arbitration may largely be explained by competition: we will address this point under the next heading. Complementarity appears at the second level, where it may well be unavoidable.

To begin, one can look at the functions other than dispute resolution allocated to arbitrators and courts. Only public courts can develop nomophylactic and law-development functions (with greater or lesser intensity according to each legal tradition). Arbitrators cannot, for they lack any connection to a particular legal order, and their adjudicative role is limited to the case at hand and derives from the choice of the specific parties involved. In addition, arbitrators, even if bestowed with the above-mentioned legal functions, would find them very difficult to perform since arbitral awards are usually not published and do not create a precedent.⁹⁰ In this context the feeling that arbitration is hampering the law is shared by scholars and practitioners, particularly in common law countries. In 2016, the Lord President of the Supreme Court of England and Wales claimed arbitration is an obstacle to law development and advocated in favour of a new equilibrium in the relationship between arbitration and public courts in his lecture 'Developing Commercial Law through the Courts: Rebalancing the Relationship between the Courts and Arbitration.'⁹¹ International commercial courts do not pose the problem. On the contrary, through the resolution of inter partes disputes these bodies carry out all the tasks typically assigned to public courts. In common law systems they are entrusted with a law-making function; in civil law systems they interpret the rules - an essential role in order to avoid obsolescence in a context of rapid and constant change such as international commerce.⁹²

International commercial courts may be a response for other arbitration-related concerns. In his already-mentioned speech of 2014, Justice Quentin Loh indicated, 'Just as mediation or adjudication or other forms of ADR complement arbitration, the SICC will do likewise for disputes that do not sit

⁸⁸ B. Hess, entry in Conflictoflaws.net, March 31, 2017.

⁸⁹ See <https://www.adgm.com/doing-business/adgm-courts/arbitration/>.

⁹⁰ The consequence -fragmentation- may nevertheless be mitigated by the repetitive appointment of the same of arbitrators.

⁹¹ Lord Thomas of Cwmgiedd (Lord Chief Justice of England and Wales), Bailli Lecture, March 9, 2016: <https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf>.

⁹² International commercial courts are called to play an important role in the development of the national law, but also - and probably to a larger extent- of the *lex mercatoria*.

well with the private consensual dispute resolution process.⁹³ This happens when the issue at stake affects the public interest - a more and more common occurrence linked to the proliferation of public-private contracts entered into by States or their emanations and private partners. Public distrust towards investment and (admittedly to a lesser extent) commercial arbitration has mushroomed in the last decade fostered by, among other factors⁹⁴, the lack of transparency or direct misinformation in relation to high value disputes referred to arbitration on 'hot' topics such as border security⁹⁵. Unlike arbitration, international commercial courts provide a forum conducted under the principle of transparency. Not without reason they have been described as a formula '[to] meet the needs of the digital revolution in our Global Village and strengthen the rule of law'.⁹⁶

Likewise, in areas where party autonomy is not the prevailing standard adjudication by the international commercial courts ensures respect of the mandatory rules, whereas their application in arbitration proceedings is less certain. This is not without consequences, which do not necessarily wait to pop up at the recognition or enforcement stages of the award. On the contrary, doubts about the suitability of some claims to be resolved by arbitration can be traced in recent EU EM decisions refusing to require compliance with arbitration agreements on disputes covered by substantive *lois de police*: the typical case is that of commercial representation or agency contracts, and distribution agreements.⁹⁷

Competition

Recent surveys conducted on international commercial arbitration show a certain degree of user dissatisfaction. In 2015, one survey reported a growing concern due to a 'perceived reluctance by tribunals to act decisively in certain situations for fear of the award being challenged on the basis of a party not having had the chance to present its case fully ('due process paranoia').⁹⁸ Moreover, the arbitration rules proposed by the arbitral institutions are becoming increasingly formal.⁹⁹ Indeed, this 'judicialization' of arbitration is largely related to the complexity of disputes; as a reaction and in order to enhance the efficiency of the arbitration process, several arbitration institutions have newly revised their rules and practices. Objectively, the trend does not deserve a negative assessment: it results

⁹³ Above, note 87.

⁹⁴ On the public's perception S. Mourre, 'La *Soft law* como condición para el desarrollo de la confianza en el arbitraje internacional', X Conferencia Internacional Hugo Grocio de arbitraje, Fundación Universitaria San Pablo CEU, 2018, 7-9. On an increasing regulatory power of arbitral institutions and the legitimacy question B. Warwas, *The Liability of Arbitral Institutions: Legitimacy Challenges and Functional Responses*, Springer, 2017.

⁹⁵ See in the UK the *eBorder* case, reported by S. Brekoulakis, May 8, 2017: <http://arbitrationblog.kluwerarbitration.com/2017/05/08/the-protection-of-the-public-interest-in-public-private-arbitrations/>.

⁹⁶ Lord Thomas of Cwmgiedd (Lord Chief Justice of England and Wales), 'Commercial Justice in the Global Village: the Role of Commercial Courts', *DIFC Academy of Law Lecture*, Dubai, February 1, 2016: <https://www.judiciary.uk/wp-content/uploads/2016/02/LCJ-commercial-justice-in-the-global-village-DIFC-Academy-of-Law-Lecture-February-2016.pdf>.

⁹⁷ See F. Ragno, 'Inarbitrability: A Ghost Hovering over Europe?', in: F. Ferrari (ed.), *Limits to Party Autonomy in International Commercial Arbitration*, Juris, NYU, 2016, 127-163, 132-144.

⁹⁸ Queen Mary/White and Case 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf.

⁹⁹ The most relevant arbitration institutions have modified their rules and practices in the last years to promote the efficiency of the arbitration process, but also to ensure their compatibility with procedural standards of due process: see for instance Article 14 London Court of International Arbitration Rules (1998); Article 12 (8) ICC Rules 2017 (former Article 10 (2) 1998). 'Formalization' results as well from the involvement in the proceedings of the institutions themselves: see J. Lee, 'The evolving role of institutional arbitration in preserving parties' due process rights', 10 (2) *Contemp. Asia Arb. J.* 234, *passim*.

from a concern to offer a quality service meeting the needs of the case.¹⁰⁰ User perception may be different, though, for ‘judicialization’ has an immediate consequence on party autonomy: more and more frequently, the rules of arbitral institutions limit the autonomy of the parties, directly or indirectly, restricting their margin of manoeuvre to design a custom-made procedure.¹⁰¹

In addition to the foregoing, surveys reveal that respondents believe arbitration suffers (and continues to suffer) from other shortcomings: high costs; lack of effective sanctions during the arbitral process; lack of power in relation to third parties; lack of speed.¹⁰² More positively, ‘enforceability of awards’ followed by ‘avoiding specific legal systems/national courts’, ‘flexibility’ and ‘ability of parties to select arbitrators’, are praised,¹⁰³ although concerns have been expressed regarding the absence of data allowing arbitrators to be properly chosen.¹⁰⁴ The delegation of merit-related tasks to the tribunal secretaries has become a source of mistrust as well.¹⁰⁵

The ability of international commercial courts to be preferred over arbitration by users will depend on their capacity to provide a jurisdictional service with arbitration-like qualities, and free from its downsides or able to compensate for them. There is not much information so far on how international commercial courts work; it is not easy to obtain factual data from the arbitration ,ither. Still, some inferences may be drawn from the comparison of the theoretical frames and the scant evidence gathered from the practice from both sides.

3.1.1.1 Matching and improving the offer

International commercial courts are public courts. As such, they are apt to provide an ‘adjudicative offer’ in ways arbitrators are not: either adding possibilities beyond the reach of the latter, such as recourse against a first-level decision (but adding sometimes the possibility to waive it prior to the process, as we saw for Singapore under 2.2.4); or avoiding some of its disadvantages, like awards inconsistency due to the absence of precedents, the claim of lack of legitimacy or other ethical issues affecting arbitrators, the limitations on joinder, restrictions related to the arbitrability of the subject-matter, to adopt or enforce sanctions against a non-compliant party, or to apply particular remedies.¹⁰⁶

More specifically, international commercial courts seem to be able to compete with some arbitration-distinctive characteristics, in particular regarding the length of the proceedings. As we have already explained, international commercial courts are equipped both legally and technically to act swiftly. The

¹⁰⁰ L. Trakman, H. Montgomery, ‘The ‘Judicialization’ of International Commercial Arbitration: Pitfall or Virtue?’, (2017) *Leiden Journal of International Law* vol. 30 (2), 405.

¹⁰¹ See A. Carlevaris, ‘Limits to Party Autonomy and Institutional Rules’, in F. Ferrari (ed.), *Limits to Party Autonomy in International Commercial Arbitration*, Juris, NYU, 2016, 8; S. Sills, ‘Party Autonomy, the ‘Right’ to Appoint, and the Rise of Strategic Challenges’, *id. loc.*, 37-82.

¹⁰² These were the findings of the Queen Mary/White case Survey 2015, which remain unchanged according to the 2018 Survey: <http://www.arbitration.qmul.ac.uk/research/2018>.

¹⁰³ *Loc. ult. cit.*

¹⁰⁴ The 2018 Survey points to an improvement in the situation, but acknowledges that the sources of information are ‘word of mouth’, ‘internal colleagues’, and ‘publicly available information’; data provided from the arbitral institutions remain far behind.

¹⁰⁵ An area still lacking regulation: see *In P v Q* [2017] EWHC 194.

¹⁰⁶ As pointed out by J. Walker, ‘Privatizing Dispute Resolution and its Limits: International Commercial Arbitration and National Courts’, (pending publication in L. Cadiet, B. Hess, M. Requejo Isidro, *Privatizing Dispute Resolution and its Limits*, Nomos, expected 2019), under 3, arbitral institutions are indeed trying to react to these shortcomings.

data retrieved from some of the courts point to good outcomes in this respect: we refer to the examples of Singapore and Ireland (under 2.2.4 and 2.4.3, respectively). Statistics on the duration of civil proceedings in the first instance before the EU Member States point to the Netherlands as fastest - an average of 130 days from notification until sentence, followed by Germany - about 200 days from notification until sentence - and France - almost a year.¹⁰⁷ There is no reason to doubt the respective international commercial courts will not corroborate the general tendency.

Moreover, reference should be made to a common feature of all international commercial courts, namely the tendency to encourage the parties to resolve their differences through alternative dispute resolution or to reach an out-of-court or before-the-court settlement. Again, this seems to be working well in practice: according to the 2017 Annual review of the DIFC Courts, there is a settlement rate of 88% for cases before the Court of First Instance, and a similar one before the Smalls Claim Tribunal. Figures in relation to Ireland have already been mentioned (under 2.4.3).

On other issues nuances would be needed for each single commercial court or chamber. Indeed, in order to better fit with the specificities of international commercial litigation all international commercial courts give room for the parties' involvement in the design of the process, but with differences precluding any general conclusion. Similarly, steps are taken to ensure the parties' comfort limitations on representation by foreign lawyers are softened, but not in the same way in all jurisdictions. On fees, we have seen that the rules are not at all uniform- no fee in Qatar, general fees in Germany, specific in Singapore but following a variable rate, also specific in The Netherlands but with a flat rate. Competitiveness will therefore vary accordingly.

3.1.1.2 Drawbacks

In some aspects the international commercial courts' offer lags and a reversal of the situation looks rather improbable. Some elements almost consubstantial to arbitration cannot be taken up by the international commercial courts, for they clash against equally consubstantial characteristics of the State courts system. Confidentiality (which will certainly be an issue in many of the proceedings before the international commercial courts: suffice it to mention trade secrets), provides the best example: the starting point of international commercial courts is publicity in line with the general principle of public courts; the opposite is the exception.¹⁰⁸ Only under very exceptional circumstances will the actual existence of a dispute, the fact that the party was involved in the proceedings, or the judgment remain confidential.

On the merits, international commercial courts adjudicate according to PIL rules. In Europe the conflict of law rules of the Regulations 593/2008, Rome I, and 864/2007, Rome II, apply.¹⁰⁹ Both instruments support party autonomy; however, they also impose boundaries to it which are absent in the framework of arbitration. The Commission's proposal for the Rome I Regulation opening up the choice to 'principles and rules of the substantive law of contract recognised internationally or in the

¹⁰⁷ T. Evas, figure 6.

¹⁰⁸ In addition to publicity - needed to reinforce public confidence in the administration of justice- the right to an effective remedy and to a fair trial of the parties involved in a specific procedure must also be protected. See B. Hess, A. Koprivica (ed.), *Open Justice*, pending publication.

¹⁰⁹ OJ L 177/6, July, 4 2008; OJ L 199/40, July 31, 2007, respectively.

community' was rejected;¹¹⁰ not surprisingly, in a recent document the EU Parliament takes up the opportunity to recommend a modification of the Rome I and Rome II regulations 'to afford the parties to purely commercial contracts further autonomy while ensuring the protection of the weaker parties in business-to-business relations'.¹¹¹ Freedom of choice is restrained under the circumstances contained in Article 3 (3) Rome I -Article 14 Rome II. According to Article 9 of the Rome I Regulation - Article 16 of the Rome II Regulation, European international commercial courts must apply the *lois de police* of the forum. Choice of law is not absolute either before the Asian international commercial courts: foreign law will not apply if it is inconsistent with the public policy of the forum. Conversely, arbitral tribunals are not bound by mandatory rules - neither internal nor international ones- even if they have an interest in abiding by them to guarantee the validity of the award in case of a subsequent scrutiny.¹¹²

A further drawback of international commercial courts, likely to tilt the balance in favour of international arbitration, will emerge if there is a need to enforce the judgment abroad. There is no instrument comparable to the New York Convention of 1958 for arbitral awards¹¹³ - hence the interest of the DIFC case explained above, under 2.2.1. Today, the recognition and enforcement of a judicial decision in another jurisdiction depends heavily on whether or not there are international agreements between the issuing and the requested States. We will address this point under the following heading: how developed the network of agreements for recognition and enforcement is will play a decisive factor in favour of (or against) the international commercial courts, not only in the relationship with arbitration but also with each other.

3.2 *International Commercial Courts in Competition*

Forum selling, forum shopping

The essential task of public courts of resolving disputes among private parties has traditionally been conceived as a service of the State, and not as a commercial product involving competition among suppliers. That perspective must not be overlooked: the first objective of any jurisdictional system governed by the rule of law must be the resolution of the cases, in a framework that guarantees the fundamental rights of access to justice and equality of arms. At the same time, it not possible to ignore any longer that how a judiciary works can attract desirable foreign investment: thus the label of 'litigation market'. Independent, efficient courts known for the quality of their decisions, and staffed with skilled personnel, are an essential component of the trust-building which is essential to investments and trade.

¹¹⁰ Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) COM(2005) 650 of 15 December 2005, Article 3(2)

¹¹¹ Report with recommendations to the Commission on expedited settlement of commercial disputes (2018/2079(INL)), Annex, under II.

¹¹² On the Rome I and Rome II Regulations and arbitration see P. de Miguel Asensio, 'The Rome I and Rome II Regulations in International Commercial Arbitration', in F. Ferrari (ed.), *The Impact of EU Law on International Commercial Arbitration*, Juris, Nueva York, 2017, 177-243.

¹¹³ A. Saito, 'International Commercial Arbitration and International Commercial Courts: Towards a Competitive and Cooperative Relationship', in: *Harmonising Trade Law to Enable Private Sector Regional Development*, Victoria University (New Zealand), Special Issue, 2016, 33-58, 48; D. Demeter, K.M. Smith, at 452.

In fact, in international commerce the idea of competition between the courts of different States is novel, although it has intensified since the new millennium, as shown by the 2007 booklet published by the Law Society London, 'England and Wales, The jurisdiction of choice',¹¹⁴ and the German reaction thereto 'Law-made in Germany':¹¹⁵ both documents tend to promote recourse to their respective judicial systems.

Expressions such as *forum selling* or *forum shopping* epitomize the consequences of the competition between jurisdictions in terms that evoke the selection or the promotion of a consumer product: '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'.¹¹⁶

The degree of competition among jurisdictions 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.¹¹⁷ In the EU, before the UK's official notice of intention to withdraw from the Union on 29 March 2017, the UK's most serious competitors were Germany and the Netherlands: the news of changes in the field of justice in the UK - particularly related to cost increases - coupled with improvements introduced in the systems of the latter countries may account for this. In addition, Germany's advantages include much more certainty around lawyers' fees, quicker and less costly proceedings, and (albeit limited) some initiative towards the use of English as the language in court under specific circumstances. Meanwhile, Dutch courts are known for their efficiency in the management of complex and high-level litigation, as well as for offering collective redress mechanisms not available anywhere else in Europe.¹¹⁸ The announcement of the UK withdrawal from the EU has boosted projects to establish international commercial courts or chambers in other Member States. The reaction, which some have called 'opportunistic',¹¹⁹ has undoubtedly a component of competition with the UK; be that as it may, it certainly reflects the need to fill the gap left by the likely departure of London in the intra-European panorama. The statistics of recourse to the London Commercial Court between March 2017 and April 2018 still show an increase of 22% in the total number of litigations submitted to the court; they also indicate the predominance of EU-originating litigants, followed by litigants from Asia.¹²⁰ However, with regard

¹¹⁴ <https://www.eversheds-sutherland.com/documents/LawSocietyEnglandAndWalesJurisdictionOfChoice.pdf>. For a comment on the 'battle' see S. Vogenauer, 'Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence', (2013) 21 *European Review of Private Law* 13, 30 ff.

¹¹⁵ www.lawmadeingermany.de

¹¹⁶ E. Lein, R. McCorquodale, L. McNamara, H. Kupelyants, J. del Rio, *Factors Influencing International Litigants' Decisions to Bring Commercial Claims to the London Based Courts*, Ministry of Justice Analytical Series-BIICL, London, 2015, under 4.5.

¹¹⁷ On judges 'advertising' their services, comparing the USA and Germany see S. Bechtold, J. Frankenreiter, D. Klerman, 'Forum Selling Abroad', MPI Collective Goods Discussion Paper, No. 2018/11; Virginia Law and Economics Research Paper No. 2018-14, SSRN: <https://ssrn.com/abstract=3256183>. More generally see A. Bonomi, K. Nadakavukaren Schefer, *US Litigation Today: Still a Threat For European Businesses or Just a Paper Tiger?*, Shulthess Verlag, 2018.

¹¹⁸ R. McCorquodale, L. McNamara, H. Kupelyants, J. del Rio, 26-27.

¹¹⁹ See A. Briggs's comments to B. Hess/M. Requejo, in <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-civil-justice-cooperation/written/46823.html>, fn. 46.

¹²⁰ *Portland Commercial Courts Report 2018*, <https://portland-communications.com/publications/commercial-courts-report-2018-portland/>.

to Europe, the data may change radically from March 31, 2019, in the absence of an agreement between the UK and the EU regarding the transitional period, and above all, of a future agreement ensuring the recognition and enforcement of English judgments in the remaining Member States.¹²¹

We have already explained that the fundamental argument underpinning the creation of international commercial courts at the UAE, Qatar or Singapore was not in the first instance competition with London, nor the need to fill a gap left by a hard or simply messy Brexit. However, the desire that at some point competition occurs and culminates with a different share of cases exists: 'it is hoped that the SICC will compete with the English Commercial Court for a share of the international commercial cases now drawn to London.'¹²² Although it is too early to evaluate the commercial court alternatives to London, in what follows we will argue that at the theoretical level the Asian and Middel East settings appear to better suited than the European ones.

Choice-Determinative Factors

Admitting from the outset the difficulty to identify the factors determining user preferences, we can accept the relevance of the following:¹²³

3.2.1.1 Access

International commercial courts can only accomplish their mission if disputes are brought before them. That is why it is essential to open up ways to confer jurisdiction on them including through broad criteria attributing international jurisdiction and a generous delimitation of the substantive scope of jurisdiction — in other words, the notion of 'international commercial litigation'. In this regard, the fact that international commercial court rules authorize the parties to agree on either or both conditions, 'international' and 'commercial', as for the SICC, represents an advantage.

International jurisdiction can be based on a choice of court agreement by the parties for all international commercial courts; for those located in a EU Member State, in accordance with Article 25 Brussels I bis regulation. However, whether jurisdiction may be conferred to (all) the current European bodies by virtue of a parties' choice of forum is unclear. As we saw above, the agreement of the parties for proceedings to be before the NCC District Court in English is a condition *sine qua non* for the action to be initiated in the NCC District Court; the same occurs in Frankfurt. On the contrary, being listed for the Dublin Commercial Division is a discretionary decision; the assignment to the Chambre Internationale in Paris depends on the 'Chambre de placement'; finally, they are not 'jurisdictions' in the proper sense of the term, but just chambers or divisions, and their competence results from the internal allocation of cases.

¹²¹ Last December the UK ratified the 2005 Hague Convention on choice of court agreements, to enter into force on April 1, 2019, should no-agreement be reached between the UK and the UE. https://verdragenbank.overheid.nl/en/Verdrag/Details/011343/011343_Notificaties_13.pdf. However, due to its limited scope the Convention cannot replace the EU rules on recognition and enforcement of civil judgements.

¹²² Justice Anselmo Reyes, 'Recognition and Enforcement of Interlocutory and Final Judgments of the Singapore International Commercial Court' (2015) 2 *Journal of International and Comparative Law* 337, 339. See as well *Portland Commercial Courts Report 2018*, at 3.

¹²³ T. Evas, under 3.2, summarizes three studies conducted in 2005, 2008 and 2016 which allow concluding that the decisive elements are: the quality of the legal system and of the law applicable to litigation; the time invested in the resolution; the predictability of the outcome; costs; others, including the probabilities of recognition and enforcement of decisions outside the forum.

Conversely, parties' can directly choose an Asian international commercial court.

3.2.1.2 *What is on the menu?*

In theory, significant differences exist among the international commercial courts on non-negligible aspects. For instance, limitations in the use of English and tardiness in incorporating new technologies are likely to work against the German initiative, and the same can be expected for the French model; the NCC is much better equipped in both respects, but the high access fees imposed on litigants is likely to work as a drawback.

Asian international commercial courts offer the major advantage of having adopted the English language for the whole proceeding. In addition, English commercial substantive rules have been incorporated into the legal system (Singapore did not need to 'import' foreign legal rules pertaining to another tradition and culture so avoided all related problems). The transplanting of such rules to the local legal system increases the probabilities that the parties will choose local law to apply to their commercial relationship or dispute. Furthermore, should this not be the case specific solutions have been adopted to ascertain the contents of foreign law. European international commercial courts lag behind in these aspects as well.¹²⁴

Still as to the merits, the fact that no foreign member is allowed to sit on the benches of the European international commercial courts currently in operation may prove to be a disadvantage compared with the Asian courts. This issue should not be underestimated in international commerce: the integration of judges acquainted with English law (also, case law) and with the common law tradition can have a decisive impact on the handling of the cases. The customary association of civil law jurisdictions with written, fixed and precise rules has posed serious obstacles to the resolution of cross-border cases where no literal support was found in the texts addressing a specific problem. This has happened, for instance, in cross-border insolvency, where communication and cooperation between the courts dealing with the insolvency of one single debtor is of the essence. Until the adoption of Regulation 2015/848 on insolvency proceedings¹²⁵ such cooperation was deemed impossible in many EU jurisdictions because the previous law - Article 31 Regulation 1346/2000- only provided for the obligation to communicate among the liquidators. In the UK, the lack of a legal provision was easily overcome.¹²⁶ From this point of view, the Dublin and Singapore international commercial courts are better placed than the rest from the outset, for both jurisdictions belong to the family of common law countries.

The incorporation of new technologies into the procedure will certainly matter as well. IT can improve and speed up the working of a court and simplify case management by the parties; in the near future it will no doubt have the essential task of supporting intercommunication and the secure and fast exchange of information between courts of different jurisdictions. Belonging or not to an interoperability network (as well as its geographical and functional scope) will impact on the costs and

¹²⁴ See M. Requejo Isidro, 'The application of European Private International Law and the ascertainment of foreign law', in E.M. Kieninger, J. von Hein, G. Rühl, *How European is European Private International Law?*, pending publication.

¹²⁵ OJ L/19 141, June 5, 2015.

¹²⁶ *Vid.* High Court of Justice Birmingham, May 11, 2005, in *MG Rover*, 2005 [EWHC] 874; In *Re Nortel Group SA* [2009] EWHC 206 (Ch). M. Requejo Isidro, 'Cooperation, Communication, Coordination', in Hess/Oberhammer/Bariatti/Koller/Laukemann/Requejo Isidro/Villata (eds.), *The Implementation of the New Insolvency Regulation*, Nomos-Hart, 2017, 139-155.

the length of judicial proceedings in cross-border litigation. At this juncture the Asian courts appear better equipped than those of Europe, at least taken separately; not much is known about inter-operative systems. In the EU they do exist, but are still at an experimental stage and with a limited scope.¹²⁷

Further differences relate to the openness to party autonomy and how much leeway the parties have to participate in the design of 'their' proceedings. In this regard some possibilities like the ex-ante waiver of the right of appeal or to object to the recognition/enforcement of the judgment, which exist for the SICC (see above under 2.2.4), are completely alien to the European landscape -and most likely are incompatible with the prevailing understanding of the right to a due process.

3.2.1.3 The 'exportability' of the judgments

How easy or complicated the recognition and enforcement of decisions is outside the jurisdiction can play an essential role.

If the judgment debtor refuses voluntary compliance because he lacks any assets in the State where the judgment has been given, then enforcement will be sought abroad. To do this generally requires that the decision is recognized and granted exequatur in the targeted State. In this respect international commercial courts do not differ from any other public court, with the exception of the DIFC Court, whose decisions may be 'converted' into an award in the terms explained above. For the rest, those international commercial courts whose resolutions have better options to be exported will enjoy a competitive advantage. Under the current situation the network of bilateral and multilateral instruments on recognition and exequatur promotes fragmentation by geographical regions: stakeholders doing business in the UAE or the Gulf area may have a preference for the DIFC Courts and the ADGM Courts based on the fact that the Emirates are part of the *Gulf Cooperation Council Convention for the Execution of Judgments, Delegations and Judicial Notifications 1996*¹²⁸ and of the *Riyadh Arab Agreement for Judicial Cooperation 1983*;¹²⁹ international commercial court decisions benefit from those regimes after registration with a local court once translated into Arabic. Moreover, in recent years memoranda of understanding and of guidance have been entered into by the UAE international commercial courts, especially the DIFC Courts, to ease the recognition and enforcement of decisions abroad.

Within the group of Asian international commercial courts the SICC enjoys an advantageous situation as neither registration nor translation of decisions is needed. In addition, Singapore has concluded multiple bilateral agreements for the mutual recognition of decisions.¹³⁰ Since June 2016, Singapore has also been a party to the Hague Convention of 2005 on choice of forum clauses; a step which may have significant consequences on the recognition and enforcement of SICC judgments abroad, especially in Europe. In our view, however, this element should not be overestimated because the material scope of the 2005 Hague Convention can considerably restrict its practice relevance for

¹²⁷ Research is being carried out with the support of the European Commission into technologies at the service of justice, and to set up an E-justice environment: see the e-CODEX project on the cross-border exchange of documents, and the follow-ups (Me-CODEX I/ II).

¹²⁸ Bahrain, Saud Arabia, Oman, Qatar, Kuwait, EAU.

¹²⁹ Jordan, Bahrain, Tunisia, Algeria, Djibouti, Saudi Arabia, Sudan, Syria, Somalia, Iraq, Oman, Palestine, Qatar, Kuwait, Lebanon, Libya, Morocco, Mauritania, Yemen.

¹³⁰ As of October 2018, with Australia, Brunei Darussalam, Hong Kong, India, Malaysia, New Zealand, Pakistan, Papua New Guinea, Sri Lanka, United Kingdom, the Windward Islands.

various reasons: Article 2 leaves out many matters relevant to international commerce; Article 21 allows for further reservations with respect to other specific matters, and the EU has made use of the authorization. Moreover, the choice of court clause triggering the application of the Convention must be an exclusive one.¹³¹ Although it is true that according to Article 22 Contracting States may declare that their courts shall recognize and enforce judgments issued by the courts of another Contracting State designated by virtue of a non-exclusive election agreement, no contracting State has so far made such a declaration. Besides, whether jurisdiction based on the transfer of another court (domestic or foreign) to an international commercial court qualifies as an 'exclusivity clause choice' within the meaning of the Convention may be disputed.

As far as European international commercial courts are concerned, their decisions benefit from the streamlined regime for the enforcement of judgments in other EU Member States or EFTA countries provided by the Brussels I bis regulation and the Lugano Convention.¹³² Conversely, the Hague Convention of 2005 is not really relevant in practice from the European perspective, since apart from the EU, currently only Mexico, Montenegro and Singapore are contracting parties thereto.¹³³ It has been signed but not ratified by the Ukraine, the US and China.

3.2.1.4 Other

Lastly, the reputation enjoyed in general by the jurisdiction where the international commercial court is located, and external factors such as the level of political and economic stability will bear on their ability to attract business litigation to the forum. Indeed, the strategy to become a major player in the world of international commercial litigation requires a wholesale effort and here again Singapore seems to be head of the class.¹³⁴

3.3 Epilogue- A Word on the 'Judgments Project'

In the context of a 'litigation market', the work in progress at the Hague Conference for a 'judgments convention' should be mentioned. Assuming that the negotiations succeed (many provisions are currently still in brackets, reflecting the lack of agreement),¹³⁵ interest in signing the convention will

¹³¹ Although a choice of court agreement is deemed to be exclusive unless the parties have expressly provided otherwise (Article 3(b)).

¹³² Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
OJ L 339, December 21, 2007.

¹³³ On June 12, 2018 the first EU MS decision was recognized in Singapore by virtue of the Convention: *Ermgassen & Co Ltd v Sixcap Financials Pte Ltd* [2018] SGHCR 8.

¹³⁴ See nonetheless G. L. Benton, 'The Whispered Conversation: Hong Kong v Singapore', in <http://arbitrationblog.kluwerarbitration.com/2019/01/02/whispered-conversation-hong-kong-v-singapore/>, January 2, 2019: 'Singapore's parliamentary political system has been dominated by the ruling People's Action Party (PAP) and the family of current Prime Minister Lee Hsien Loong since 1959. According to Freedom House, the electoral and legal framework allows for some political pluralism and considerable economic prosperity but critics contend that what effectively amounts to a one-party system limits freedoms of expression, assembly, and association. Death penalties for drug traffickers, canings for some 35 other offenses and prohibition on chewing gum are reminders that Singapore adheres to different standards than many Western jurisdictions'.

¹³⁵ Text under: <https://assets.hcch.net/docs/9faf15e1-9c36-4e57-8d56-12a7d895faac.pdf>. For the Revised Explanatory Report, December 2018, para. 54, 55: <https://assets.hcch.net/docs/7d2ae3f7-e8c6-4ef3-807c-15f112aa483d.pdf>.

depend on its material scope, the number of contracting States, and on whether it offers a more liberal regime than the systems of recognition and enforcement otherwise applicable.

On the first point, the judgments convention would apply to decisions by a court grounding its jurisdiction in a non-exclusive choice of court agreement, thus filling the gap left open by the 2005 Hague Convention. However, like the latter instrument, the set of matters not included (as of today)¹³⁶ in the instrument restricts the benefits to be expected. It should also be noted the notion of 'decision' does not comprise provisional measures.

At this stage little can be said about the question of the potential signatory States. Accession from relevant countries such as the US and China will depend both on the outcome of the negotiations from their perspective, and the political moment and leadership. At any rate, the limited success of the 2005 Hague Convention - which is actually what was left from the failure of a similar previous project - allows for justifiable doubts vis-à-vis the new project.

As for the third aspect - the comparison between the future convention's system and other regimes- it is worth noting that the Convention provides for a two-step examination of the decisions to be recognized/enforced abroad. Firstly, the decision is assessed to decide on its 'eligibility' for recognition and enforcement which in turn depends on the ground of jurisdiction relied upon by the court of origin. The requirement is, in reality, a hidden control of international jurisdiction leading to the exclusion of the judgment at hand from the scope of the convention if none of the criteria listed therein is met. Secondly, the recognition of an eligible judgement may be refused (although it is not imperative) under the conditions provided for in the convention. Nevertheless, a general clause has been incorporated according to which 'Subject to Article 6, this Convention does not prevent the recognition or enforcement of judgments under national law'.

From the EU perspective, a comparative study of national systems in April 2018 suggests that there may be an interest in the (future) judgments convention from States with 'conservative' systems of recognition and enforcement of foreign decisions, in the absence of any another more favourable agreement: this would be the case of India, Australia, the UK and Singapore. With regard to other, more liberal jurisdictions, the fact that they become contracting parties to a future Hague convention will not make any difference thanks to (current) Article 16. Since the proposed convention does not standardize other aspects of recognition and enforcement - for example, the development of the exequatur process - its added value for these countries will be limited, or non-existent.¹³⁷

¹³⁶Further exclusions were added in May 2018.

¹³⁷ P. de Miguel Asensio, G. Cuniberti, P. Franzina, C. Heinze, M. Requejo Isidro, 'The Hague Conference on Private International Law *Judgments Convention*', In-Depth Study, European Parliament, PE 604.954, April 2018, under 4.3, 4.4.



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