

Articles

INTERNATIONAL COMMERCIAL COURTS AND ARBITRATION — ALTERNATIVES, SUBSTITUTES OR TROJAN HORSE?

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“禍兮福之所倚，福兮禍之所伏”¹

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¹ English Translation by Yu-Fen Chang: “*Good fortune follows upon disaster; disaster lurks within good fortune.*”

ABSTRACT

The past years have seen the emergence of international commercial courts in various jurisdictions, but in particular in the Dubai International Financial Centre, Qatar, Abu Dhabi and Singapore. These courts are inspired in part by the London Commercial Court and display some unique features when compared with domestic courts. It seems they want to combine the best of both worlds, namely state court proceedings and international arbitration. Indeed, they are often of a hybrid nature. Potential users should have a close look whether it is actually worth giving up certain advantages such as the power to join a third party in court proceedings for the advantages of international arbitration which cannot easily be replicated by international commercial courts and which focus on the principle of party autonomy.

KEYWORDS: *Abu Dhabi Global Market Courts, Belt and Road Initiative, BREXIT, Brussels International Business Court, China International Commercial Court, confidentiality, Dubai International Financial Centre Courts, European Commercial Court, Frankfurt International Chamber for Commercial Matters, International Commercial Courts, international judges, London Commercial Court, The Netherlands Commercial Court, New York Commercial Courts, One Belt–One Road, Paris Court of Appeal International Chambers, party autonomy, Qatar International Court, right of audience, Singapore International Commercial Court, Zurich Commercial Court*

I. INTRODUCTION

Arbitration is still the most popular dispute resolution mechanism for international businesses²—not only on the global level but also in Asia where the growth rates have been particularly impressive over the last years.³ However, arbitration is not “the only game in town”.⁴

A. *Skepticism vis-à-vis International Arbitration*

Indeed, arbitration has come under attack for various reasons.⁵ On the one hand, users of arbitration complain about a lack of time- and cost-efficiency.⁶ On the other hand, investment arbitration in particular has experienced a certain backlash for alleged lack of transparency, democratic legitimacy as well as fairness in recent years.⁷ Accordingly, it cannot come as a surprise to anyone involved in international dispute resolution that alternatives to international arbitration were not only discussed in academic circles but also implemented in practice. In investment arbitration, we meanwhile see the proposal of the Commission of the European Union (hereinafter “EU”) to do away with traditional investor state arbitration and establish a multilateral investment court.⁸ While the idea of this multilateral investment court is still in the project stage (and might not develop further) the EU has also provided for bilateral

² See, e.g., SCH. OF INT’L ARBITRATION, QUEEN MARY UNIV. OF LONDON & WHITE & CASE, 2018 INTERNATIONAL ARBITRATION SURVEY: THE EVOLUTION OF INTERNATIONAL ARBITRATION 2 (May 9, 2018) (Their findings include: “97% of respondents” surveyed prefer international arbitration to resolve cross-border commercial disputes. 99% would choose or recommend international arbitration in the future.).

³ Sundaresh Menon, the Honourable the Chief Justice, Keynote Address at the Chartered Institute of Arbitrators International Arbitration Conference: Some Cautionary Notes for an Age of Opportunity 3 (Aug. 22, 2013) (“[T]he number of international arbitrations worldwide has grown, with a marked increase seen in Asia”).

⁴ Dalma Demeter & Kayleigh M. Smith, *The Implications of International Commercial Courts on Arbitration*, 33(5) J. INT’L ARB. 441, 441 (2016).

⁵ See, in particular, Sundaresh Menon SC, former Attorney Gen. & meanwhile Chief Justice of Sing., Address at ICCA Congress 2012 Opening Plenary Session: International Arbitration: The Coming of a New Age for Asia (and Elsewhere) 17-25 (June 11, 2012).

⁶ See, e.g., Stephan Wilske, *Legal Challenges to Delayed Arbitral Awards*, 6(2) CONTEMP. ASIA ARB. J. 153, 155-56 (2013); Stephan Wilske, *Crisis? What Crisis? – The Development of International Arbitration in Tougher Times*, 2(2) CONTEMP. ASIA ARB. J. 187, 196-203 (2009); William K. Slate II, *Cost and Time Effectiveness of Arbitration*, 3(2) CONTEMP. ASIA ARB. J. 185, 186-87 (2010); Johan Gernandt, *Cost and Time Effectiveness of Dispute Resolution*, 3(2) CONTEMP. ASIA ARB. J. 199, 201 (2010) (“I see three recent developments in international commercial arbitration that tend to prolong arbitration proceedings and drive up costs for the parties.”); Menon, *supra* note 3, at 14.

⁷ See generally Stephan Wilske, *Collective Action in Investment Arbitration to Enforce more Claims – Justice to the Deprived or Death Knell for the System of Investor-State Arbitration?*, 5(2) CONTEMP. ASIA ARB. J. 165, 190-93 (2012); see generally THE BACKLASH AGAINST INVESTMENT ARBITRATION (Michael Waibel et al. eds., 2010).

⁸ Stephan Wilske & Lars Markert, *How the Current Controversy About an Investment Court System Highlights Japan’s Emerging Role as a Key Player in International Investment Policy*, JAPAN COM. ARB. ASS’N (JCAA) NEWSL., no. 39, 2018, at 1, 5; Stephan Wilske et al., *The Emperor’s New Clothes: Should India Marvel at the EU’s New Proposed Investment Court System?*, 6(2) INDIAN J. ARB. L. 79, 86-89 (2018).

investment courts in its latest Free Trade Agreements (FTAs) with Canada and Vietnam—a concept for which it arguably has neither competence nor convincing arguments.⁹

B. Surge of International Commercial Courts

In the international commercial arena, we have experienced a recent surge of international commercial courts. They are partly a consequence of BREXIT, i.e., the United Kingdom's (hereinafter "U.K.") decision to leave the EU. Obviously, quite a few jurisdictions want to benefit from an assumed loss of attraction of the London courts for international disputes. Accordingly, the prospect of BREXIT has led a number of countries on the European continent to take measures designed to make their civil justice system more attractive for international litigants.¹⁰

However, initiatives by certain jurisdictions to solve international disputes by means of international commercial courts are older than BREXIT. At least three separate developments seem to be contributing to a growth of the idea of international commercial courts. Such courts might be a logical consequence of a certain disappointment about—obvious or perceived short-comings—of international arbitration. In some places and in particular in Asia, such international commercial courts seem to be part of a natural development which includes elements of national pride, emancipation from old post-colonial hierarchies and a gain of reputation when judging the world's commercial disputes. Finally, the resolution of significant commercial disputes with high amounts at stake may well be considered to be revenue-generating not only for courts but also for the local legal profession and service providers closely linked to dispute resolution (quantum experts, accountancy, interpreters and translators, hotel industry, etc.).¹¹

The most recent interest in this topic is evidenced by a number of academic conferences focusing on this topic. The EBS Law School (Wiesbaden, Germany) already organized an EBS Law School Arbitration Day on November 18, 2016 addressing the topic "All New and All Better? From New Rules to New Courts: The Quest for Improved Assistance of Arbitration".¹² On July 14, 2014, the University of Tokyo tackled the issue of "The Re-Emergence of International Commercial Courts: Indications for Litigants".¹³ On May 13,

⁹ Wilske et al., *supra* note 8, at 80-81.

¹⁰ Giesela Ruehl, *Towards a European Commercial Court?*, CONFLICTOFLAWS.NET (Aug. 11, 2018), <http://conflictolaws.net/2018/towards-a-european-commercial-court/>.

¹¹ See, e.g., Stephan Wilske, *The Global Competition for the 'Best' Place of Arbitration for International Arbitrations – A More or Less Biased Review of the Usual Suspects and Recent Newcomers*, 1(1) CONTEMP. ASIA ARB. J. 21, 27-29 (2008).

¹² See the conference report by Stephan Walter, *EBS Law School Arbitration Day: "All New and All Better? From New Rules to New Courts: The Quest for Improved Assistance of Arbitration"*, 15(2) SchiedsVZ März/April 2017 100, 100.

¹³ See *HSP Seminar the Re-Emergence of International Commercial Courts: Implications for Litigants 18:30-20:00 July 14th 2017*, RESEARCH CTR. FOR SUSTAINABLE PEACE, INST. ADVANCED GLOB.

2018, Qatar University College of Law in partnership with the Qatar International Court and Dispute Resolution Centre organized a “First Conference on the Rise of International Commercial Courts”.¹⁴ On July 10, 2018, the Erasmus School of Law in collaboration with the Max Planck Institute for Procedural Law Luxembourg and the Montaigne Centre for Rule of Law and Administration for Justice (Utrecht University) hosted the seminar “Innovating International Business Courts: A European Outlook” in Rotterdam.¹⁵ And most recently, the Inter-Pacific Bar Association (hereinafter “IPBA”) held its IPBA European Conference 2018 in Brussels (Belgium) on November 22, 2018, dealing with the topic “International Commercial Courts in Various European Jurisdictions & in Singapore”.¹⁶

C. Features of an International Commercial Court

First of all and in order to avoid any misunderstandings: The international commercial courts which are the topic of this paper are in fact municipal courts¹⁷ that only have an international dimension. In fact, they are a far cry away from truly international courts, such as the International Court of Justice, the International Tribunal for the Law of the Sea or the International Criminal Court. Such international dimension—which distinguishes these international commercial courts from traditional national courts—often has some or all of the following features.¹⁸

1. *Cross-Border Disputes Involving at Least One Foreign Party* — The *raison d'être* for these international commercial courts is to offer a forum for disputes where at least one litigant is not domiciled within the jurisdiction of this court. Only commercial matters can be decided by such an international commercial court.

2. *International Composition of Bench* — A unique feature is “international judges”, i.e., judges who are not citizens of the court’s home jurisdiction. The

STUDIES, GRADUATE SCH. ARTS & SCIS., UNI. TOKYO, <http://cdr.c.u-tokyo.ac.jp/RCSP/en/topics/398.html> (last visited Nov. 10, 2018).

¹⁴ See *First Conference on the Rise of International Commercial Courts*, C. L., QATAR U., QATAR INT’L CT. & DISP. RESOL. CTR., <https://www.transnational-dispute-management.com/news/20180513.pdf> (last visited Nov. 7, 2018) [hereinafter QATAR U. C. OF L. & QICDRC].

¹⁵ In relation hereto, Erasmus Law Review invited submission for its upcoming special issue on “International Business Courts – A European and Global Perspective”.

¹⁶ *IPBA European Conference 2018 Conference Agenda*, INTER-PACIFIC BAR ASS’N, <https://www.ipba2018.com/> (last visited Nov. 18, 2018).

¹⁷ See, e.g., Marilyn Warren AC, the Honourable Chief Justice & Clyde Croft, the Honourable Justice, Remarks at the Commercial CPD Seminar Series: An International Commercial Court for Australia: Looking Beyond the New York Convention 13-14 (Apr. 13, 2016); Sundaresh Menon, Chief Justice of the Supreme Court of Sing., Opening Lecture for DIFC Courts Lecture Series 2015: International Commercial Courts: Towards a Transnational System of Dispute Resolution 12 (2015) (“When viewed through the lenses of the accepted legal taxonomy, they might not be regarded as international courts at all.”).

¹⁸ As the first example—the London Commercial Court—will show, a national court may well be perceived as an international commercial court even if historically it has not been established to attract foreign litigants.

international composition of the judges is intended to enhance the international character of such court and further the idea of a neutral forum. Where legislators have not (yet) dared to allow for such international diversity, at least the background of such judges is regularly international, i.e., they received part of their legal education abroad or have other international experience. Obviously, the more international diversity one can experience on the bench of such an international commercial court, the more it reminds the users of international arbitration—a resemblance which is certainly not incidental.

3. *Limited Party Autonomy* — Arbitration's most distinctive feature vis-à-vis litigation in state courts is providing the parties with autonomy over the process and the legal framework of the dispute resolution. This ranges from the choice of procedural and substantive laws and arbitration rules to the free choice of legal counsel and arbitrators. As will be shown in the following, some international commercial courts provide for some degree of party autonomy as well as flexibility of process, but certainly not to the extent of that provided in arbitration.¹⁹

4. *Right of Audience for Non-Domestic Legal Counsel* — One of the advantages of arbitration is that parties may be represented by foreign lawyers. At least in some of the international commercial courts described in this paper, litigants may be represented by foreign lawyers as well, provided, however, that they are registered with the respective courts.

5. *Proceedings in the English Language* — The proceedings of such international commercial courts are often conducted in English, which is still the dominant language in international dispute resolution.²⁰

6. *Judgments Are Publicly Available* — Often, one has heard complaints about lack of precedent in international arbitration.²¹ In contrast, international commercial courts are considered to be well-placed to develop consistent jurisprudence.²² Accordingly, judgments of international commercial courts are often publicly available—sometimes even on their websites.

7. *Different Focus Relating to Confidentiality and Transparency* — In particular, availability of confidentiality is fundamental for many parties in arbitration whereas absolute confidentiality is only a myth. In fact, arbitration has well managed to ensure transparency or at least maintain the possibility for confidentiality.²³ However, international commercial courts normally operate publicly and sometimes even invite members of the public to attend hearings.²⁴ Yet, subject to certain criteria, international commercial courts may also limit publicity of the proceedings. Nevertheless, litigants should keep in mind that even where such courts may limit the publicity of their proceedings, such

¹⁹ Demeter & Smith, *supra* note 4, at 446.

²⁰ Stephan Wilske, *Linguistic and Language Issues in International Arbitration—Problems, Pitfalls and Paranoia*, 9(2) CONTEMP. ASIA ARB. J. 159, 163 (2016).

²¹ Cf. *see generally* Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture*, 23(3) ARB. INT'L 357 (2007).

²² Menon, *supra* note 17, ¶ 55.

²³ Demeter & Smith, *supra* note 4, at 449.

²⁴ *Id.*

decision is not completely within their control, but at least partly dictated by the public policy of the court's home jurisdiction.

8. *Lack of Finality of Trial Court Decision* — As a general rule, arbitration is a one-step process, resulting in a final and binding arbitral award with very limited grounds for judicial review according to Art. V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter “New York Convention”).²⁵ Only a few arbitral institutions include an internal appeal mechanism.²⁶ In contrast, international commercial courts regularly grant a right to appeal based on the merits of the decision. One might assume that a two-step process could delay the dispute resolution process and could increase costs. However, at least *Sundaresh Menon* took the position that “the absence of appellate mechanisms in arbitration has paradoxically led to rising costs”.²⁷

9. *Inherent Powers of Court vis-à-vis Third Parties and Counsel* — A very obvious advantage of international commercial courts in comparison with arbitration is the fact that an arbitral tribunal is more often than not unable to join third parties. Almost all arbitration rules of major arbitral institutions have worked on this issue and amended their rules to deal with multi-party or multi-contract arbitration. Nevertheless, it is simply easier for a court than an arbitral tribunal to join an unwilling third party to its proceedings.²⁸ Further, while there is still much debate whether an arbitral tribunal has the power to sanction counsel in international arbitration,²⁹ it is not in dispute that a commercial court may police the conduct of counsel.³⁰

In the following, this article will discuss the various international commercial courts on offer (see Part II.), in so doing often discussing the relationship between international arbitration and international commercial courts which is in any case a sensitive one. The author will present a humble conclusion and outlook for the future (see Part III.).

II. THE VARIOUS INTERNATIONAL COMMERCIAL COURTS ON OFFER

International commercial courts did not appear “out of the blue”.³¹ They are partly a traditional institution, but mostly based on new initiatives. In the following, this author will try to describe whether and in how far an individual

²⁵ *Id.* at 450.

²⁶ An example is the optional appeal mechanism of the American Arbitration Association (AAA), see AM. ARB. ASS'N, WWW.ADR.ORG (LAST VISITED NOV. 7, 2018).

²⁷ Menon, *supra* note 17, ¶ 48.

²⁸ Cf. Demeter & Smith, *supra* note 4, at 444; Andrew Godwin et al., *International Commercial Courts: The Singapore Experience*, 18(2) MELBOURNE J. INT'L L. 219, 227-28 (2017); *Id.* ¶ 42; Johannes Landbrecht, *The Singapore International Commercial Court (SICC) – An Alternative to International Arbitration?*, 34(1) ASA BULLETIN 112, 118 (2016).

²⁹ Stephan Wilske, *Sanctions Against Counsel in International Arbitration – Possible, Desirable or Conceptual Confusion?*, 8(2) CONTEMP. ASIA ARB. J. 141, 156 (2015) (“[T]his is one of the most hotly debated issues in international arbitration.”).

³⁰ Menon, *supra* note 17, ¶ 52; Landbrecht, *supra* note 28, at 123.

³¹ Demeter & Smith, *supra* note 4, at 442.

international commercial court may constitute a veritable alternative to international arbitration (at least under certain circumstances).

A. The Benchmark of International Commercial Courts and the Various Runner-Up

Many international courts are inspired, in part, by or modeled after the Commercial Court in London, England. This is particularly true for the commercial courts associated with financial centers in the Gulf Area.³² Therefore, this court often serves as a kind of benchmark for other international commercial courts.

1. *London Commercial Court* — The London Commercial Court was established in 1895 as a division of the Queen’s Bench. Unlike similar institutions in Singapore and Dubai, it was not specially established for international disputes.³³ Indeed, the London Commercial Court is a purely domestic court that has not even adapted its procedure or composition to attract foreign litigants.

Nevertheless, it became—for different reasons—very attractive to foreign parties. In 2015, 63% of disputes at the Commercial Court involved foreign nationals.³⁴ As such, the London Commercial Court contributes to London as a hub for commercial litigation. *Portland’s Annual Commercial Courts Report 2018* reveals that 158 cases were heard in the London Commercial Courts between March 2017 and April 2018. Litigants from sixty-nine countries were represented over this period with only 40.7% being U.K. litigants and 59.3% being non-U.K. litigants.³⁵ The London Commercial Courts experienced a 10% increase over three years, whereby much of the overall growth came from an increase in litigants from Asia and Europe. However, Russian litigants in particular continue to loom large in London Commercial Court proceedings.³⁶ Yet, *Portland’s* analysis reveals that the market for international commercial courts is increasingly competitive with five European Cities—Paris, Dublin, Amsterdam, Brussels and Frankfurt—having announced the potential launch of, or increased funding for, English-speaking courts with common law features.³⁷

³² For a short overview of these financial centers, see generally David Russell QC, *Recent Developments—Financial Centers in the Gulf*, 31(1) NYSBA INT’L L. PRACTICUM 114 (2018).

³³ Warren & Croft, *supra* note 17, at 16-17.

³⁴ Adam Sanitt, *The Financial List: Resolving Financial Markets Disputes in London*, NORTON ROSE FULBRIGHT (Nov. 2015), <http://www.nortonrosefulbright.com/knowledge/publications/134005/the-financial-list-resolving-financial-markets-disputes-in-london>.

³⁵ PORTLAND’S DISPUTES, COMMERCIAL COURTS REPORT 2018, at 1 (2018), <https://portland-communications.com/pdf/Portland-commercial-courts-report-2018.pdf>; see also Firew Tiba, *The Emergence of Hybrid International Commercial Courts and the Future of Cross Border Commercial Dispute Resolution in Asia*, 14(1) LOYOLA U. CHI. INT’L L. REV. 31, 36 (2016) (“It is suggested that 80% of work before the London Commercial Court has, at least, one party who is based outside the jurisdiction.”).

³⁶ PORTLAND’S DISPUTES, *supra* note 35, at 2.

³⁷ *Id.* at 3.

Indeed, in the course of BREXIT discussions, it became apparent, that London could lose its attractiveness. The impact of BREXIT on the European judicial scenery is already visible.³⁸ In leaving the EU the U.K. will be precluded from the EU regime for the mutual recognition of judgments. In the future, applications for the recognition and enforcement of English judgments will have to be filed in each Member State of the EU resulting in additional time and cost for the parties involved. Notably, some of the novel features of international commercial courts such as the international composition of the bench and a right of audience for foreign legal counsel are non-existent in London Commercial Court proceedings. This might be a chance for new rivals to achieve a competitive edge vis-à-vis the English role model of an international commercial court.

2. *Dubai International Financial Centre Courts* — In 2004, the Dubai International Financial Centre (hereinafter “DIFC”), a special financial free zone in Dubai, created its own court system including a Court of First Instance and a Court of Appeal.³⁹ These courts are referred to as the DIFC Courts.⁴⁰

While the Dubai courts and the whole of United Arab Emirates (hereinafter “UAE”) form a civil law jurisdiction, the DIFC Courts are based on a common law system modelled after the Civil Procedure Rules of England and Wales. Like “a common law island in a civilian ocean”⁴¹ the DIFC Courts are building a bridge between the common and civil law systems.⁴²

Based within the special economic zone of the DIFC, the DIFC Courts were created to provide an independent judiciary.⁴³ Therefore, they are composed of judges from across the world and the DIFC Courts working language is English.⁴⁴ The current Chief Justice is *Michael Hwang* (Singapore) who, at the same time, is also the nominal head of the DIFC-LCIA Arbitration Centre.⁴⁵ Of the other eleven judges, three are from England and Wales, another three are from Australia, Malaysia, Singapore respectively and only

³⁸ Louis Thibierge, *Towards the Creation of a Specialized International Commercial Court?*, ALTANA (Dec. 18, 2017), <http://www.altanalaw.com/en/medias/vers-la-creation-dune-jurisdiction-commerciale-internationale>; Emmanuel Gaillard et al., *The International Chambers of the Paris Courts and Their Innovative Rules of Procedure*, SHEARMAN & STERLING (Apr. 23, 2018), <https://www.shearman.com/pe-respectives/2018/04/paris-courts-and-their-innovative-rules-of-procedure>; see also John Hyde, *Business Shun UK Courts in Doves as Brexit Looms*, THE L. SOC’Y GAZETTE (July 23, 2018), <https://www.lawgazette.co.uk/businesses-shun-uk-courts-in-doves-as-brexite-looms/5066997.article>.

³⁹ Law in respect of the Judicial Authority at Dubai International Financial Centre, No. 12 of 2004 (Dubai); Andrew Bodnar & Martin Kenney, *Jurisdiction and the Dubai Courts: Self-Immolation or Order Out of (Potential) Chaos?*, 19(2) BUS. L. INT’L 125, 125 (2018).

⁴⁰ See the website of DUBAI INT’L FIN. CTR. (DIFC) CTS., WWW.DIFCCOURTS.AE (LAST VISITED NOV. 8, 2018) [hereinafter DIFC CTS.].

⁴¹ Michael Hwang, *Commercial Courts and International Arbitration — Competitors or Partners?*, 31(2) ARB. INT’L 193, 201 (2015).

⁴² Menon, *supra* note 17, ¶ 19.

⁴³ *Id.* ¶ 25.

⁴⁴ See *Annual Review 2017*, DIFC CTS., <http://annualreview.difccourts.ae/> (last visited Nov. 8, 2018). (“[O]ver 34 countries and more than 300 years [of experience]”).

⁴⁵ Hwang, *supra* note 41 (“I should point out that this is not unique because Singapore had such a situation a decade and a half ago, when the SIAC was housed in the Supreme Court Building and was managed under the supervision of the Academy of Law, whose President was the Chief Justice.”).

five are citizens of the UAE. Two out of the twelve judges are actually female, a fact that should not be taken for granted in the Arab world despite all calls for diversity.⁴⁶ The DIFC Court hearings in public cases are open to the public and media. All judgments that are available to the public can be located on the DIFC Courts' website. There is a possibility for foreign counsel to be registered and, thereafter, represent litigants in DIFC Court proceedings.⁴⁷

The DIFC Courts originally enjoyed exclusive jurisdiction in certain areas, such as disputes involving a DIFC body or transactions conducted within the DIFC. In 2011, this jurisdiction was extended to international disputes without a connection to their physical jurisdiction.⁴⁸ Parties now have the opportunity to select the jurisdiction of the DIFC Courts, in cases without a special connection to the DIFC.⁴⁹

As a result, parties started to turn to the DIFC Courts for the recognition and enforcement of arbitral awards, after it became possible to refer disputes to the DIFC Courts. Although the DIFC Courts have a separate identity from the Dubai court system, their judgments and orders are enforced in Dubai Courts without a consideration of the merits of the claim.⁵⁰ Therefore, after enforcing a decision through the DIFC Courts, parties can execute this decision through the Dubai Courts.⁵¹ By virtue of the *Gulf Cooperation Council Convention for the Execution of Judgments, Delegations and Judicial Notifications*, which provides for mutual recognition and enforcement of all court judgments between Gulf Cooperation Council (GCC) countries (Jordan, Bahrain, Qatar, Kuwait, Oman, UAE), DIFC Courts' judgments are fully enforceable throughout the Gulf region.⁵² Furthermore, there is also the possibility of DIFC Courts' judgment being enforceable in the wider Middle East North Africa Region (hereinafter "MENA") under the *Riyadh Arab Agreement for Judicial Cooperation* of April 6, 1983.⁵³

One special feature is a mechanism by means of which the DIFC Courts transform their own judgments into arbitral awards.⁵⁴ The idea is that following a money judgment of the DIFC Courts, the judgment creditor would be able to demand payment of the judgment sum and, if payment were not made pursuant to that demand for any reason, a judgment creditor would be able to consider an

⁴⁶ See generally WOMEN JUDGES IN THE MUSLIM WORLD: A COMPARATIVE STUDY OF DISCOURSE AND PRACTICE XII- XIII (Nadia Sonneveld & Monika Lindbekk eds., 2017).

⁴⁷ Menon, *supra* note 17, ¶ 22; see also *Register of Practitioners*, DIFC CTS., <https://eregistry.difccourts.ae/#practitioners> (last visited Nov. 8, 2018).

⁴⁸ Menon, *supra* note 17, ¶ 20.

⁴⁹ Deidre Walker & Aarti Thadani, *The Dubai Judicial Tribunal: A Claw-Back of Jurisdiction?*, NORTON ROSE FULBRIGHT (May 2018), <http://www.nortonrosefulbright.com/knowledge/publications/165614/the-dubai-judicial-tribunal-mdashbra-claw-back-of-jurisdiction>.

⁵⁰ Bodnar & Kenney, *supra* note 39, at 127.

⁵¹ Walker & Thadani, *supra* note 49.

⁵² Hwang, *supra* note 41, at 203. This Convention entered into force on Mar. 17, 1996 (see REYADH MOHAMED SEYADI, THE EFFECT OF THE 1958 NEW YORK CONVENTION ON FOREIGN ARBITRAL AWARDS IN THE ARAB GULF STATES 64 (2017).)

⁵³ Hwang, *supra* note 41, at 203.

⁵⁴ *Id.* at 203-12.

enforcement dispute to have arisen and could refer the dispute to arbitration at the DIFC-LCIA Arbitration Centre, or any other arbitration center.⁵⁵ It is ironic for a court judgment to become an arbitral award rather than the other way around.⁵⁶ Certainly, at the drafting of the New York Convention such artificial avenue had not been envisaged.⁵⁷ This triggers questions as to whether parties to the New York Convention would really allow the enforcement of court judgments they would normally not enforce simply because they had turned into arbitral awards.⁵⁸

The DIFC Courts' aim is to support and foster economic activities between East and West. In this way, they seek to sustain and increase Dubai's status as a global business hub. Their goal is to become one of the world's leading commercial courts by 2021.⁵⁹ In a 2018 speech *Amna Sultan Al Owais*, Chief Executive & Registrar, DIFC Courts, pointed out: "The driving force has not been competition between courts for cases, but rather competition between countries for investment."⁶⁰

Even though the DIFC Courts are not on the *One Belt, One Road* route, they are already pursuing initiatives to engage in the process and provide their dispute resolution services.⁶¹

Interestingly, the DIFC Courts' website has a section that deals specifically with arbitration,⁶² emphasizing that "The DIFC Courts have appointed a number of judges with extensive background in international arbitration, giving parties immense trust in all arbitration related Court proceedings" as well as "The DIFC Courts can provide parties with support for . . . many . . . arbitration related issues. The DIFC Courts therefore represent an exciting new prospect for parties seeking to arbitrate in the MENA region and around the world."⁶³ This seems to indicate that the DIFC wants to satisfy all kind of disputants whether they prefer litigation or arbitration.

3. *Qatar International Court* — The Qatar International Court and Dispute Resolution Centre (QICDRC), also known as the Civil and Commercial Court of the Qatar Financial Center (hereinafter "QFC") (or, in short, Qatar International Court, hereinafter "QIC"), was established in 2009 to be the final piece of the state of Qatar's initiative to build a "world-class international

⁵⁵ *Id.* at 205.

⁵⁶ Demeter & Smith, *supra* note 4, at 468.

⁵⁷ *Id.* at 469.

⁵⁸ *Id.*; Hwang, *supra* note 41, at 295.

⁵⁹ Amna Sultan Al Owais, Speech at the Fourth International Conference on Emerging Research Paradigms in Business and Social Sciences: Global and Local Challenges in Commercial Dispute Resolution (Jan. 16, 2018), <https://www.difccourts.ae/2018/01/25/global-and-local-challenges-in-commercial-dispute-resolution/>.

⁶⁰ *Id.* See also Hwang, *supra* note 41, at 197 (referring to London as a kind of role model for international commercial courts).

⁶¹ Press Releases, NEW ALLIANCE TO ENHANCE LEGAL PROTECTION ALONG CHINA'S BELT AND ROAD, DIFC CTS. (MAY 27, 2018), <https://www.difccourts.ae/2018/05/27/new-alliance-to-enhance-legal-protection-along-chinas-belt-and-road/>.

⁶² *Arbitration – Judgements*, DIFC CTS., <https://www.difccourts.ae/judgments/arbitration> (last visited Nov. 8, 2018).

⁶³ *Id.*

financial Centre”.⁶⁴ It was designed to have “*international standards in dispute resolution, and to be part of the strategy of the QFC to attract international business and financial services into Qatar*”.

The QIC consists of a First Instance Circuit and an Appellate Circuit. The First Instance Circuit has the jurisdiction to hear all kinds of civil and commercial disputes that have a link to the QFC. Unlike other international commercial courts, the QIC has not yet opened its doors to litigants all over the world for disputes that have no connection to the QFC. The QIC judges come from a variety of common law and civil jurisdictions with an English former Master of the Rolls, namely Lord Phillips of Worth Matravers as its president and nine judges, including only two Qataris. The other judges are from Singapore, New Zealand, England, Scotland and Cyprus. Among these persons is—what a surprise—even one woman, Frances Kirkham, formerly a English Technology & Construction Court judge in Birmingham, England. The QIC’s website already presents fifty-five judgments rendered by the QIC between 2009 and 2018. The Court hearings are held in public unless the Court orders otherwise.⁶⁵ They take place in the QFC.⁶⁶ The proceedings before the QIC will usually be in English, although they can be conducted in Arabic should the parties so wish.⁶⁷ Parties are generally allowed to be represented by a lawyer of their choice in QIC proceedings as long as the lawyer is entitled to appear before the superior courts of his or her home jurisdiction.⁶⁸

Again, the official mission statement of the QIC is “to provide a world-class international court and dispute resolution Centre that will maintain the highest ethical standards, act in accordance with international recognized best practices and deliver justice fairly and efficiently with a firm commitment to upholding the Rule of Law.”⁶⁹ The vision aims even higher: “Our vision is to be recognized as the world’s leading forum for the resolution of international civil and commercial disputes.”⁷⁰ This demonstrates that the ambition goes far beyond serving as a dispute resolution forum for the region. Thus, it is only a matter of time until the QIC extends its jurisdiction beyond the region and offer its “world-class” services to the world.

The QIC is closely connected to arbitration, i.e., it offers, for example, its judges as arbitrators as well as arbitration facilities. Furthermore, the QIC also administers arbitrations.⁷¹ Other forms of alternative dispute resolution are provided on request. It seems that Qatar is offering the kind of “all included”

⁶⁴ *About Us*, QATAR INT’L CT. & DISP. RESOL. CTR., <https://www.qicdrc.com.qa/about-us> (last visited Nov. 8, 2018) [hereinafter *About QICDRC*].

⁶⁵ *FAQs*, QATAR INT’L CT. & DISP. RESOL. CTR., <https://www.qicdrc.com.qa/faq-main> (last visited Nov. 8, 2018).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *About QICDRC*, *supra* note 64.

⁷⁰ *Id.*

⁷¹ *Id.*

buffet of various dispute resolution mechanisms to make it clear to any disputants that there is no need to go elsewhere to settle a dispute.

4. *Abu Dhabi Global Market Courts* — The Abu Dhabi Global Market (hereinafter “ADGM”) Courts were established in 2015. They are broadly modeled on the English judicial system. Inspiration for the regulations of the ADGM Courts has also been drawn from other common law jurisdictions. The fact that English common law is directly applicable makes Abu Dhabi Global Market the first jurisdiction in the Middle East to adopt a similar approach to that of Singapore and Hong Kong.⁷² This already shows that the ADGM Courts see a natural rival in Asia, namely Singapore and Hong Kong, but of course they are also taking on the London Commercial Court for a piece of the pie. The ADGM Courts consist of a Court of First Instance and a Court of Appeal. The judges of the ADGM Courts are supposed to emphasize the character of ADGM Courts as “*institutions of international excellence, with a commitment to providing dispute resolution services that are of the highest quality*”.⁷³ The currently seven judges are from England, Scotland, Australia, New Zealand and Hong Kong. The current Chief Justice of the ADGM Courts is *Lord David Hope of Craighead KT* (a retired U.K. judge).⁷⁴ These judges sit both in the Court of First Instance and the Court of Appeal.⁷⁵

Foreign lawyers can apply rather easily for a right of audience to represent parties in the ADGM Courts.⁷⁶ Hearings at the ADGM Courts may be conducted anywhere in the world. Such hearings are fully accessible to the public.⁷⁷ The ADGM Courts conduct all proceedings in English.⁷⁸ Also, all documents are to be submitted in English.⁷⁹

Interestingly, the ADGM Courts’ judges are also available to act as arbitrators under ADGM’s Arbitration Regulations.⁸⁰

The mission statement of the ADGM Courts’ regulations and supporting rules is “*the desire to establish a judiciary and system of law with the following hallmarks:*

- (1) *founded upon well-established, recognized and accepted principles of law*
- (2) *enshrines the importance of the impartiality, independence and integrity of the Judges*
- (3) *has enforceable judgments and rulings in ADGM, throughout the UAE and*

⁷² *ADGM Courts Legislative Framework*, ABU DHABI GLOBAL MKT. CTS., <https://www.adgm.com/doing-business/adgm-courts/adgm-legal-framework/adgm-courts-legal-framework/> (last visited Nov. 8, 2018) [hereinafter *ADGM Courts Legislative Framework*].

⁷³ *Frequently Asked Questions*, ABU DHABI GLOBAL MKT. CTS., <https://www.adgm.com/doing-business/adgm-courts/frequently-asked-questions/> (last visited Nov. 8, 2018) [hereinafter *Frequently Asked Questions*].

⁷⁴ *Judges*, ABU DHABI GLOBAL MKT. CTS., <https://www.adgm.com/doing-business/adgm-courts/judges/> (last visited Nov. 8, 2018).

⁷⁵ *Frequently Asked Questions*, *supra* note 73.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

in other jurisdictions

- (4) *has the confidence of the local and international commercial and legal markets; and*
 (5) *seeks to complement arbitration.*⁸¹

At this point, i.e., in mid-August 2018, the Court of First Instance listed seventeen cases which had commenced between August 16, 2017 and June 10, 2018. At the same time, the Court of Appeal has not yet experienced its first case. Three judgments of the Court of First Instance are available for review on the homepage of the ADGM Courts. The Court of First Instance has jurisdiction to hear and determine civil and commercial cases in accordance with ADGM's regulations and rules.⁸² The Court of Appeal has jurisdiction to hear and determine appeals against judgments and decisions of the Court of First Instance and the interpretation of ADGM's regulations and rules.⁸³

In sum, the ADGM Courts offer quite some international features which are far removed from local parochialism. However, the parties are stuck with the eight ADGM judges, all male, all rather senior and all with a rather British cultural background. Accordingly, whoever expects diversity to be reflected in the composition of the bench should pursue other options.

5. *Singapore International Commercial Court* — The Singapore International Commercial Court (hereinafter "SICC") was established in January 2015 as a new division of the Singapore High Court.⁸⁴ It only hears claims that are "of an international and commercial nature".⁸⁵ Its creation was directly inspired by the London Commercial Court.⁸⁶

Unlike the DIFC Courts the SICC clearly belongs to the Singapore legal system. The SICC has jurisdiction if it fulfills the following requirements:

- (1) The action is one that the High Court may hear and try in its original civil jurisdiction;
- (2) The claims are of an international and commercial nature;
- (3) The parties have submitted to the SICC's jurisdiction under a written jurisdiction agreement (pre- or post-dispute); and
- (4) The parties do not seek any relief in the form of, or connected with, a prerogative order.⁸⁷

Also, the SICC has jurisdiction over cases transferred to it from the High Court.⁸⁸ As a result, there is a natural caseload of the SICC independent from any jurisdiction agreement by parties. This guaranteed that for the first two years of its existence, all the cases heard by the SICC had been transferred from

⁸¹ *ADGM Courts Legislative Framework*, *supra* note 72.

⁸² *Frequently Asked Questions*, *supra* note 73.

⁸³ *Id.*

⁸⁴ See *Establishment of the SICC*, SING. INT'L COM. CT. [hereinafter SICC], <https://www.sicc.gov.sg/about-the-sicc> (last visited Nov. 8, 2018).

⁸⁵ Godwin et al., *supra* note 28, at 221 with further references.

⁸⁶ Landbrecht, *supra* note 28, at 113.

⁸⁷ Godwin et al., *supra* note 28, at 225-26 with further references.

⁸⁸ Landbrecht, *supra* note 28, at 115; Godwin et al., *supra* note 28, at 226.

the High Court.⁸⁹ The SICC has the responsibility to develop jurisprudence for commercial purposes.⁹⁰ Moreover, as a part of the Singapore Supreme Court, any of its decisions can be subject to appeal at the Singapore Court of Appeal.⁹¹

The SICC bench is composed of twenty-two Singaporean judges and twelve “*International Judges*”, including judges from the United States, Australia, England, France, Canada, Hong Kong and Japan.⁹² Its current Chief Justice is *Sundaresh Menon*. A person may be appointed as an International Judge if, in the opinion of the Chief Justice, that individual has the necessary qualifications, experience and professional standing.⁹³ International judges are assigned to cases on *ad hoc* basis.⁹⁴

Subject to registration, foreign lawyers may appear before the SICC.⁹⁵ While it is considerably easier for a foreign lawyer to appear in SICC proceedings than in regular Singapore court proceedings, he or she must still satisfy various requirements in order to be granted registration, including being sufficiently proficient in the English language and agreeing to abide by a code of ethics.⁹⁶ The lawyer must also have at least five years experience in advocacy in order to be granted full registration for SICC appearances.⁹⁷

Hearing lists and recent judgments may also be found on the SICC’s website.⁹⁸ Indeed, it is assumed that the SICC must direct that the judgment be published in law reports if it is “of major legal interest”.⁹⁹ Publication is considered to be “necessary for the SICC’s decisions to develop Singapore’s commercial law jurisprudence and to contribute towards the development of a body of international commercial law.”¹⁰⁰

“A party may be joined as a party to an SICC action, including as an additional plaintiff or defendant, or as a third or subsequent party,” if the claims are “appropriate” to be heard in the SICC.¹⁰¹ In reality, this means that the SICC can join parties without their consent. Of course, where a party refuses to take part in such proceedings, there may be problems enforcing the judgment against this party outside of Singapore.

In general, the SICC Procedural Rules provide for more flexibility with respect to confidentiality and a contractual limitation of a party’s right to appeal. The SICC is not bound to apply Singapore Rules of Evidence but

⁸⁹ Godwin et al., *supra* note 28, at 229.

⁹⁰ Menon, *supra* note 17, ¶ 27.

⁹¹ Landbrecht, *supra* note 28, at 120.

⁹² See *Judges*, SICC, <https://www.sicc.gov.sg/about-the-sicc/judges> (last visited Nov. 8, 2018).

⁹³ Godwin et al., *supra* note 28, at 223.

⁹⁴ *Id.* at 224.

⁹⁵ *Registration of Foreign Lawyers Before the SICC*, SICC, <https://www.sicc.gov.sg/registration-of-foreign-lawyers/registration-of-foreign-lawyers> (last visited Nov. 8, 2018).

⁹⁶ Godwin et al., *supra* note 28, at 236.

⁹⁷ *Id.*

⁹⁸ *Recent Judgments*, SICC, <https://www.sicc.gov.sg/hearings-judgments/judgments> (last visited Nov. 10, 2018).

⁹⁹ Godwin et al., *supra* note 28, at 240.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 227.

instead may allow the parties to choose other rules of evidence.¹⁰² Thus, quite obviously, the SICC tries to provide litigants with some features of international arbitration. It seems, however, that the main goal is to “compete with the English Commercial Court for a share of the international commercial cases now drawn to London”.¹⁰³

SICC judgments are enforceable in the same manner as any other Singaporean Supreme Court decisions. There have been suggestions within the Singapore Government to engage in the negotiations of multilateral judgment enforcement agreements, especially within the Association of Southeast Asian Nations (ASEAN).¹⁰⁴

Because of its convenient geographical location and ability to provide the necessary legal infrastructure, Singapore is presumed to be the “Asian Dispute Resolution Hub”. The SICC does not see itself as a competitor to arbitration but rather as its companion,¹⁰⁵ since it merely offers an additional alternative to resolve transnational commercial disputes. As such, it seeks to contribute to Singapore’s potential as a hub for international dispute resolution in Asia.¹⁰⁶ Or, to use the words of *Michael Hwang*: One of the main aims of the SICC is “to establish the Singapore brand for dispute resolution”.¹⁰⁷

6. . . . And Some Other Contenders

(a) *Zurich Commercial Court* — While Switzerland is well-known for international arbitration, it is—at least to so-called insiders—also known for offering adjudication of international commercial disputes by experienced state courts.¹⁰⁸ In particular, the Zurich Commercial Court has established itself as being quite experienced with international commercial disputes. The Court is known for offering hearings in English—if so desired by the parties—and does not shy away from English exhibits. However, submissions cannot be submitted in English. As long as the amount in dispute exceeds CHF one million, the Zurich Commercial Court will also accept a jurisdiction clause of two non-Swiss parties.¹⁰⁹

(b) *New York Commercial Courts* — New York is not only a popular place of arbitration, but it also takes pride in the fact that New York judges are “frequently called upon to decide cases involving cross-border business

¹⁰² *Id.* at 240.

¹⁰³ Anselmo Reyes, *Recognition and Enforcement of Interlocutory and Final Judgments of the Singapore International Commercial Court*, 2 J. INT’L & COMP. L. 337, 339 (2015).

¹⁰⁴ Warren & Croft, *supra* note 17, at 40. See also *id.* at 357 who suggested that “Judgments of the SICC will be enforceable, following the coming into effect of and Singapore’s accession to the 2005 Hague Choice of Court Agreements Convention, in about 40 countries.”

¹⁰⁵ Godwin et al., *supra* note 28, at 223 (quoting T. F. Bathurst, Chief Justice, Speech at Sydney Arbitration Week: Benefits of Courts such as the Singapore International Commercial Court (SICC) (Nov. 21, 2016)).

¹⁰⁶ See *Establishment of the SICC*, *supra* note 84.

¹⁰⁷ Hwang, *supra* note 41, at 196.

¹⁰⁸ Felix Dasser & Georg Naegeli, *Adjudication of Commercial Disputes by Zurich Commercial Court*, INT’L L. OFF. (Sept. 23, 2003), <https://www.internationallawoffice.com/Newsletters/Litigation/Switzerland/Homburger-/Adjudication-of-Commercial-Disputes-by-Zurich-Commercial-Court>.

¹⁰⁹ Cf. Com. Ct. Zurich, *Blätter für Zürcherische Rechtsprechung* [Leaflets for Zurich jurisprudence], 103 (2004) Nr. 19 Erw. 6 (2018) (Swiz.).

relationships and have broad and deep experience in applying New York law in the international commercial context”.¹¹⁰ Indeed, even the New York International Arbitration Center is using “New York’s Neutral and Sophisticated Courts” to solicit disputants to come to New York.¹¹¹ The ability of a foreign corporation to commence legal proceedings in a court of New York State is subject to very few limitations . . . provided that the amount in dispute exceeds a certain threshold and New York law is applicable.¹¹²

(c) *More to Come?* — Even countries like Kazakhstan, Ghana and Ruanda have meanwhile created such international commercial courts or are discussing establishing them.¹¹³ Australia—which is geographically rather challenged for an international commercial court—has also discussed this idea but has not yet implemented it.¹¹⁴ Accordingly, it is understandable that one author recently described the phenomenon of international courts as follows: “They shoot up like mushrooms.”¹¹⁵

In 2015, *Sundaresh Menon* called for a “collaborative approach amongst international commercial courts [to] enhance knowledge-sharing, the consistency of decisions, and possibly even the practical coercive powers of the court.”¹¹⁶ Indeed, such a desire was already fulfilled with the inaugural meeting in 2017 of the *Standing International Forum of Commercial Courts* (SIFoCC). One of their aims is that “users—that is, businesses and markets—will be better served if best practice is shared between courts and courts work together to keep pace with rapid commercial change.”¹¹⁷ This first inaugural London meeting on May 5, 2017 was attended by commercial courts from five continents. New York will host the forum’s next meeting, in autumn 2018.¹¹⁸

B. The BREXIT Wannabe Profiteers

In the wake of BREXIT many European States are setting up their own commercial courts. By trying to replace the London Commercial Court and London’s monopoly position as the European hub for international commercial

¹¹⁰ See N.Y. STATE BAR ASS’N & N.Y. INT’L ARB. CTR., CHOOSE NEW YORK LAW FOR INTERNATIONAL COMMERCIAL TRANSACTIONS 15 (2014), https://www.nysba.org/Sections/Dispute_Resolution/Dispute_Resolution_PDFs/Choose_New_York_Law_For_International_Commercial_Transactions.html.

¹¹¹ *Id.*

¹¹² *Id.* at 10.

¹¹³ QATAR U. C. OF L. & QICDRC, *supra* note 14.

¹¹⁴ See generally Warren & Croft, *supra* note 17.

¹¹⁵ Bob Wessels, *International Commercial Courts: The Netherlands Is Lagging Behind*, LEIDEN L. BLOG (Feb. 5, 2018), <http://leidenlawblog.nl/articles/international-commercial-courts-the-netherlands-is-lagging-behind>.

¹¹⁶ Menon, *supra* note 17, at 44.

¹¹⁷ See *About Us*, STANDING INT’L F. COM. CTS., www.SIFoCC.org/about-us/ (last visited Nov. 8, 2018).

¹¹⁸ Michael Cross, *London Base for Global Forum of Commercial Courts*, THE L. SOC’Y GAZETTE (May 15, 2017), <https://www.lawgazette.co.uk/practice/london-base-for-global-forum-of-commercial-courts/5061113.article>.

dispute resolution, these States hope to get access to the industry as well.¹¹⁹ So far, the initiatives have reached different stages and it remains to be seen if they will succeed.

1. *The International Chamber of the Paris Court of Appeal* — On February 7, 2018, the International Chamber of the Paris Court of Appeal was established. This International Chamber has jurisdiction to hear disputes relating to international commercial matters and, mostly, decide appeals from judgments pronounced, in the first instance, by the International Chamber of the Tribunal of Commerce of Paris.¹²⁰ This first instance commercial court in Paris has been in operation—albeit rather discreetly—for almost a decade.¹²¹ What has been headline-grabbing is the use of English in French court proceedings. Parties are now allowed to submit documents in English without the need for translation into French. Further, it is possible to hear the evidence of witnesses and experts in English. However, as a general rule, written pleadings and submissions have to be in French. Also, judgments will be published in French, along with a sworn translation in English.¹²²

The International Chamber will be composed of permanent judges, experienced in commercial, financial and economic cases, with a knowledge of the main applicable foreign laws, but also able to use English during the proceedings.¹²³ Even non-French lawyers may be granted rights of audience to appear before the International Chamber, as long as they are accompanied by a member of the Paris bar.¹²⁴

The procedure adopts some common law approaches, in that the parties can call witnesses and experts to give written evidence on which they may be cross-examined at the hearing, as well as in relation to the production of documents by allowing certain document requests.¹²⁵

The French Government's commitment to promote Paris as a leading center for international commercial disputes supports the efforts of the French arbitration community—with the backing of the French government—to

¹¹⁹ Alison Ross, *Paris's English-Speaking Court Meets with Mixed Response*, GLOBAL ARB. REV. (Feb. 15, 2018), <https://globalarbitrationreview.com/article/1159078/pariss-english-speaking-court-meets-with-mixed-response>.

¹²⁰ Patrick Dunaud, *Global Outlook Sponsored Briefing: The International Chamber of the Paris Court of Appeal – France Has Risen to the Challenge*, LEGAL BUS. (May 17, 2018, 9:30 AM), <https://www.legalbusiness.co.uk/analysis/disputes-yearbook-2018/global-outlook-sponsored-briefing-the-international-chamber-of-the-paris-court-of-appeal-france-has-risen-to-the-challenge/>.

¹²¹ Duncan Fairgrieve & Solenn Le Tutour, *Doors Open for First Hearing of International Chamber at Paris Court of Appeal*, CONFLICTOFLAWS.NET (June 5, 2018), <http://conflictoflaws.net/2018/doors-open-for-first-hearing-of-international-chamber-at-paris-court-of-appeal/>.

¹²² Dunaud, *supra* note 120.

¹²³ Ioana Knoll Tudor, *Specialised Chambers for International Commercial Disputes: Paris in the Spotlight*, KLUWER ARB. BLOG (Feb. 14, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/02/14/specialised-chambers-international-commercial-disputes-paris-spotlight/>.

¹²⁴ Fairgrieve & Le Tutour, *supra* note 121.

¹²⁵ Helen Conybeare Williams, *Brexit: Is Opportunity Knocking for Paris' New International Chamber of the Paris Court of Appeal?*, HAYNESBOONE (Feb. 16, 2018), <http://www.haynesboone.com/Alerts/International-chamber-of-paris-court-of-appeal>.

promote Paris as “The Home of International Arbitration”.¹²⁶ It goes without saying that the U.K.’s reaction was rather reserved with English practitioners’ firm eagerness to defend what they consider their home turf.¹²⁷

2. *The Netherlands Commercial Court* — Since January 1, 2016, litigants in the Netherlands have been allowed to conduct civil proceedings in the area of maritime and transport law and the international sale of goods in English at the Rotterdam District Court.¹²⁸ A more ambitious plan is the new Netherlands Commercial Court (hereinafter “NCC”) which is supposed to soon open its doors. This Court shall be specialized in hearing complex international commercial cases. Parties are not required to have any links to the Netherlands in order to submit a matter to the NCC. Proceedings will be conducted in English. Also, judgments will be handed down in English.

The NCC is promoting as its advantages, *inter alia*, “effective and shorter proceedings”, “the ability to tender evidence in French, German, English or Dutch” and “paperless litigation”.¹²⁹ Dutch court judgments are relatively easily enforceable in over thirty other jurisdictions.¹³⁰ Further, Dutch courts have a reputation for awarding arrest orders quite readily, giving plaintiffs in Dutch court proceedings a high degree of security and certainty regarding their ability to execute a judgment if it is handed down in their favor.¹³¹ Thus, the NCC feels compelled to praise the civil legal system of the Netherlands as the highest ranked of all civil justice systems in the world pursuant to the World Justice Project 2015 Rule of Law Index, based on criteria such as cost-effectiveness, efficiency, impartiality and independence. No matter that the NCC is even challenging arbitration despite the fact that it is no even in operation yet.¹³²

3. *The Brussels International Business Court* — Following the general trend in Europe, Belgium also wants to establish its own international commercial court, the Brussels International Business Court (hereinafter “BIBC”). The BIBC will focus on international commercial dispute settlement.¹³³ There is no designated appeal instance.

The BIBC shall have jurisdiction in cases where the parties have establishments in different jurisdictions or commercial relationships with

¹²⁶ PARIS ARBITRATION - THE HOME OF INT’L ARB., [HTTP://PARISARBITRATION.COM/EN/](http://parisarbitration.com/en/) (LAST VISITED NOV. 10, 2018).

¹²⁷ Ross, *supra* note 119 (quoting Stephen Jagusch (“[T]he idea that the English courts might establish a chamber to handle French language and French law cases sounds like something from an episode of Monty Python. It’s hard to see that the situation in reverse would be taken any more seriously.”)).

¹²⁸ Pim Rank, *The Netherlands as a Centre for International Commercial Dispute Resolution?*, LEIDEN L. BLOG (Sept. 26, 2016), <http://leidenlawblog.nl/articles/the-netherlands-as-a-centre-for-international-commercial-dispute-resolution>.

¹²⁹ NETH. COM. CT., [HTTPS://NETHERLANDS-COMMERCIAL-COURT.COM/](https://netherlands-commercial-court.com/) (LAST VISITED NOV. 8, 2018).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ Leen Ketels & Margaux Van Opendbosch, *An International English-Speaking Commercial Court in Brussels: The Brussels International Business Court (BIBC)*, HVG, <http://www.hvglaw.be/2017/11/30/an-international-english-speaking-commercial-court-in-brussels-the-brussels-international-business-court-bibc/> (last visited Nov. 8, 2018).

foreign countries, or where foreign law is applicable. The parties must, however, expressly consent to the jurisdiction of the BIBC.¹³⁴

Its proceedings will be based on the UNCITRAL Model Law on International Arbitration in spite of the Belgian Judicial Code, as these rules seem more suited to deal with international commercial disputes.¹³⁵ Thus, more flexibility with respect to procedural rules may be expected. Most likely, the BIBC will consist of experienced judges. The proceedings will be conducted in English.¹³⁶ The Belgian courts are not particularly well-known in Europe for raising the standards of time-efficiency. Thus, it will be interesting to see whether this ambitious plan will be implemented and what it will look like in practice. The draft bill prepared by the Belgium government still has to be debated in the Belgium parliament. Should the Parliament approve the BIBC project, it is scheduled to start working on January 1, 2020.¹³⁷

4. *The Frankfurt International Chamber for Commercial Matters* — In Germany, a similar initiative for the settlement of international commercial disputes resulted in the creation of the International Chamber for Commercial Matters at the Regional Court (*Landgericht*) of Frankfurt as of January 1, 2018.¹³⁸ As a financial center of the EU (at the latest after BREXIT), Frankfurt seeks to gain additional popularity and establish itself as an international forum for the settlement of international commercial disputes.¹³⁹

The Frankfurt International Chamber will derive its jurisdiction from the parties' consent.¹⁴⁰ Judges with good English skills and knowledge in international business law will constitute the International Chamber.¹⁴¹ What makes the International Chamber special is the fact that the hearings before the

¹³⁴ Guillaume Croisant, *The Belgium Government Unveils Its Plans for the Brussels International Business Court (BIBC)*, KLUWER ARB. BLOG (June 25, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/06/25/the-belgian-government-unveils-its-plan-for-the-brussels-international-business-court-bibc/>.

¹³⁵ Ketels & Van Opendenbosch, *supra* note 133.

¹³⁶ *Creation of an English-Speaking International Commercial Court in Brussels*, LEXGO (Oct. 30, 2017), <https://www.lexgo.be/en/papers/judicial-law/international-private-law/creation-of-an-english-speaking-international-commercial-court-in-brussels,114947.html>.

¹³⁷ Giesela Rühl, *Building Competence in Commercial Law in the Member States*, PARL. EUR. DOC. (PE 604.980) 43 (2018).

¹³⁸ Hermann Hoffmann, *Von "Law—Made in Germany" zu "Commercial Litigation in Germany": Impulse für eine Verbesserung der Justiz im internationalen Handelsrecht*, 2018(2) ZEITSCHRIFT FÜR INTERNATIONALES WIRTSCHAFTSRECHT 58, 59 (2018).

¹³⁹ LG Frankfurt, *Englischsprachige Kammer für Handelssachen ab Januar 2018*, ORDENTLICHE GERICHTSBARKEIT HESSEN (Nov. 2, 2017), <https://ordentliche-gerichtsbarkeit.hessen.de/pressemitteilung/en/englischsprachige-kammer-f%C3%BCr-handelssachen-ab-januar-2018>.

¹⁴⁰ Richard Happ & Luca Thönes, *Regional Court of Frankfurt Introduces Plan for an International Chamber for Commercial Matters*, LUTHER RECHTSANWALTSGESELLSCHAFT MBH (Jan. 18, 2018), <https://www.luther-lawfirm.com/blog/complex-disputes/regional-court-of-frankfurt-introduces-plan-for-an-international-chamber-for-commercial-matters.html>. For a model jurisdiction clause, see Juergen Mark & Heiko Alexander Haller, *The Chamber for International Commercial Disputes at the District Court Frankfurt/Main*, LEXOLOGY (Oct. 5, 2018), <https://www.lexology.com/library/detail.aspx?g=01f8bd1a-21aa-4529-9476-0d8105d3142c>.

¹⁴¹ Burkhard Hess, *The Justice Initiative Frankfurt am Main 2017*, CONFLICTOFLAWS.NET (Mar. 31, 2017), <http://conflictoflaws.net/2017/the-justice-initiative-frankfurt-am-main-2017-law-made-in-frankfurt/>.

chamber are conducted in English. However, problems arise, due to Section 184 of the German Courts Constitution Act (*Gerichtsverfassungsgesetz, GVG*), which prescribes that German must be the language of the court.¹⁴² This requirement extends to all communication between the Court and the parties. Although legislative initiatives to change this rule have previously failed, efforts continue.¹⁴³ Accordingly, the written submissions and the decisions by the International Chamber are in German.

Nevertheless, BREXIT might have a certain game-changing effect on the judicial landscape in the EU. Accordingly, Frankfurt's chance of becoming an international place of jurisdiction for commercial cross-border disputes should not be underestimated.

5. . . . *And Some Other Contenders* — Ireland is also believed to be joining the race to establish a new European hub for the resolution of international commercial disputes if BREXIT should undermine the status of the London Commercial Court.¹⁴⁴ As a common law jurisdiction with an English language legal system, it should be easier for Ireland to sell these advantages to global litigants. Nevertheless, there might be doubts as to Dublin's chances of depriving London of a significant share of its current caseload. We will see whether more European countries or cities join the bandwagon.

6. *The Idea of a European Commercial Court* — Quite rightly, *Giesela Ruehl*, a professor of International Private and Procedural Law as well as Comparative Law at the University of Jena, asked the question whether the above-mentioned individual attempts by a number of EU countries will yield much success.¹⁴⁵ She takes the position that “the many national initiatives vary considerably in detail and, thus, send rather diffuse signals to the business community”.¹⁴⁶ A more convincing offer by the EU member states would be to offer European and other companies a European Commercial Court. This court would offer commercial litigants a forum for the settlement of international commercial disputes. Quite rightly, such European Commercial Court would be a “truly international forum”.¹⁴⁷ Just like an international arbitral tribunal, it could be equipped with experienced commercial law judges from the various EU member states. This would credibly signal that the European Commercial Court offers neutral dispute settlement and will not favor individual parties. Thus, a European Commercial Court could be an attractive alternative to international arbitration.

¹⁴² Bartosz Dzionsko, *Frankfurt: First German Court to Arrange English Chamber*, WINHELLER BLOG (Dec. 29, 2017), <https://winheller.com/blog/en/first-english-chamber-germany/>; Christoph Just, *A New Landmark in International Commercial Litigation? The Frankfurt High Court Installed a Specialized Chamber for International Commercial Matters*, SCHULTE RIESENKAMPFF (Jan. 26, 2018), <https://www.schulte-lawyers.com/schulteblog/2882017-6y2e6>.

¹⁴³ Happ and Thönes, *supra* note 140; Dzionsko, *supra* note 142.

¹⁴⁴ Arthur Beesley, *Ireland Angles to Pick up Post-Brexit Legal Business*, THE IRISH TIMES (Jan. 12, 2018, 9:19), <https://www.irishtimes.com/business/retail-and-services/ireland-angles-to-pick-up-post-brexit-legal-business-1.3352983>.

¹⁴⁵ Ruehl, *supra* note 10.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

While on the one hand such European Commercial Court would satisfy the needs of new businesses for a neutral dispute resolution forum, it could also “participate more convincingly in the global competition for international disputes”.¹⁴⁸ In a study for the European Parliament (published in September 2018), Professor *Ruehl* suggests a package of measures on how to establish such European Commercial Court.¹⁴⁹ One can only hope that the EU will pick up this idea and discard its ill-advised idea of establishing a multilateral court for the settlement of investment disputes.¹⁵⁰

C. A Special Challenger: The China International Commercial Court

1. *History and Development of the CICC* — Following the international trend, in June 2018 the China International Commercial Court (hereinafter “CICC”) was established by the Supreme People’s Court of China (hereinafter “SPC”) with two branches, one in Shenzhen (hereinafter “No. 1 International Commercial Court”) and one in Xi’an (hereinafter “No. 2 International Commercial Court”). The CICC’s mission is to handle a broad range of international disputes, in particular commercial and investment disputes related to the Belt and Road Initiative¹⁵¹ (hereinafter “B&R”).

The CICC is specifically designed to provide one-stop legal services for trade and investment disputes related to the “B&R”. It provides parties with a choice between mediation, arbitration and litigation and makes breakthroughs in simplifying evidence procedures and adopting electronic legal proceedings.

The CICC has a strategic meaning for China through its role in protecting the interests of domestic companies and moving the locus of China-related dispute resolution to China.

The future development of the CICC still faces serious challenges and outstanding questions. The structure of the CICC is largely constrained by

¹⁴⁸ *Id.* See also Thomas Pfeiffer, *Ein europäischer Handelsgerichtshof und die Entwicklung des europäischen Privatrechts*, 24 ZEUP 795 (2016).

¹⁴⁹ See *Rüehl*, *supra* note 137, at 38-43 (discussing, *inter alia*, the international commercial court projects in EU Member States, and recommending the setting-up of a European Commercial Court). See also a summary of the study by Erlis Themeli et al., *International Commercial Courts: Should the EU Be Next?—EP Study Building Competence in Commercial Law*, CONFLICTOFLAWS.NET 24 (Sept. 23, 2018), <http://conflictflaws.net/2018/international-commercial-courts-should-the-eu-be-next-ep-study-building-competence-in-commercial-law/> (questioning “whether there is a political interest from the Member States considering other pressing issues in the EU, the investments made by some Member States in setting up their own international commercial courts, and the interest in maintaining local expertise and keeping interesting cases within the local court system.”).

¹⁵⁰ See generally Wilske & Markert, *supra* note 8; Wilske et al., *supra* note 8.

¹⁵¹ The Belt and Road is a development strategy that focuses on land- and sea-based connectivity from China to major markets in Europe, Asia and the Middle East launched in 2013. To date, a total of seventy-five countries (including China) participate in the B&R. See BELT AND ROAD PORTAL, [HTTPS://ENG.YIDAIYILU.GOV.CN/](https://eng.yidaiyilu.gov.cn/) (LAST VISITED NOV. 9, 2018). See also *The Belt and Road Initiative: Country Profiles*, H.K. TRADE DEV. COUNCIL (HKTDC) RES., <http://china-trade-research.hktdc.com/business-news/article/The-Belt-and-Road-Initiative/The-Belt-and-Road-Initiative-Country-Profiles/obor/en/1/X000000/1X0A3610.htm> (last visited Nov. 9, 2018) for a list of B&R countries.

current legal obstacles in terms of the appointment of foreign judges and foreign counsel, use of English and enforcement of judicial decisions.

The concept of the CICC was unveiled for the first time by Judge *Liu GuiXiang*, a member of the SPC's Judicial Committee, in his speech at a forum on international judicial cooperation along the B&R routes in Dunhuang in September 2017.¹⁵²

In January 2018, the *Central Comprehensively Deepening Reforms Commission of China* reviewed and adopted the *Opinion on Establishing the "One Belt and One Road" Dispute Resolution Mechanism and Institutions* and—officially announced the decision to create the CICC.¹⁵³ Subsequently in March, China's Chief Justice *Zhou Qiang* announced that the SPC will establish the CICC to attract international commercial disputes arising from the B&R.¹⁵⁴

On June 29, 2018, the SPC issued the *Provisions on Several Issues Concerning the Creation of International Commercial Courts* (hereinafter "Provisions"). The Provisions deal with the jurisdiction of the CICC, qualifications of judges, trial mechanism, creation of the foreign expert committee, and the one-stop dispute resolution mechanism featuring the organic combination of litigation, mediation and arbitration. Meanwhile, the No. 1 International Commercial Court and the No. 2 International Commercial Court were established in Shenzhen, Guangdong and in Xi'an, Shaanxi respectively.¹⁵⁵

2. *Design and Structure of the CICC* — The CICC handles disputes of high value and important disputes between commercial parties over issues in trade and investment.

According to the Provisions, the CICC handles international commercial disputes which¹⁵⁶

- (1) have a claim value of more than RMB300 million;
- (2) are transferred from the Higher People's Court to the SPC; and
- (3) have a significant impact nationwide.

¹⁵² See Li Yang, *China to Set Up Belt and Road Commercial Court*, BELT & ROAD PORTAL (Sept. 28, 2017, 15:46), <https://eng.yidaiyilu.gov.cn/qwyw/rdxw/29380.htm>.

¹⁵³ See CICC, *Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions*, CHINA INT'L COM. CT. [hereinafter CICC] (June 27, 2018), <http://cicc.court.gov.cn/html/1/219/208/210/819.html>.

¹⁵⁴ *Zhou Qiang* delivered a work report of the SPC at the second plenary meeting of the first session of the 13th National People's Congress at the Great Hall of the People in Beijing on March 9, 2018. In his report, *Zhou* confirmed that the SPC will establish an international commercial court to handle B&R disputes. See Xinhua, *Chinese Courts to Better Protect Property Rights: Chief Justice*, CHINA.ORG.CN (Mar. 9, 2018), http://www.china.org.cn/china/NPC_CPPCC_2018/2018-03/09/content_50692872.htm.

¹⁵⁵ See Xinhua, *China to Launch Two International Commercial Courts*, CHINA DAILY (June 28, 2018, 23:03), <http://www.chinadaily.com.cn/a/201806/28/WS5b34f8d6a3103349141df948.html>.

¹⁵⁶ See *Zuigao Renmin Fayuan Guanyu Sheli Guoji Shangshi Fating Ruogan Wenti de Guiding [Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court]* (promulgated by the Sup. People's Ct., June 27, 2018, effective July 1, 2018), art. 2, 2018 CICC, <http://cicc.court.gov.cn/html/1/219/199/201/817.html> (China) [hereinafter *Provisions Regarding the Establishment of the International Commercial Court*].

The jurisdiction of the CICC is first and final, i.e., there will be no appeal against its judgments or rulings. A party who is unsatisfied with the CICC's judgment or ruling may only apply for a retrial of the dispute by the SPC.¹⁵⁷

The CICC does not accept trade disputes between countries or investor-state disputes given that both kinds of disputes can be resolved through the World Trade Organization (WTO) and through International Centre for Settlement of Investment Disputes (ICSID) respectively.

(a) *The CICC Provides Parties with a Choice Between Litigation, Mediation and Arbitration* — As a one-stop legal platform for international commercial dispute resolution, the CICC allows parties to opt for litigation, mediation or arbitration. Quite rightly, the CICC has been described as “potentially most innovative in providing multiple mechanisms for dispute resolution”.¹⁵⁸ The CICC will select certain international mediation and arbitration centers to be part of its international commercial dispute resolution mechanism and set up an *International Commercial Expert Committee*.¹⁵⁹ The *International Commercial Expert Committee* will be responsible for providing consultation and mediation services.

After the dispute is accepted by the CICC, parties will have seven days to decide whether to bring the dispute to mediation.¹⁶⁰ Parties can choose between the international mediation centers and the *International Commercial Expert Committee* to mediate the dispute.

If parties opt for arbitration, the dispute will be heard by the international arbitration center that is part of the CICC's international commercial dispute resolution mechanism. The CICC will provide judicial assistance in the evidence, property or conduct preservation prior to the commencement of or during the arbitration proceeding, as well as the annulment and enforcement of the arbitral award.¹⁶¹

(b) *The CICC Has Seats in Beijing, Xi'an and Shenzhen* — The CICC is a permanent adjudication organ of the SPC with two branches, i.e., the No. 1 International Commercial Court in Shenzhen and the No. 2 International Commercial Court in Xi'an.

The No. 1 International Commercial Court mainly handles commercial disputes for the Maritime Silk Road, which connects China, Southeast Asia,

¹⁵⁷ *Id.* art. 16.

¹⁵⁸ Matthew S. Erie, *The China International Commercial Court: Prospects for Dispute Resolution for the “Belt and Road Initiative”*, AM. SOC'Y INT'L L. (Aug. 31, 2018), <https://www.asil.org/insights/volume/22/issue/11/china-international-commercial-court-prospects-dispute-resolution-belt>.

¹⁵⁹ The nation's first B&R International Commercial Court-connected and Mediation Centre was already unveiled in Shenzhen on 7 January 2018. See *The First B&R International Commercial Lawsuit and Mediation Center Settles in Qianhai*, CHINA FOREIGN-RELATED COM. TRIAL (Jan. 22, 2018), http://enccmt.court.gov.cn/ChinaForeignRelatedCommercialTrial/201801/22/c_128192.htm. The Qianhai Centre is very likely one of the international mediation centres which will be part of the international commercial dispute resolution mechanism led by the CICC. See also Provisions Regarding the Establishment of the International Commercial Court, *supra* note 156, art. 11.

¹⁶⁰ Provisions Regarding the Establishment of the International Commercial Court, *supra* note 156, arts. 11 & 12.

¹⁶¹ *Id.* arts. 2(4) & 14.

Africa, and Europe.¹⁶² The No. 2 International Commercial Court mainly handles commercial disputes for the Silk Road Economic Belt, which connects western China, Central Asia, the Middle East, and Europe.¹⁶³

(c) *The CICC Simplifies Evidence Procedures and Adopts Electronic Legal Proceedings* — Generally, foreign evidence is often required to be notarized, legalized and translated in order to be accepted in Chinese legal proceedings.¹⁶⁴ The notarization, legalization and translation of foreign evidence cost time, money and a great deal of effort and, what's more, stall the legal proceedings. But now foreign evidence can be submitted before the CICC regardless of whether it is notarized or legalized.¹⁶⁵ Furthermore, the CICC accepts English evidence without a Chinese translation upon all parties' consensus.¹⁶⁶ Such less formalistic acceptance of foreign evidence is expected to greatly accelerate the legal proceedings before the CICC and bring considerable convenience to parties.

The adoption of electronic legal proceedings is another important measure carried out by the CICC for the convenience of parties. The CICC accepts electronic case registration, payment, review of files, exchange of evidence, service of process and even electronic hearings.¹⁶⁷

3. *Strategic Roles of the CICC* — For a long time, foreign parties have avoided bringing commercial disputes with Chinese companies before Chinese courts and have instead submitted such disputes to litigation or arbitration outside China. Often, Chinese companies fear that this will put them in an unfavorable position.¹⁶⁸

Since the announcement of the B&R in 2013, many Chinese companies actively participate in the related trade and investment projects, headed by state-owned enterprises.¹⁶⁹ To protect their interests, it seems critical and

¹⁶² See Dezan Shira & Associates, *Confusion over Dispute Resolution at China's New Belt and Road Courts*, CHINA BRIEFING (Feb. 2, 2018), <http://www.china-briefing.com/news/2018/02/02/bilatera-confusion-dispute-resolutio-chinas-new-belt-roadcourts.html>.

¹⁶³ See *China to Set up Belt and Road Dispute Courts in Beijing, Xi'an, and Shenzhen*, SILK ROAD BRIEFING (Feb. 2, 2018), <https://www.silkroadbriefing.com/news/2018/02/02/china-set-belt-road-dispute-courts-beijing-xian-shenzhen/>.

¹⁶⁴ See Zuigao Renmin Fayuan Guanyu Minshi Susong Zhengju de Ruogan Guiding [Some Provisions of the Supreme People's Court on Evidence in Civil Procedures] (promulgated by the Sup. People's Ct., Dec. 21, 2001, effective Apr. 1, 2002), art. 11 (China).

¹⁶⁵ See Provisions Regarding the Establishment of the International Commercial Court, *supra* note 156, art. 9.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* art. 18.

¹⁶⁸ Chen XiaoChen, director of International Research Department of the Chongyang Institute for Financial Studies, Renmin University of China, was interviewed by the Economic Observer on Jan. 24, 2018 regarding his interpretation on the Opinions on Establishing the "One Belt and One Road" Dispute Resolution Mechanism and Institutions. See Wen-Yang Zhang, "Guanyu Jianli Yidaiyilu Zhengduan Jiejue Jizhi he Jigou de Yijian" Chutai, *Kan Zhuanjia Ruhe Jiedu* [How the experts view the proposal of "Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions"], EEO (Jan. 27, 2018, 9:23), <http://www.eeo.com.cn/2018/0127/321640.shtml>.

¹⁶⁹ See *List of Enterprises*, BELT & ROAD PORTAL, https://eng.yidaiyilu.gov.cn/info/iList.jsp?cat_id=10080 (last visited Nov. 9, 2018) for a list of Chinese enterprises engaging in the B&R.

necessary for China to establish its own international commercial court, where it can design the rules and procedures and has significant authority and influence.

To increase its international credibility, China is eager to establish a widely-recognized dispute resolution institution and demonstrate its determination to advance its legal system.¹⁷⁰ The CICC is such a pilot program.

In order to gain more control and initiative in international business activities, China desires to “move the locus of China-related dispute resolution from London and other centres in Europe to China”.¹⁷¹ The CICC has thus been created to enhance China’s position as a hub for international commercial dispute resolution.

4. Current Challenges of the CICC

(a) *Appointment of Foreign Judges* — One important feature of international commercial courts is the appointment of foreign judges.¹⁷² However, pursuant to related Chinese laws, a judge must be a national of China.¹⁷³

According to the Provisions, the judges of the CICC will be appointed from a pool of the SPC’s senior judges who are experienced with international treaties, conventions and practice and have English working proficiency.¹⁷⁴ So far, the SPC has appointed eight judges, including *Wang Chuang, Zhu Li, Sun Xiangzhuang, Du Jun, Shen Hongyu, Zhang Yongjian, Xi Xiangyang, and Gao Xiaoli*.¹⁷⁵ A bench consisting of three (or more than three) judges will hear each case.¹⁷⁶ As a kind of substitute for the lack of foreign judges, the International Commercial Expert Committee was set up as a way to involve foreigners in the CICC. It is anticipated that the experts on this Expert Committee will be able to mediate disputes and provide opinions on foreign law, among other

¹⁷⁰ QiSheng He, *A Research on Constructing China’s International Commercial Court*, 3 WUHAN U. INT’L L. REV. 3 (2018).

¹⁷¹ Susan Finder, *Update on China’s International Commercial Court*, SUP. PEOPLE’S CT. MONITOR (Mar. 11, 2018), <https://supremepeoplescourtmonitor.com/2018/03/11/update-on-chinas-international-commercial-court/>.

¹⁷² The SICC has fifteen international judges. See *Judges*, SICC, https://www.sicc.gov.sg/about-the-sicc/judges#21_Judge_ (last visited Nov. 9, 2018). The Dubai International Financial Centre has seven international judges. See *Court Judges*, DIFC CTS., <https://www.difccourts.ae/court-structure/judges/court-judges/> (last visited Nov. 9, 2018).

¹⁷³ See *Zhonghua Renmin Gongheguo Faguan Fa* [Judges Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Feb. 28, 1995, effective July 1, 1995), art. 9(1) (China). See also *Zhonghua Renmin Gongheguo Gongwuyuan Fa* [Civil Servant Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 27, 2005, effective Jan. 1, 2006), art. 11(1) (China).

¹⁷⁴ See Provisions Regarding the Establishment of the International Commercial Court, *supra* note 156, art. 4.

¹⁷⁵ The resumes of the appointed judges are revealed by the CICC. Most of appointed judges have oversea experiences in common law jurisdictions. See The Supreme People’s Court, *Eight Judges of China International Commercial Court Were Appointed*, CICC (July 3, 2018), <http://cicc.court.gov.cn/html/1/219/208/210/821.html>.

¹⁷⁶ See Provisions Regarding the Establishment of the International Commercial Court, *supra* note 156, art. 5.

functions.¹⁷⁷ In August 2018, the SPC appointed thirty-two experts for a four-year term lasting until August 2022 to its International Commercial Experts Committee. Quite some of these experts are leading arbitration specialists from all over the world, including the chair of the Chinese Arbitration Association (Taipei), Fuldien Li.¹⁷⁸

(b) *Representation of Parties by Foreign Counsel* — In China, a foreign party (including foreign individuals, corporations and organizations) must be represented by a Chinese counsel before a Chinese court.¹⁷⁹ At least, this author does not expect that China will easily follow the example of Singapore and the DIFC and allow foreign counsel to represent a foreign party in CICC proceedings.

(c) *Use of English Language* — Many international commercial courts use or intend to use English as their official language in proceedings of their international commercial courts. In order to be competitive, CICC must also use English as working language. The Provisions do not clarify whether the CICC will hear cases in English.

For the CICC to hear cases in English, the Chinese legislature must first amend the law currently requiring all foreign-related civil cases to be heard in Chinese in accordance with Article 262 of the Civil Procedure Law. It should also be noted that the pool of Chinese judges able to hear cases in English is not large.¹⁸⁰

(d) *Enforcement of Judicial Decisions* — To date, China has concluded thirty-three bilateral treaties on provisions of judicial assistance, and some of those treaties include provisions on the recognition and enforcement of judgments.¹⁸¹ China is actively participating in negotiations on the Hague Convention of the Recognition and Enforcement of Foreign Judgments, and is studying ratification of the Hague Convention on the Choice of Courts Agreement.¹⁸² For the enforcement of the judgments of the CICC, the SPC is said to be drafting a judicial interpretation on the recognition and enforcement

¹⁷⁷ Susan Finder, *China International Commercial Court & the Supreme People's Court Monitor*, SUP. PEOPLE'S CT. MONITOR (Aug. 31, 2018), <https://supremepeoplescourtmonitor.com/2018/08/31/china-international-commercial-court-the-supreme-peoples-court-monitor/>. It should be noted that Susan Finder, a Distinguished Scholar in Residence at the School of Transnational Law, Peking University (Shenzhen) was among the first group of experts appointed to the CICC's International Commercial Expert Committee in August 2018.

¹⁷⁸ Alison Ross, *Arbitration Specialists Feature on New Committee of China's Top Court*, GLOBAL ARB. REV. (Sept. 6, 2018), <https://globalarbitrationreview.com/article/1173903/arbitration-specialists-feature-on-new-committee-of-chinas-top-court>.

¹⁷⁹ See Zhonghua Renmin Gongheguo Minshi Susong Fa [Civil Procedure Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Apr. 9, 1991, effective Apr. 1, 2008), art. 241 (China).

¹⁸⁰ See Susan Finder, *Update on China's International Commercial Court*, SUP. PEOPLE'S CT. MONITOR (Mar. 11, 2018), <https://supremepeoplescourtmonitor.com/2018/03/11/update-on-chinas-international-commercial-court/>.

¹⁸¹ King Fung Tsang, *Chinese Bilateral Judgment Enforcement Treaties*, 40(1) LOYOLA L.A. INT'L & COMP. L. REV. 1, 6 (2017).

¹⁸² See *China Signs the 2005 Choice of Court Convention*, HAGUE CONF. ON PRIV. INT'L L. (Sept. 12, 2017), <https://www.hcch.net/en/news-archive/details/?varevent=569>.

of foreign civil and commercial judgments.¹⁸³ In any case, parties should not expect—at least on a global level—the enforceability of a CICC judgment to be anywhere close to the enforceability of an arbitral award within the next decade.

5. *Summary* — In today’s international commercial dispute resolution, the establishment of international commercial court is a global trend. China established its own international commercial courts to catch up with other countries and jurisdictions, and, most importantly, to protect domestic enterprises and gain more control in international business activities. Without doubt, the CICC is a relatively advanced dispute resolution institution in China. Still, the CICC faces many ambiguities and outstanding issues.¹⁸⁴ To build its credibility internationally, the CICC still has a long way to go. However, one can be sure that in the course of the B&R, China will be able to find contract partners who will accept the CICC for any dispute resolution.¹⁸⁵

III. CONCLUSION AND OUTLOOK

Novelties always have a certain charm—not only in international dispute resolution. The task is to find out what is behind the novelty factor and the temptation to try something beyond the meanwhile rather established option for resolving international disputes by arbitration. Or, as the *Glimmer Twins* so aptly expressed it in the Rolling Stones track *New Faces*:

There’s a new guy in town
He’s been dragging around
He’s the figure of youth
And his eyes are so blue

¹⁸³ Gao XiaoLi, *Zuigao Fayuan Minsiting Futingzhang Gao Xiaoli: Dazao Guoji Shangshi Fating Sifa Baozhang “Yi Dai Yi Lu” Jianshe* [Deputy Head of the SPC’s No. 4 Civil Tribunal Gao Xiaoli: To Establish International Commercial Court, Judicial Guarantee for “One Belt One Road”], *JUD. PROTECTION FOR INTELL. PROP.* (Mar. 16, 2018), <http://www.chinaiprlaw.cn/index.php?id=5183>. See also Finder, *supra* note 180.

¹⁸⁴ See, e.g., Erie, *supra* note 158. (“Yet much remains unexplained about how the CICC will function in practice.”) See also Glen Haley, *China International Commercial Court*, *CHARTERED INST. ARB. (CI Arb)* (Oct. 11, 2018), http://www.ciarb.org/news/features/features-detail/features/2018/10/11/china-international-commercial-court?utm_source=Chartered%20Institute%20of%20Arbitrators&utm_medium=email&utm_campaign=9916943_eSolver%20-%20October%202018&dm_i=I8H,5WJYN,39C9ZU,N3O54. (“However, whether non-Chinese parties will be willing to submit to the jurisdiction of the Court remains to be seen. The Court’s experience and procedures are untested, and doubts will linger over its independence and impartiality ‘whether fairly or unfairly.’”)

¹⁸⁵ See Haley, *supra* note 184:

The Chinese-funded Bar-Boljare highway project in Montenegro [a small country in South-Eastern Europe bordering Bosnia and Herzegovina to the North, Serbia and the disputed territory of Kosovo to the East, Albania to the South and Croatia to the West with a population of about 640,000], for example, requires disputes to be resolved by arbitration in China. China may now put forward the Court instead of, or as its first negotiating position before, arbitration in China.

And they are looking at you
So tell me the truth¹⁸⁶

The truth is that despite the sweet talk about international commercial courts being “companions” and not “competitors” of arbitration, the fact is that to a large extent, they are fishing in the same pond, namely international commercial cases with high stakes. Insofar, the answer to the question whether the commercial courts and international arbitration are competitors can be answered—as suggested by Michael Hwang—in one word: “both”.¹⁸⁷

International commercial courts, however, have the potential to target clients who do not immediately think of arbitration as a viable option for their business—thereby increasing the pie.¹⁸⁸ Where international courts work closely together with an arbitration center as has been shown in the examples of Singapore and all international commercial courts which are located in the Gulf region, it does not make sense if the international commercial court cannibalizes the caseload of the neighboring arbitration institution.¹⁸⁹ Both institutions have to complement each other in providing dispute resolution options to international commercial parties.¹⁹⁰ Certainly, there is room for co-existence and developments of these two systems of dispute resolution.¹⁹¹

Furthermore, the truth is also that quite a few of these international commercial courts seem to offer an attractive option for resolving international disputes. As usual, a second look is often appropriate. For a typical business transaction between a Taiwanese and a European company, none of the parties—assuming that the bargaining powers are equally divided—would accept having to litigate a business dispute in the courts of the respective business partner. The transaction costs would simply be too high for a European company to instruct Taiwanese counsel, have all documents translated into Chinese and, possibly, explain foreign law to the Taiwanese local counsel. The same would apply vice versa, i.e., a Taiwanese company would have added transaction costs by having all relevant documents translated into, for example, Italian, Spanish or Polish. An ICC arbitration clause with a place of arbitration in Zurich, Singapore or even Taipei would make life much easier for both parties—provided that the contract documentation is already in English.

What kind of added value may be expected from international commercial courts? The quality of the individuals deciding the case? This does not sound credible in a situation where some international commercial courts offer to have their judges act as arbitrators. A high degree of legal authority? Apart from an

¹⁸⁶ THE ROLLING STONES, *NEW FACES* (written by Mick Jagger & Keith Richards), from their 20th studio album *Voodoo Lounge*, July 1994.

¹⁸⁷ Hwang, *supra* note 41, at 194. *See also* Reyes, *supra* note 103, at 339. (“[T]he SICC should also be characterised as a competitor to international commercial arbitration.”).

¹⁸⁸ Hwang, *supra* note 41, at 196-97.

¹⁸⁹ *Id.* at 196.

¹⁹⁰ *Id.* at 197.

¹⁹¹ *See* Menon, *supra* note 17, ¶ 10.

impressive seal of an international commercial court, the question would be whether the judgment of such court would do significantly better in the enforcement phase than an international arbitral award. In all likelihood, an arbitral award will remain a more viable option on the global level in light of the currently 159 contracting states to the New York Convention,¹⁹² but there might be exceptions. In particular, a judgment by one of the international commercial courts domiciled in the MENA region might overcome the resistance of a reluctant debtor also domiciled in the MENA region more easily—always assuming that the debtor has assets in this region.

In general, transaction costs would probably be higher when involving international commercial courts, because notwithstanding a foreign counsel's right of appearance, it would be wise to instruct experienced local counsel.

The savings that can be achieved by the smart exercise of party autonomy are frequently underestimated. The parties can often easily agree on certain procedural details. An experienced arbitral tribunal will normally comply with the parties' joint wishes (as long as they are not to the detriment of the arbitral tribunal). Judges of such international commercial courts, however, should be expected to be less flexible and more bound by sometimes rigid rules of procedural law.

International commercial courts may be perceived as a challenge to the "arbitration industry".¹⁹³ But arbitration only needs to fear such challenge if international commercial courts would satisfy the needs of potential users better than arbitration can do.

In the long run, it would be neither convincing nor possible to simply put an international commercial court in an arbitral tribunal's clothing. In fact, even if the two systems learn from each other¹⁹⁴ they have different but complimentary tools in their individual toolboxes¹⁹⁵ as well as, at least to some extent, different users.

In the end it boils down to the value of certain individual special features and their respective benefits under a given scenario. For instance, in construction contracts with complex multi-party and multi-contract situations, the possibility to join third parties might be of overriding significance, which would speak in favor of international commercial courts, whereas this argument would be irrelevant in a "one contract/two parties" situation.

Each system, i.e., international arbitration and international commercial courts, should carefully analyze to what extent certain elements from the other system could be useful for its own mode of dispute resolution. However, while striving for "perfect" solutions is absolutely justifiable, one should not expect that the "one size fits all" solution for the resolution of international disputes

¹⁹² See *List of Contracting States*, N.Y. ARB. CONVENTION, <http://www.newyorkconvention.org/> (last visited Nov. 10, 2018).

¹⁹³ Demeter & Smith, *supra* note 4, at 446.

¹⁹⁴ See, e.g., the institution of "emergency arbitrator" where the arbitration community learnt from court proceedings and its users that speedy injunctive relief is often a decisive factor for its own attractiveness.

¹⁹⁵ See Menon, *supra* note 17, ¶ 56.

might be established anytime soon. Nevertheless, it is perfectly justified to hope—in remembrance of the eternal Tom Petty’s insightful song of wisdom “*Hope on Board*”¹⁹⁶—for the “ultimate partnership between commercial courts and arbitration”.¹⁹⁷

¹⁹⁶ TOM PETTY AND THE HEARTBREAKERS, HOPE ON BOARD (written by Tom Petty) is a song from their August 1996 studio album *She’s the One*.

¹⁹⁷ Hwang, *supra* note 41, at 212.

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