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THE ADJUDICATION BUSINESS

Pamela K. Bookman*

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The recent proliferation of international commercial courts around the world is changing the global business of adjudication. The rise of these courts also challenges the traditional accounts of the competitive relationship between and among courts and arbitral tribunals for this business. London and New York have long been considered the forum of choice in international commercial contracts—whether parties opt for litigation or arbitration. More recently, however, English-language-friendly international commercial courts have been established in China (2018), Singapore (2015), Qatar (2009), Dubai (2004), the Netherlands (2019), Germany (2018), France (2010), and beyond.

The emerging scholarship addressing these new courts tends to view them as engaged in a global competition with each other and with arbitration to create the most efficient dispute resolution mechanism. That account oversimplifies. The creation of each of these courts is driven by multiple, different factors on the ground.

This Article makes four contributions. First, it offers a categorization of international commercial courts based on the forces apparently driving their creation. Second, it critiques the “race to the top” narrative both within the law-and-economics framework and outside it, drawing attention to the range of domestic and international forces driving the courts’ rise. The courts’ success therefore will not necessarily be based on the excellence of adjudication they provide, but rather on other metrics, like the number of cases or amount of investment they attract, that reflect what drove states to create the international commercial court in the first place. Third, these courts counter a traditional U.S. narrative that arbitration and litigation are opposites. International commercial courts borrow many features from arbitration, like expert adjudicators, confidentiality, and customizable procedures. These courts thus raise questions about what characteristics of arbitration and litigation are fundamental and what parties prefer. Fourth, the Article celebrates procedural innovation but warns international commercial courts against becoming beholden to either sovereign or private interests.

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

This is a DRAFT. Please send comments to pbookman@fordham.edu.

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INTRODUCTION

The business of providing adjudication services for international commercial disputes—whether through courts, arbitration, or alternative dispute resolution (ADR) mechanisms—is a growth industry. London and New York have long been go-to fora for international commercial litigation in court.¹ The traditional top choices for seating arbitration include London, Paris, New York, and Geneva, homes to “the oldest and most popular arbitral institutions.”² Reflecting the commonly cited refrain that most international commercial disputes go to arbitration, there has also been growth and innovation in arbitration centers and arbitration-friendly domestic laws.³

A recent phenomenon has disrupted this traditional picture. States around the world are establishing international commercial courts—English-language-friendly domestic courts specializing in international commercial disputes. In the past fifteen years, Dubai (2004), Qatar (2009), Singapore (2015), Abu Dhabi (2015), Kazakhstan (2018), and China (2018) have all opened specialized courts focusing on international commercial disputes.⁴ Since the Brexit vote in 2015,

¹ John MacKenzie, Shepherd and Wedderburn LLP, *UK: Competition For Commercial Disputes Around The World*, MONDAQ (March 4, 2019), <http://www.mondaq.com/uk/x/785390/Arbitration+Dispute+Resolution/Competition+For+Commercial+Disputes+Around+The+World>.

² Aceris Law LLC, *The Seat of Arbitration International Commercial Arbitration*, ACERIS LAW (Aug. 11, 2017), <https://www.acerislaw.com/seat-arbitration-international-commercial-arbitration/>.

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

⁴ See Matthew Erie, *The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution*, 59 VA. J. INT'L L. (forthcoming); Nicolás Álvaro Zambrana-Tévar, *The Court of the Astana International Financial Center in the Wake of Its Persian Gulf Predecessors* (Dec. 31, 2018), https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3308296 (Kazakhstan); A. Nurabay; "Can the Astana International Financial Centre Offer a Forum for the Resolution of Transport Disputes which Arise along Belt and Road Initiative?" TDM 1 (2020), www.transnational-dispute-management.com, URL: www.transnational-dispute-management.com/article.asp?key=2689. Abu Dhabi's new commercial court handles both domestic and international commercial disputes. See TradeArabia News Service, *Abu Dhabi to set up new commercial court*, TRADEARABIA (Sept. 14, 2019), http://www.tradearabia.com/news/MISC_358611.html.

this phenomenon has echoed in Europe. Germany,⁵ France,⁶ the Netherlands,⁷ Belgium,⁸ and Switzerland⁹ have all either recently opened or considered plans to open new courts or court branches specifically dedicated to international commercial disputes. Other countries are also contemplating opening new international commercial courts or judicial divisions dedicated to international commercial disputes.¹⁰

⁵ Burkhard Hess and Timon Boerner, *Chambers for International Commercial Disputes in Germany: The State of Affairs*, *Erasmus L. Rev.* (2019).

⁶ Emmanuel Gaillard, Yas Banifatemi, & Chloe Vialard, *The International Chambers Of The Paris Courts And Their Innovative Rules Of Procedure*, SHEARMAN & STERLING (Apr. 23, 2018), <https://www.shearman.com/perspectives/2018/04/paris-courts-and-their-innovative-rules-of-procedure>; Alexandre Biard, *International Commercial Courts in France: Innovation without Revolution?*, *Erasmus L. Rev.* (2019)

⁷ Eddy Bauw, *Commercial Litigation in Europe in Transformation: The Case of the Netherlands Commercial Court*, *Erasmus L. Rev.* (2019); *Netherlands Commercial Court (NCC)*, NCC, <https://www.rechtspraak.nl/English/NCC/>.

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

⁹ Natalija Matic, *In The Pipeline: Zurich International Commercial Court*, *MONDAQ* (Oct. 13, 2018), <http://www.mondaq.com/x/745118/international+trade+investment/In+The+Pipeline+Zurich+International+Commerical+Court> (discussing different cities in Switzerland).

¹⁰ See, e.g., James M. Claxton, et al., *Developing Japan as a Regional Hub for International Dispute Resolution: Dream Come True or Daydream?*, 47 *J. OF JAPANESE L.* __ (forthcoming 2019), https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3299097; Reem Shamseddine, *Saudi Arabia sets up commercial courts to expedite investment*, *REUTERS* (Oct. 16, 2017), <https://www.reuters.com/article/us-saudi-court/saudi-arabia-sets-up-commercial-courts-to-expedite-investment-idUSKBN1CL2DT>; John Balouziyeh, *Judicial Reform in Saudi Arabia: Recent Developments in Arbitration and Commercial Litigation*, KLUWER ARBITRATION BLOG (Dec. 31, 2017), <http://arbitrationblog.kluwerarbitration.com/2017/12/31/judicial-reform-saudi-arabia-recent-developments-arbitration-commercial-litigation/>; The Honorable Justice John Middleton, *The Rise of the International Commercial Court*, *FEDERAL COURT OF AUSTRALIA* (Sept. 21, 2018), <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-middleton/middleton-j-20180921> para 30, (discussing “numerous appeals for an international commercial court to be established in Australia”); Andrew Stephenson, Lindsay Hogan, & Jaclyn L Smith, *Australia: Is an international commercial court for Australia a viable option?*, *MONDAQ* (June 27, 2016), <http://www.mondaq.com/australia/x/504084/International+Courts+Tribunals/Is+an+international+commerical+court+for+Australia+a+viable+option/> (“If Australia wants to compete with the likes of Singapore and Hong Kong for a slice of the international commercial disputes resolution market, then it makes sense to establish an international commercial court in Australia.”); Marta Requejo Isidro, *International Commercial Courts in the Litigation Market* (2019) MPILux Research Paper Series 2019 (2), [www.mpi.lu], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3327166 at fn. 197 (describing discussions in Spain about opening an international commercial court).

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

Scholars, mostly outside the United States, are beginning to notice these courts. Several early articles describe some subset of these new courts and discussed their capacity to compete with arbitration.¹³ More recently, entire

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

¹² For a discussion of a subset of these courts as arbitration-litigation hybrids, see Bookman, *Arbitral Courts* (draft on file with author).

¹³ See, e.g., Matthew Erie, *The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution*, 59 VA. J. INT'L L. (forthcoming). (placing international commercial courts in the context of emerging legal hubs in Asia and surrounding areas); Janet Walker, *Specialized International Courts: Keeping Arbitration on Top of Its Game*, 85 ARBITRATION 2 (2019); Marta Requejo Isidro, *International Commercial Courts in the Litigation Market* (2019) MPILux Research Paper Series 2019 (2), [www.mpi.lu], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3327166; Firew Tiba, *The Emergence of Hybrid International Commercial Courts and the Future of Cross Border Commercial Dispute Resolution in Asia*, 14 LOY. U. CHI. INT'L L. REV. 31, 32 (2016); Andrew Godwin, *International Commercial Courts: The Singapore Experience*, 18 MELB. J. INT'L L. 219, 222 (2017); Dalma Demeter & Kayleigh M. Smith, *The Implications of International Commercial Courts on Arbitration*, 33 J. INT'L ARB. 441, 441 (2016); Stephan Wilske, *International Commercial Courts and Arbitration – Alternatives, Substitutes or Trojan Horse?*, 11 CONTEMP. ASIA ARB. J. 153 (2018). For an example of a U.S. scholar examining these courts from a U.S. perspective, see S.I. Strong, 'International Commercial Courts and the United States: An Outlier by Choice and by Constitutional Design?' In *International Business Courts – A European and Global Perspective*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3376106.

volumes have been devoted to exploring the inner workings of these courts and speculating about their ability to attract cases.¹⁴

This Article takes on the common narrative that competition with arbitration to provide the best dispute resolution mechanism is the sole purpose driving the creation of these courts. It argues that this narrative is mistaken and incomplete.

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

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

Second, this Article seeks to correct and shape the current conversation about international commercial courts as an emerging source of positive, efficient competition with arbitration. Long before the rise of international commercial courts, scholars have argued and assumed that competition for forum selection *in contracts* is an efficient competitive force. That is, such competition is supposed to drive a “race to the top” for tribunals to develop the best, most efficient procedures to resolve disputes.¹⁵ The nascent literature on the rise of international commercial courts likewise often relies on these assumptions as a jumping off point, describing international commercial courts as competing with arbitration by combining the best of both worlds (litigation and arbitration).¹⁶

This account is incomplete. These courts emerge not from some idealistic desire to perfect courts, but from a confluence of different local and international forces. Some have appeared because localities want to become new legal hubs

¹⁴ See, e.g., Xandra Kramer and John Sorabji, “International Business Courts in Europe and Beyond: A Global Competition for Justice?”, 1 *Erasmus Law Review* 1 (2019) (lead article in volume addressing international business courts); INTERNATIONAL BUSINESS COURTS: A EUROPEAN AND GLOBAL PERSPECTIVE (2019), available at <https://boeken.rechtsgebieden.boomportaal.nl/publicaties/9789462369719?q=business+courts&BoomToken=JrMB5g%2bH16jNYfNPeqPXuQ#9>.

¹⁵ See, e.g., Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241, 243 (2016) (“Forum selling in contractual settings may be beneficial. When sophisticated parties use forum-selection clauses to choose the forum in their contracts, they have an incentive to choose a forum that provides unbiased, efficient adjudication because doing so maximizes the value of their transaction.”); Scott & Triantis.

¹⁶ See, e.g., Tiba, *supra* note __, at 32 (describing the SICC as a “hybrid institution [that] promises to combine the best of international commercial arbitration and that of judicial settlement of disputes”).

for dispute resolution—providing not only new courts, but a forum hospitable to litigation, arbitration, and other forms of ADR (not necessarily focused on generating substantive law).¹⁷ Singapore, for example, recently created an international commercial court to complement its rising prominence in arbitration and as a regional economic hub.¹⁸ Some international commercial courts can emerge as aspiring litigation destinations without a parallel emphasis on arbitration or other kinds of ADR, as appears to be the case in Amsterdam, for example.¹⁹ Other locations, such as Dubai, Qatar, and Astana, Kazakhstan, have created special economic zones and see courts with dispute resolution expertise as an integral part of attracting investment and capital to those zones.²⁰ Finally, China’s aim seems keyed to exercising control over Belt and Road disputes,²¹ though they may have broader, longer-term goals as well.²²

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

It is possible that the road to achieving these results might coincide with positive perceptions of the courts’ quality, fairness, or cost-effectiveness. But it might not. Instead, courts might achieve these results in other ways, such as by catering to certain constituencies or by expanding jurisdiction. As the scholarship on corporate law has shown, probing the “race to the top” analogy may reveal a more complicated picture than first appears.²³ While there is much to celebrate about the innovation of international commercial courts, these complicated dynamics also recommend watching them closely to see how they develop. A goal of this Article is to begin a line of scholarship that celebrates these courts’ potential and helps to avoid their worst outcomes.

International commercial courts also offer insight into a second, related theme in scholarship about the relationship between arbitration and litigation. U.S. courts often portray arbitration and litigation as stark alternatives, with the

¹⁷ See Erie, *The New Legal Hubs*, *supra* note __, at 49 (“[New legal hubs] compete on the quality of their legal services and procedural efficiency, rather than, necessarily, supplying the law itself.”).

¹⁸ See *infra* [section on Singapore].

¹⁹ See *infra* Part II.C.2.

²⁰ See *infra* Part II.B.

²¹ [Insert footnote explaining Belt and Road]

²² See *infra* Part II.D.

²³ See William J. Moon, *Delaware’s New Competition*, 114 Nw. L. Rev. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3395387 (discussing the corporate law debates).

former as parties' favorite for resolving disputes arising out of international commercial contracts. As I have argued elsewhere, this dichotomy is overblown.²⁴ The new international commercial courts bolster this argument and challenge the conventional story in a new way. International commercial courts often borrow procedural devices, like party-driven design and confidentiality, that are typically thought to be characteristics distinguishing arbitration from litigation. They therefore explode assumptions about inherent differences between arbitration and litigation and undermine assumptions commonly made by U.S. courts that being pro-arbitration requires being hostile to litigation. In a companion piece, I explore the idea of courts that seek to act like arbitral tribunals and questions of legitimacy and public access that such "arbitral courts" raise.²⁵

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

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

²⁴Arbitration-Litigation Paradox.

²⁵ See Pamela Bookman, *Arbitral Courts* (draft on file with author); Hiro Aragaki, *The Metaphysics of Arbitration: A Reply to Hensler and Khatam*, 18 NEV. L. J. 541 (2018) (discussing international commercial courts as hybrids in the context of identifying the "essence" of arbitration).

I. COURTS, COMMERCIAL COURTS, AND INTERNATIONAL COMMERCIAL COURTS

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

In U.S. law schools, students are usually introduced to two main types of courts: state and federal. State courts are courts of general subject-matter jurisdiction—that is, state courts can hear any kind of dispute (other than those over which federal courts have exclusive jurisdiction). Federal courts, by contrast, are courts of limited subject-matter jurisdiction. Those limits are defined by statutes such as the diversity and federal question statutes,²⁶ which grant federal court jurisdiction over disputes involving parties from different states that involve high amounts in controversy, or disputes that "arise under" federal law. Within those constraints, however, federal courts hear disputes involving a wide variety of subject matters, from torts to civil rights to antitrust. The Federal Rules of Civil Procedure, correspondingly, are "transsubstantive," with rules that supposedly apply equally no matter the substance (or subject matter) of the dispute.²⁷

There are a variety of ways, however, in which states can organize their court systems. While the federal courts do so only rarely,²⁸ state courts often specialize in certain subject matter areas, such as traffic court or family court or probate court. One area of court specialization is business or commercial disputes. The first example of such specialization appeared in 1895, when the Queen's Bench in London created the London Commercial Court.²⁹ In 1993, New York (along with Illinois) started a U.S. trend and established a Commercial Division to focus on commercial disputes with high amounts in controversy.³⁰ Several other U.S. states and states around the world have created business courts since then.³¹

²⁶ 28 USC 1331 and 1332.

²⁷ See, e.g., David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 B.Y.U. L. Rev. 1191; but see, e.g., J. Maria Glover, *The Supreme Court's "Non-Transsubstantive" Class Action*, 165 U. Pa. L. Rev. 1625 (2017).

²⁸ For example, the Federal Circuit specializes in patent and certain other subject matters.

²⁹ Wilske at 160.

³⁰ Illinois adopted a similar kind of court at the same time. Coyle, 53 Wm. & Mary L. rev. at 1918. See also Standing International Forum of Commercial Courts, <https://www.sifocc.org/about-us/>.

³¹ Id.

International commercial courts, the focus of this Article, are in some ways a natural extension of specialized commercial courts. The “old school” approach to having a court that catered to international commercial disputes was to have a high quality domestic commercial court available to locals but also welcoming to foreign parties and attractive to them by virtue of the courts’ expertise, efficiency, and broad jurisdiction, among other characteristics. For over a hundred years, London and New York have been hospitable not only to international commercial litigation but also to arbitration. Relatedly, they have both also been creators of widely consumed substantive law.³² They have led as a premier court chosen through choice-of-forum clauses, a premier seat for arbitration, and often as the source of substantive law chosen through choice-of-law clauses.³³

Neither London nor New York specifically established themselves as “international” commercial courts. That is, unlike the new international commercial courts discussed here, their subject matter jurisdiction is not limited to disputes categorized as “international.” They thus represent an “old school” kind of “international” commercial court.

For a long time, the London Commercial Court was the prototypical—and indeed only—example of such a court. Over time, that chamber became recognized for its judges’ business sophistication, independence, and respect for the rule of law, as well as its development of English law (and the flexible but predictable common law system) and its welcoming attitude toward foreign litigants.³⁴ The London Commercial Court is particularly attractive to foreign parties because of its broad concept of jurisdiction,³⁵ flexible procedural rules designed to accommodate complex commercial cases,³⁶ and its proclivity

³² See, e.g., Geoffrey P. Miller & Theodore Eisenberg, *The Market for Contracts*, 30 CARDOZO L. REV. 2073 (2009); Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 17–18, 35–36 (2008) (discussing New York’s development of contract law aimed at making it more predictable and therefore more attractive as a choice for international commercial disputes).

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

³⁴ Eva Lein, et al, *Factors Influencing International Litigants’ Decisions to Bring Commercial Claims to the London Based Courts*, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/396343/factors-influencing-international-litigants-with-commercial-claims.pdf

³⁵ See Delphine Nougayrede, *Outsourcing Law in Post-Soviet Russia*, 3 J. EURASIAN L. 6 (2015) (discussing Russian oligarchs’ use of UK courts and law); https://www.judiciary.uk/wp-content/uploads/2019/02/6.5310_Commercial-Courts-Annual-Report_v3.pdf (“The jurisdiction of the Commercial Court is wide. It extends to any claim relating to the transaction of trade and commerce (including commercial agreements, import and export, carriage of goods by sea, land and air, banking and financial services, insurance and reinsurance, markets and exchanges, commodities, oil, gas and natural resources, the construction of ships, agency, arbitration and competition matters).”).

³⁶ See, e.g., JUDICIARY OF ENGLAND AND WALES, *THE COMMERCIAL COURT REPORT 2017-2018*, https://www.judiciary.uk/wp-content/uploads/2019/02/6.5310_Commercial-Courts-Annual-

toward compelling parties to disclose documents beyond standard disclosures.³⁷ The Commercial Court boasts a 60% settlement rate.³⁸ It also offers expedited and expert procedures for cases that qualify for the “Financial List” by having more than £50 million in dispute and relating to financial markets.³⁹

Related to the attractiveness of London’s courts is the attractiveness of the English language and English law. English, the “global language of business,” is one of the most widely spoken languages in the world.⁴⁰ English law, likewise, enjoys a favorable reputation around the globe. It is the most selected law to govern business contracts within the EU.⁴¹ It is sought after for its familiarity, stability, and predictability, as well as its reputation for fairness and efficiency.⁴² The doctrine of precedent offers predictability but also flexibility to adapt to the modern business world.⁴³ English law also is quite favorable towards enforcing contracts.⁴⁴

These features attract a large quantity of international cases. The UK’s Justice Department advertises both UK courts and UK law as an important export.⁴⁵ In 2015, 63% of disputes at the London Commercial Court involved foreign nationals,⁴⁶ and 52% of the contracts drafted in English in the Middle

Report v3.pdf (discussing opportunities for “shorter and flexible trials”); Robin Byron, *Update on Dispute Resolution in England and Wales: Evolution or Revolution*, 75 TUL. L. REV. 1297, 1301 (2001).

³⁷ *Id.*

³⁸ Judiciary of England and Wales, Business and Property Courts: The Commercial Court Report 2017-2018, at 10 (2019).

³⁹ The Financial List: Resolving financial markets disputes in London, <https://www.nortonrosefulbright.com/en/knowledge/publications/0ee0087d/the-financial-list-resolving-financial-markets-disputes-in-london> (2015).

⁴⁰ Tsedal Neeley, *Global Business Speaks English*, HARVARD BUSINESS REVIEW, May 2012, <https://hbr.org/2012/05/global-business-speaks-english>.

⁴¹ *Providing A Cross-Border Civil Judicial Cooperation Framework: A Future Partnership Paper*, HM GOVERNMENT at 4, (Aug. 22, 2017), <https://www.gov.uk/government/publications/providing-a-cross-border-civil-judicial-cooperation-framework-a-future-partnership-paper>.

⁴² See Vogenauer, *supra* note __.

⁴³ COURTS AND TRIBUNAL JUDICIARY, LEGALUK: THE STRENGTH OF ENGLISH LAW AND THE UK JURISDICTION, 3 (2017), <https://www.judiciary.uk/wp-content/uploads/2017/08/legaluk-strength-of-english-law-draft-4-FINAL.pdf>; Hwang, *supra* note __ (discussing benefits of English common law).

⁴⁴ *Id.*

⁴⁵ THE LAW SOCIETY OF ENGLAND AND WALES, ENGLAND AND WALES: THE JURISDICTION OF CHOICE, [http://www.eversheds-](http://www.eversheds-sutherland.com/documents/LawSocietyEnglandAndWalesJurisdictionOfChoice.pdf)

[sutherland.com/documents/LawSocietyEnglandAndWalesJurisdictionOfChoice.pdf](http://www.eversheds-sutherland.com/documents/LawSocietyEnglandAndWalesJurisdictionOfChoice.pdf) (“The Ministry of Justice is committed to supporting the legal sector’s success on the international stage. I am therefore delighted to introduce this brochure by the Law Society promoting England and Wales as the jurisdiction of choice for the resolution of disputes arising all over the world.”); *Introduction*, LCIA, <https://www.lcia.org/LCIA/introduction.aspx>.

⁴⁶ Wilske, *supra* note __, at 160 (quoting 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>).

East and North Africa chose London as the seat of jurisdiction for disputes.⁴⁷ Eighty percent of cases involve foreign parties.⁴⁸

London's embrace of litigation coexists with an embrace of arbitration. London hosts one of the most popular commercial arbitration centers, the London Court of International Arbitration (LCIA),⁴⁹ and is one of the most popular choices for an arbitral seat, regardless of which arbitration center administers the arbitration.⁵⁰ UK law liberally supports arbitration. In 1996, Parliament revised the Arbitration Act, modeling it after the UNCITRAL Modern Rules for Arbitration,⁵¹ which requires courts to support arbitration and limit judicial interference.⁵²

At the same time, UK courts are strongly committed to openness, including allowing non-parties access to court documents.⁵³ The UK has also signed many judgment enforcement treaties, and has liberal and consistent judgment-enforcement rules, which promotes the enforcement of UK judgments in countries where such enforcement depends on reciprocity.⁵⁴

Like London, New York is also a popular choice for designation in both choice-of-law and choice-of-forum clauses. While London dominates the European market, New York law and New York City dominate choice-of-law and choice-of-forum decisions in the Americas.⁵⁵ Like English law, New York

⁴⁷ Requejo, *supra* note __.

⁴⁸ THE LAW SOCIETY OF ENGLAND AND WALES, *supra* note __, at 5.

⁴⁹ 2018 *International Arbitration Survey: The Evolution of International Arbitration*, QUEEN MARY UNIVERSITY OF LONDON,, 2 (2018), <http://www.arbitration.qmul.ac.uk/research/2018/>.

⁵⁰ See *Arbitral Seats*, *supra* note __.

⁵¹ Byron, *supra* note __ at 1316.

⁵² The previous Arbitration Act had permitted appeals of questions of law from arbitration to the courts. The 1996 law ended that practice.

⁵³ *Cape Intermediate Holdings Ltd v Dring* (for and on behalf of Asbestos Victims Support Groups Forum UK), [2019] UKSC 38, <https://www.supremecourt.uk/cases/uksc-2018-0184.html>.

⁵⁴ See John F. Coyle, *Rethinking Judgments Reciprocity*, 92 N.C. L. REV. 1109 (2014).

⁵⁵ Lein, et al., https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/396343/factors-influencing-international-litigants-with-commercial-claims.pdf

Notably, many of the studies of emerging international commercial courts and legal hubs cite London as both the inspiration and primary competition for the new courts. See, e.g., Matthew Erie, *The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution*, 59 VA. J. INT'L L. (forthcoming). (placing international commercial courts in the context of emerging legal hubs in Asia and surrounding areas); Janet Walker, *Specialized International Courts: Keeping Arbitration on Top of Its Game*, 85 ARBITRATION 2 (2019); Marta Requejo Isidro, *International Commercial Courts in the Litigation Market* (2019) MPILux Research Paper Series 2019 (2), [www.mpi.lu], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3327166; Firew Tiba, *The Emergence of Hybrid International Commercial Courts and the Future of Cross Border Commercial Dispute Resolution in Asia*, 14 LOY. U. CHI. INT'L L. REV. 31, 32 (2016); Andrew Godwin, *International Commercial Courts: The Singapore Experience*, 18 MELB. J. INT'L L. 219, 222 (2017); Dalma Demeter & Kayleigh M. Smith, *The Implications of International Commercial Courts on Arbitration*, 33 J. INT'L ARB. 441, 441 (2016); Stephan Wilske, *International Commercial Courts and Arbitration — Alternatives, Substitutes or Trojan Horse?*, 11 CONTEMP. ASIA ARB. J. 153 (2018). For an example of a U.S. scholar examining these courts from a U.S. perspective, see S.I. Strong

law is widely respected and often designated to govern contracts even where the particular business relationship has little or no connection to New York. Also like English law, its value resonates in the common law tradition. New York law is respected for its stability and predictability, as well as its flexibility, and it is thought to be generally favorable to business interests and to enforcing contracts.⁵⁶ In a study of contracts filed with the SEC, New York was designated as the forum in 34% of the studied domestic contracts and 45% of international ones.⁵⁷

Most international commercial disputes heard in New York end up in federal court because the parties are diverse or foreign and their disputes have a high amount in controversy. The Southern District of New York, the federal trial level court that sits in Manhattan, is well respected for the competence, neutrality, and legal expertise of its judges.⁵⁸

In 1993, almost one hundred years after the establishment of the London Commercial Court, New York established its own Commercial Division. New York's state courts have long also been "extraordinarily receptive to enforcing contracts that select New York as the provider of law or forum, even in cases where there are few or no other connections between New York and the contract or the parties."⁵⁹ In the Manhattan Commercial Division, disputes must be in excess of \$500,000.⁶⁰ For cases that may have no other connection to New York, New York statutes also grant jurisdiction over all cases relating to any contract worth over \$1 million dollars where foreigners designate New York in their choice-of-law and choice-of-forum clauses.⁶¹ These statutes were enacted in

[chapter].

The few scholars to consider the U.S. role in the growing market for international commercial dispute resolution do not emphasize the importance of New York compared to other states, which have far less developed commercial courts and often focus on domestic rather than international disputes. See S.I. Strong chapter. But New York has the distinction both of having a widely used substantive law and of being a popular litigation destination. See Miller & Eisenberg, *supra* note __; Nyarko at 15.

⁵⁶ Miller & Eisenberg, *supra* note __; Sarath Sanga, *Choice of law: An Empirical Analysis*, 11 J. EMP. L. STUDIES 894 (2014).

⁵⁷ Nyarko, *supra* note __, at 15.

⁵⁸ See Pierce, *supra*.

⁵⁹ Miller & Eisenberg, *supra* note __, at 2087; Vogenauer, *supra* note __, at 44 ("Today, New York law and New York courts are widely regarded as being particularly sophisticated and mature and as being perceptive to business in general and the financial industry in particular.") Interestingly, Julian Nyarko has documented a "striking lack of choice-of-forum provisions in commercial contracts" filed with the SEC. Julian Nyarko, *Stickiness and Incomplete Contracts*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3446206.

⁶⁰ NY Court Rules § 202.70(a).

⁶¹ NY CPLR §5-1401 (parties may agree to have disputes arising under a contract resolved in New York, if: (a) the value of the contract is at least \$1 million; and (b) The parties agree to submit to personal jurisdiction in New York); see, e.g., IRB-Brasil Resseguros, S.A. v. Inepar Invest., S.A., 20 N.Y.3d. 310, 315 (2012); Hemlock Semiconductor Pte. Ltd. v. Jinglong Indus. & Comm. Group Co., Ltd., 56 Misc.3d 324 (N.Y. Sup. Ct. 2017); Bristol Inv. Fund Ltd. v. ID Confirm, Inc., 2008 N.Y. Misc. LEXIS 7549, *6-7 (N.Y. Sup. Ct. 2008).

response to New York Bar Association committee reports recommending “affirmative measures to attract foreign business by providing ready access to a competent forum for dispute resolution” and to compete with other international business centers.⁶² New York courts vigorously enforce arbitration clauses, forum-selection clauses, and choice-of-law clauses.⁶³

The Commercial Division prides itself on its flexibility and efficiency. For example, under Rule 9, the parties may choose “accelerated procedures” that promise to end within nine months and require parties to waive a number of procedural rights and defenses, including the right to a jury trial, to recovery of punitive damages, and to interlocutory appeal.⁶⁴

Inspired by the London Commercial Court’s “Financial List” for cases over £50 million, New York also recently opened a “Large Complex Case List” for disputes over \$50 million, which opens opportunities for special procedures, including the use of special referees for discovery or settlement.⁶⁵ The Commercial Division continues to innovate in other ways as well.⁶⁶ These efforts have led the Commercial Division to dramatically improve resolution time for cases and dramatically increased the number of cases that settled before trial.⁶⁷

The New York Commercial Division also has various provisions permitting documents to remain confidential.⁶⁸ But while “confidentiality orders have become a routine part of commercial litigation,” the Commercial Division polices parties’ requests for confidentiality for excess or abuse. In a recent

⁶² Miller & Eisenberg, *The Market for Contracts*, 30 CARDOZO L. REV. 2073, 2091 (2009).

⁶³ See, e.g., *Corcoran v. Ardra Ins. Co.*, 77 N.Y.2d 225, 233 (1990) (citing *Cooper v. Ateliers de la Motobecane, S.A.*, 57 N.Y.2d 408 (1982)) (“[I]t is the policy in New York to encourage resolution of disputes through arbitration, particularly conflicts arising in the context of international commercial transactions.”); see also Miller & Eisenberg, *supra* note __, at 2089-90.

⁶⁴ N.Y. Comp. Codes. R. & Regs. Tit. 22, & 2.70(9). When parties choose these accelerated procedures, they are deemed to have waived a number of procedural rights, including the right to a jury trial and the right to interlocutory appeal. *Id.*, Rule 9(c).

⁶⁵ Stephen P. Younger & Muhammad U. Faridi, *Top 10 New York Commercial Division Cases and Developments of 2017*, PATTERSON BELKNAP LLP, <https://www.pbwt.com/ny-commercial-division-blog/top-10-new-york-commercial-division-cases-and-developments-of-2017> (Jan. 2, 2018).

⁶⁶ Effective October 1, 2018, for example, two new rule amendments encourage parties to use technology assisted review in discovery and to seek immediate trials on early dispositive issues. Patrick G. Rideout & Giyoung Song, *New York’s Commercial Division Continues Its Efforts to Increase Efficiencies*, LEXOLOGY, <https://www.lexology.com/library/detail.aspx?g=b04dcf9f-94c4-43c8-845d-43cb4675f1a0>, Sept. 24, 2018.

⁶⁷ *Id.* at 19. “New York has positioned itself as an attractive forum for resolution of international commercial disputes, with flexible rules permitting contracting parties to agree to procedures specific to their needs. That choice works best for parties who take the necessary time in advance to negotiate not only choice of forum, but also the procedural mechanisms of their choice.” Chaya Weinberg-Brodt, *International Commercial Litigation in New York*, NEW YORK LAW JOURNAL (Oct. 9, 2018), <https://www.law.com/newyorklawjournal/2018/10/09/international-commercial-litigation-in-new-york/?slreturn=20181027165420>.

⁶⁸ See Rule 11, CPLR 3103(a).

decision, the court sanctioned Google for aggressively over-designating documents as confidential.⁶⁹

In addition to promoting itself as a go-to forum for international commercial litigation, New York also strives to “signal to the international business community New York’s commitment to the efficient resolution of court proceedings that relate to international arbitration.”⁷⁰ New York has “engaged in vigorous efforts to attract” adjudication business—both in courts and in arbitration—for much of the last century.⁷¹

London and New York are thus “old school” examples of international commercial courts. They are courts of limited subject-matter jurisdiction, specializing in commercial disputes and including, but not limited, to disputes with international elements. They don’t quite deserve the name of “international commercial court” because they are domestic courts that will hear entirely domestic disputes. But they do make themselves attractive to international commercial disputes, even for controversies with little or no connection to London or New York. Part of that attractiveness is closely tied up in the attractiveness of the substantive law, English and New York law, respectively, that they apply and develop.

II. THE NEW INTERNATIONAL COMMERCIAL COURTS

Over the last fifteen years, a growing number of states around the world have looked to build on the London—and to some extent the New York—example and establish a domestic court that caters specifically exclusively to international commercial disputes, limiting jurisdiction to cases that qualify as both “commercial” and “international.” The courts tend to be English-language-friendly, receptive to common-law procedures and substantive law, and technologically state of the art. Many incorporate desirable characteristics of arbitration, for example, by allowing confidentiality or customized procedures.⁷² Unlike London and New York, these new courts distinguish

⁶⁹ See Thomas J. Hall & Judith A. Archer, *Use and Abuse of Confidentiality Orders*, N. Y. L. J. (Dec. 20, 2018), <https://www.law.com/newyorklawjournal/2018/12/20/use-and-abuse-of-confidentiality-orders/?slreturn=20190113131625>; *Callsome Solutions v. Google*, No. 652386/2014, 2018 WL 5267147 (N.Y. Co. Oct. 23, 2018).

⁷⁰ Reda & Frayn, *supra* note __ (quoting Advisory Council Report on Rules Changes at 3).

⁷¹ Miller & Eisenberg, *The Market for Contracts*, at 2079-87; Reda & Frayn, *supra* note __.

⁷² This study is not meant to be exhaustive (nor could it be, as new international commercial courts seem to be appearing all the time). This Article focuses on new courts or court divisions established in the twenty-first century that specifically target international commercial disputes to illustrate how the rise of these courts explode many common assumptions about international commercial dispute resolution. Other categories of courts exhibit some parallel traits. For example, Ireland currently has a commercial court open to domestic and international disputes; the Cayman Islands, Bermuda, and the British Virgin Islands have recently opened commercial divisions that specialize in disputes involving companies incorporated in those jurisdictions. See Moon, *Nw. L. Rev.* (forthcoming 2020).

themselves “on the quality of their legal services and procedur[es], rather than, necessarily, supplying the [substantive] law itself.”⁷³

While several studies examine the growth of international commercial courts as a unified global phenomenon,⁷⁴ this Part describes three categories of international commercial courts.⁷⁵ The first category includes investment-seeking courts, such as Qatar and Dubai, which were established to attract investment into the country and the region. Second, Singapore and the European courts purport to be striving to become gold-standards as go-to fora in their regions for international commercial dispute resolution. I dub these “litigation destinations.” Litigation destinations usually (but need not) exist in a local legal environment that tries to be friendly to litigation as well as arbitration. Third, the last category considers China’s new international commercial court, aimed to be a one-stop-shop for all international commercial dispute resolution needs, focused on resolving disputes arising out of its investments in the Belt and Road Initiative.⁷⁶ It has unique potential for global influence.

A. INVESTMENT-MINDED COURTS

Some international commercial courts have developed in light of a deeply local need for foreign investment and a desire to attract international commerce and capital.⁷⁷ Localities in Qatar, Dubai and Abu Dhabi in the United Arab Emirates, and Astana (now Nur-Sultan) in Kazakhstan, have established financial centers and free trade zones, complete with a full menu of international

⁷³ Erie, *Legal Hubs*, at 49.

⁷⁴ See Requejo Isidro, *supra* note 12, Tiba, *supra* note 12; Goodwin, *supra* note 12; Demeter & Smith, *supra* note 12; Wilske, *supra* note 12.

⁷⁵ “International” here describes the subject matter jurisdiction of these courts—their jurisdiction specializes in and can be limited to transnational commercial disputes. Some are also international insofar as they employ foreign jurists, allow foreign lawyers to practice before them, incorporate foreign law and procedures different from local courts, and operate in a foreign language (usually English). See Walker, *supra* note __, at 4; Georgia Antonopoulou, *Defining International Disputes – Reflections on the Netherlands Commercial Court Proposal*, NEDERLANDS INTERNATIONAAL PRIVAATRECHT (NIPR) 4/2018, p. 740-755, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3380321 (discussing the definition of “international” for the purposes of defining jurisdiction of such courts).

⁷⁶ The Belt and Road Initiative aims to improve regional cooperation and connectivity on a trans-continental scale. *Belt and Road Initiative*, THE WORLD BANK (March 29, 2018) <https://www.worldbank.org/en/topic/regional-integration/brief/belt-and-road-initiative>. The goal is to strengthen infrastructure, trade, and investment links between China and 65 other countries. *Id.* Together, they will account for over 30 percent of global GDP, 62 percent of the population, and 75 percent of known energy resources. *Id.*

⁷⁷ The establishment of international commercial courts to attract foreign direct investment likely works better than U.S. state business courts’ attempts to create business courts to attract out-of-state companies to relocate or do more business in a particular state. See Coyle, *Business Courts*, *supra* note __ at 1940 (explaining irrelevance of business court availability to business location decisions).

commercial dispute resolution options, including international commercial courts, to reassure foreign investors and the international financial world that their local investments will be protected. These jurisdictions have erected new, state of the art facilities. They build on existing best practices in international commercial dispute resolution—providing a hospitable forum for both litigation and arbitration with well-respected, international judges. They hire British and other foreign experts to design their procedures and institutions and to serve as judges. Especially at first, their innovations primarily came in the form of transplanting English judicial practices and often English judges themselves.

This section profiles the international commercial courts established in Qatar and Dubai, the oldest investment-minded courts. The newer examples, the Court of the Astana International Financial Center (AIFC) in Kazakhstan,⁷⁸ and the Abu Dhabi Global Market Courts (ADGMC),⁷⁹ follow a similar model, establishing English-language, common-law-based courts that employ international jurists, are friendly to arbitration, and seek to establish themselves as state-of-the-art dispute resolution centers to attract foreign investment and assure international constituencies of their legitimacy. These courts do not advertise themselves as litigation destinations for all global disputes; but they may seek to repatriate disputes involving locals and prevent them from going to London or elsewhere.⁸⁰

Interestingly, as these courts gain prominence and acceptance, they can become regional legal hubs, and shift their focus from providing stability and predictability to cultivating flexibility and adapting to modern challenges. Aside from the old school “international” commercial courts, the Qatar and Dubai courts, as teenagers, are the oldest courts discussed in this Article. Their

⁷⁸ Nicolás Álvaro Zambrana-Tévar, *The Court of the Astana International Financial Center in the wake of Its Persian Gulf Predecessors*, (working paper) (Dec. 31, 2018), available at https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3308296 (the Astana financial center and court will be modeled after Dubai; the president of the AIFC court will be Lord Woolf, former Lord Chief Justice of England and Wales); Erie, *Legal Hubs*, supra note __; Press Release: AIFC Court and IAC “eJustice” Launch, AIFC COURTS (Feb. 26, 2019), <http://aifc-court.kz/press-releases>. Yerbolat Uatkhonov, *AIFC Court, IAC consider five cases in 2019*, Jan. 5, 2020, *The Astana Times*, <https://astanatimes.com/2020/01/aifc-court-iac-consider-five-cases-in-2019/> (“Our dispute resolution is quick, accessible, cost effective, impartial and, above all, incorruptible.”).

⁷⁹ Wilske, supra note __, at 165; Walker at 6 (“ADGM Courts are largely based on the English judicial system with a physical and electronic registry that supports their operations and hearings in Abu Dhabi and around the world.”).

⁸⁰ See, e.g., Frances Gibb, *The Times*, *UK judges head new court in Kazakhstan*, EMBASSY OF THE REPUBLIC OF KAZAKHSTAN IN THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND (Feb. 1, 2018), <http://www.mfa.gov.kz/en/london/content-view/uk-judges-head-new-court-in-kazakhstan> (“Woolf accepts that a ‘very small number’ of cases that would have gone to London might now go to the new court. ‘But it does not detract from our commercial court; on the contrary, it promotes it in a part of the world that doesn't have that tradition.’”).

track record demonstrates that the difference between being an investment-minded court and an aspiring litigation destination can be fluid. But it also shows that international commercial courts can serve multiple masters and be designed to further multiple goals.

1. Qatar

In 2005, Qatar established the Qatar Financial Centre (QFC) to attract international investment to the country.⁸¹ The QFC creates a legislative framework to protect entities established in the QFC from the operation of ordinary Qatar law (other than criminal law). The laws aim to be business- and user-friendly to encourage foreign direct investment in Qatar. For example, they guarantee QFC entities the ability to repatriate profits and to be owned by foreigners. These reforms replaced the existing dual legal framework, which had separate courts for Muslim Qataris and for non-Muslim foreigners, governed by Shari'a law.

The QFC also includes the Qatar International Court and Dispute Resolution Centre, also known as the Qatar International Court (QIC).⁸² The QIC's jurisdiction is limited to international commercial disputes. The court's official mission is "to provide a world-class international court and dispute resolution Centre" and promotional materials state that the institution strives "to be recognized as the world's leading forum for the resolution of international civil and commercial disputes."⁸³ Nevertheless, scholars describe the original impetus for creating the court as promoting investment and demonstrating stability.⁸⁴

The QIC is open to claims regardless of their connection with Qatar if the parties choose the QIC in their contract.⁸⁵ It aims to be a state-of-the-art dispute resolution center that incorporates many of the most desirable features of the London model. The QIC operates in English (although parties can request to have proceedings in Arabic).⁸⁶ It follows common law procedures,⁸⁷ and parties

⁸¹ Zain Al Abdin Sharar & Mohammed Al Khulaifi, *The Courts in Qatar Financial Centre and Dubai International Financial Centre: A Comparative Analysis*, 46 H.K. L. J. 529, 533 (2016).

⁸² See *The Court Overview*, QATAR INTERNATIONAL COURT AND DISPUTE RESOLUTION CENTRE, <https://www.qicdrc.com.qa/court-overview-0>.

⁸³ Wilske, *supra*, note __ at 164.

⁸⁴ Sharar & Al Khulaifi, *supra* note __, at 533.

⁸⁵ Requejo, *supra*, note __, at 9.

⁸⁶ Walker at 7.

⁸⁷ "It is now accepted that the most understood and accepted jurisdiction in relation to commercial matters is the common law jurisdiction. As a result any financial centre which seeks international recognition and participation has no choice but to consider a dispute resolution regulatory structure which is based on the common law. A regulatory regime based on the common law by necessity implies that it will be English speaking because the main proponents of the common law are English speakers." Sharar & Al Khulaifi, *supra* note __, at 539.

can choose the substantive law applicable to their claims. The judges include some Qatari judges and some retired judges from common and civil law countries.⁸⁸ Decisions are typically unappealable and confidential proceedings are available for “good reason.”⁸⁹

Notably, Qatar sees the importance of the QIC as not only providing a fair, unbiased, sophisticated courts system operating in English and based in common law, but also a center for multiple kinds of dispute resolution, including arbitration. In 2017 it enacted a new arbitration law⁹⁰ based on the UNCITRAL Model Law on International Commercial Arbitration. This change should make Qatar more “arbitration friendly” and a generally more attractive location for dispute resolution.⁹¹

The QIC itself offers judges as well as arbitrators and arbitration facilities. Parties can select the QIC as an arbitral seat, as the court administers arbitrations as well and the judges may separately serve as arbitrators.⁹² It aims to be a one-stop shop for all international commercial dispute resolution needs.⁹³ As an unusual feature, the QIC has no fees.⁹⁴

There appear to be no available statistics on the number of cases the QIC has heard or the number of contracts designating the QIC.⁹⁵ Existing data suggests that some QIC proceedings took one to two years, suffering from inefficiencies with respect to appointing experts and setting deadlines for expert reports.⁹⁶ The recent establishment of an eCourt, the QICDRC Case Management System, may address some of these issues.⁹⁷

2. Dubai

Dubai, the most populous emirate in the United Arab Emirates, opened the Dubai International Financial Center (DIFC) in 2004 to be “a hub for institutional

⁸⁸ Sharar & Al Khulaifi, *supra* note __, at 534; Wilske, *supra* note __, at 163-164; Walker, at 7; <https://www.qicdrc.gov.qa/>.

⁸⁹ QIC Rules, Article 28(3).

⁹⁰ *Law No. 2 of 2017 Promulgating the Civil and Commercial Arbitration Law*, QATAR INTERNATIONAL COURT AND DISPUTE RESOLUTION CENTRE https://www.qicdrc.com.qa/sites/default/files/law_no_02_2017_promulgating_the_civil_and_commercial_arbitration_law.pdf.

⁹¹ White & Case, *The Role of the English Courts Post Brexit: Emerging Challengers?*, JD SUPRA (Oct. 31, 2018), <https://www.jdsupra.com/legalnews/the-role-of-the-english-courts-post-26537/>.

⁹² Walker at 7.

⁹³ Wilske, *supra*, note __ at 164-165.

⁹⁴ *Id.*

⁹⁵ Requejo, *supra* note __, at 10.

⁹⁶ Requejo, *supra* note __, at 10.

⁹⁷ *Id.*

finance and . . . a regional express way for capital and investment.”⁹⁸ It became fully operational in 2006.⁹⁹ Like Qatar’s financial center, the DIFC establishes a business-friendly legal jurisdiction for international investment that protects foreign companies from the local Shari’a law (in Arabic) that would otherwise govern commerce in Dubai. Establishing this free zone required a UAE constitutional amendment.¹⁰⁰ Dubai hired prominent British law firms to draft the DIFC legislation.¹⁰¹ These rules were modeled on the London Commercial court, but with some revisions, for example, replacing British evidence rules with the International Bar Association rules of evidence for arbitration.¹⁰²

The DIFC has its own court system as well as an arbitration center. The DIFC Courts have six foreign judges and three Emirati judges.¹⁰³ The DIFC proclaims that its laws are based on global best practices in international financial and commercial law.¹⁰⁴ It operates under an English-language, common-law-based legal structure. The parties can choose the substantive law applicable to their claims and the background law is local “DIFC law,” “the result of legislation and common law decisions.”¹⁰⁵ It has a liberal approach to allowing proceedings to be held confidentially.¹⁰⁶ The DIFC Courts are “set up to promote settlement.”¹⁰⁷ Over 90% of cases settle before final judgment.¹⁰⁸

In 2011, the DIFC court removed the requirement that disputes have physical connections to Dubai, and recognized consent-based jurisdiction if the parties agreed pre- or post-dispute.¹⁰⁹ According to Jayanth Krishnan, this development emboldened the DIFC court judges to broaden their interpretation of the court’s jurisdiction, for example, to hear cases involving Islamic banking, and to reject motions to dismiss on the basis of forum non conveniens.¹¹⁰

The DIFC courts also offer appealing characteristics in terms of joinder and appellate review. On joinder, in the DIFC court, “connected contracts and

⁹⁸ Sharar & Al Khulaifi, *supra* note __, at 536. See also Erie, Legal Hubs, at 32 (describing Dubai’s efforts to “repatriate Middle Eastern money,” “secure FDI and encourage international banks to lend in Dubai,” including opening the DIFC courts).

⁹⁹ Requejo, *supra* note __.

¹⁰⁰ Erie, Legal Hubs, at 32.

¹⁰¹ Erie, Legal Hubs, at 33.

¹⁰² Erie, Legal Hubs, at 33.

¹⁰³ Requejo, *supra* note __, at 2. The DIFC judges include five English judges, and an Australian, New Zealand, and Hong Kong judge. Walker, *supra* note __, at 6; DIFC Website.

¹⁰⁴ *Id.*; *Dubai International Financial Centre*, <http://www.difc.ae/discover-difc>.

¹⁰⁵ Erie, Legal Hubs, at 32.

¹⁰⁶ See Rule 35.4; *id.* Rule 35.4(3) (permitting proceedings to be private if, for example, “it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality”).

¹⁰⁷ JAYANTH K. KRISHNAN, THE STORY OF THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS: A RETROSPECTIVE 60 (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3280883.

¹⁰⁸ Krishnan, *supra* note __, at 60.

¹⁰⁹ Requejo, *supra*, note __, at 7-8; Krishnan, *supra* note __, at 40.

¹¹⁰ Krishnan, *supra* note __.

parties can be joined, and proceedings can be consolidated.”¹¹¹ The right to appeal cannot be waived and “unusually, the lower court’s decision may be appealed by a person who is not a party ... but is directly affected by a judgment or order.”¹¹²

The DIFC Courts have also been recognized as being “entrepreneurial in terms of enforcement.”¹¹³ DIFC Court judgments are fully enforceable within the DIFC. In another case, the Court established that it would fully recognize and enforce an English judgment as though it were a Dubai judgment. In the same period, some foreign courts began enforcing DIFC judgments.¹¹⁴ To enforce DIFC judgments outside of the DIFC but within the UAE, prevailing parties can follow specified procedures.¹¹⁵ Each nation follows its own law for recognition and enforcement of foreign judgments, such as those from the DIFC courts. The UAE is a party to several multilateral and bilateral recognition and enforcement treaties and the DIFC courts themselves have independently established a number of non-binding agreements with partner institutions around the world, such as the London Commercial Court, the Federal Court of Australia, the SDNY, the Supreme Court of Singapore, and the Supreme Court of the Republic of Kazakhstan.¹¹⁶

The DIFC Courts also offer parties the ability to bring a court-rendered money judgment to arbitration at the DIFC-LCIA Arbitration Centre (or any other arbitration center).¹¹⁷ This unusual process would allow a prevailing party to convert its court money judgment into an arbitral award, which can be easier to enforce in a broader number of countries under the New York Convention.¹¹⁸

The DIFC has established itself as a hospitable legal environment for investment as well as for dispute resolution. As a marker of success, in 2014, the tribunal heard its first case in a dispute arising out of a contractual agreement that assigned DIFC jurisdiction.¹¹⁹ In 2016, DIFC decided 217 disputes involving, in the aggregate, more than \$500 million.¹²⁰ The Singapore Academy of Law reported that in 2016, the number of contracts drafted in English in the Middle East and North Africa choosing the DIFC as the seat for disputes increased to

¹¹¹ Walker at 11 (DIFC Court rules pt. 20).

¹¹² Walker at 15.

¹¹³ Erie, Legal Hubs, at 35.

¹¹⁴ *Id.* (discussing Australian court’s enforcement of DIFC judgment).

¹¹⁵ Erie at 35.

¹¹⁶ Erie at 36 & n.217. Pursuant to such agreements, for example, the India updated its civil code in January 2020 to make UAE court judgments, including DIFC and ADGM court judgments, more easily enforceable in India. Vinson & Elkins, Amendment to the Indian Civil Code, <https://www.velaw.com/insights/amendment-to-the-indian-civil-code/>.

¹¹⁷ Wilske, *supra* note __, at 163; Requejo, draft at 9.

¹¹⁸ See *supra* [discussion of New York Convention].

¹¹⁹ Hwang, *supra* note __, at 197.

¹²⁰ Shearman & Sterling, *supra* note __ (discussing global trend).

42% (while London's share went from 52% to 25% from 2015 to 2016).¹²¹ At least one law firm has recommended that clients include the DIFC court in their forum-selection clauses.¹²² The high settlement rate for DIFC cases could be seen as a sign that "the court is doing its job" and creating "certainty and trust."¹²³ The DIFC Courts have found in favor of the government in cases involving the DIFC Authority, but they have also ruled against quasi-government corporations.¹²⁴

The DIFC Courts are continuing to evolve. In 2017, the DIFC Courts and the Dubai Future Foundation launched an initiative to create "Courts of the Future," which will be "designed to support companies developing new technologies, sectors and applications—from blockchain to 3D-printing."¹²⁵ Thus, this investment-minded court appears to be trying to transform itself into a regional litigation destination.

The DIFC's modern laws include a modern Arbitration Law.¹²⁶ According to the DIFC website, "[b]usinesses in Dubai are free to choose between litigation and arbitration; common versus civil law; or English versus Arabic language – whichever system best suits their specific needs. The driving force has not been

¹²¹ Requejo, *supra* note __.

¹²² Client Alert: New Dispute Resolution Options in the DIFC Courts, Latham & Watkins, 2012, <https://www.lw.com/thoughtLeadership/dispute-resolution-options-difc-courts>.

¹²³ Krishnan, *supra* note __, at 61. According to a local practitioner interviewed in 2017, "Opportunities for investment and growth here [in the litigation business in Dubai] are greater now than ever, particularly in IP and litigation." Alex Taylor, *Dubai: The Gateway To The Middle East For International Firms*, THE LAWYER (Oct. 13, 2017), <https://www.thelawyer.com/issues/the-lawyer-october-2017/law-firms-in-middle-east-2017/>; *id.* ("And this niche market, according to Al Tamimi managing partner Husam Hourani, is what gives smaller Middle Eastern firms an advantage. 'We don't do English law – we do local law,' he says. 'That's what international firms can't offer. We've focused on areas where we have a competitive edge: litigation, for example, now makes up half our revenue. We've begun building our business around IP, employment, compliance, education, healthcare, sports and consumer protection. These are niche areas which requires a niche team with a niche understanding.'").

¹²⁴ Erie at 38.

¹²⁵ *Global Consultation Launched in Dubai to Define Courts of the Future*, DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS (Nov. 29, 2017), <https://www.difccourts.ae/2017/11/29/global-consultation-launched-in-dubai-to-define-courts-of-the-future/>. Maryland and Delaware have similar aspirations. See *Maryland Business and Technology*, MARYLAND COURTS, <https://www.courts.state.md.us/businesstech>.

¹²⁶ Hwang, *supra* note __ at 195; *see also* Wilske, *supra*, note __ at 163 ("Interestingly, the DIFC Courts' website has a section that deals specifically with arbitration, emphasizing that "The DIFC Courts have appointed a number of judges with extensive background in international arbitration, giving parties immense trust in all arbitration related Court proceedings" as well as "The DIFC Courts can provide parties with support for . . . many . . . arbitration related issues. The DIFC Courts therefore represent an exciting new prospect for parties seeking to arbitrate in the MENA region and around the world." This seems to indicate that the DIFC wants to satisfy all kind of disputants whether they prefer litigation or arbitration.").

competition between courts for cases, but rather competition between countries for investment.”¹²⁷

B. ASPIRING LITIGATION DESTINATIONS

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

For some, like Singapore and Paris, these courts seek to add to an existing prominence as an “arbitration destination” (a desirable arbitral seat). For others, like Amsterdam and Frankfurt, the localities have relatively arbitration-friendly domestic law, but are not otherwise go-to arbitration destinations. The courts described in this section are for *litigation*—not just enforcing arbitration clauses and awards. Their stated goal is to be designated in choice-of-forum clauses in international commercial contracts and to provide a desirable venue for litigation of non-contract-based commercial disputes.

Litigation destinations are often modeled on or inspired by the London Commercial Court. They have broad jurisdiction. Many do not require any local connection between the case and the forum state as a basis for jurisdiction. But while London and New York distinguished themselves as providers of both substantive law and a forum for adjudication, these new courts seem less concerned about developing standard-bearing substantive law. On substantive law, their selling point is that they robustly enforce choice-of-law clauses so parties get the substantive law of their choice.¹²⁸

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

¹²⁷ *Global and Local Challenges in Commercial Dispute Resolution*, DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS, (Jan. 25, 2018) <https://www.difccourts.ae/2018/01/25/global-and-local-challenges-in-commercial-dispute-resolution/>.

¹²⁸ See, e.g., Adeline Chong & Man Yip, *Singapore as a centre for international commercial litigation: party autonomy to the fore*, 15 J. Priv. Int'l L. 97(2019); see also Rachel Chiu Li Hsien, *Clothing the Bare: The Enforcement of Arbitration Clauses in Singapore*, NYU LAW (March 2, 2018), <https://blogs.law.nyu.edu/transnational/2018/03/clothing-the-bare-the-enforcement-of-arbitration-clauses-in-singapore/> (noting the sparse choice-of-law analysis that led to the court applying Singapore law); SICC Procedural Guide, 20; Guangjian Tu, *The flowing tide of parties' freedom in private international law: party autonomy in contractual choice-of-law in China*, 15 J. Priv. Int'l L. 234 (2019). Liang, Jieying, *Party Autonomy in Contractual Choice of Law in China*, Chap 3. Paragraph 1.

1. Singapore

Singapore seems set on becoming the go-to destination for all international dispute resolution needs, especially in Asia.¹²⁹ In 1991, Singapore established the Singapore International Arbitration Centre, which has become one of the top three or four choices for arbitration internationally in a survey of international arbitration users.¹³⁰ In 2014, Singapore established a mediation center to supplement its ADR offerings.¹³¹

Then, in 2015, Singapore opened the Singapore International Commercial Court (SICC) as a division of the Singapore High Court.¹³² The SICC's stated purpose is "to enhance [Singapore's] status as a leading forum for legal services and commercial dispute resolution" and to become "an Asian dispute resolution hub catering to international disputes with an Asian connection."¹³³ Its target audience at least for now is regional rather than global.

While it had already established state-of-the-art arbitration and mediation centers and law highly deferential to arbitration agreements,¹³⁴ Singapore saw the SICC as an important complement to its dispute resolution offerings. To this end, the SICC is staffed by international judges,¹³⁵ and permits admission of foreign lawyers, confidential proceedings, and limitations on appellate review.¹³⁶ It is also receptive to parties' customization of evidence and procedure rules.¹³⁷

A key feature that sets the SICC apart is its adaptability. The highly customizable procedures are intended to cater to the parties' needs and reflect foreign legal traditions.¹³⁸ Parties may opt out of the Singapore Rules of

¹²⁹ *The Singapore Dispute Resolution Institutions – What and Why (Part 2 of 4)*, SIDRA ACADEMY (2017), <http://www.sidra.academy/blog/singapore-dispute-resolution-institutions-part-2/>.

¹³⁰ See QUEEN MARY UNIVERSITY OF LONDON, *supra* note 18 (placing Singapore third); ICC Secretariat's Dispute Resolution 2018 Statistics, http://files-eu.clickdimensions.com/iccwboorg-avxnt/files/web_icc_disputeresolution2018statistics.pdf?m=11.6.2019%2011%3A46%3A22&_cldee=YWdvaW5zQHZlbGF3LmNvbO%3D%3D&recipientid=contact-780a89b59404e911a99f000d3ab38ab1-e7a8451ec8964a3399514c904bdf1e2&esid=5a1d9a87-22a1-43b0-8004-4bc0ca257142 at 12 (placing Singapore fourth for ICC arbitrations); Requejo, *supra*, note __.

¹³¹ See Erie, Legal Hubs, at 28.

¹³² *Id.*; Supreme Court of Judicature Act (Singapore, cap 322, 2007 rev. ed.) s 18A ("Supreme Court of Judicature Act").

¹³³ Singapore International Commercial Court ('SICC') Committee, Report of the Singapore International Commercial Court Committee, 5 (Report, SICC Committee, November 2013) ("SICC Committee Report"); Hwang, *supra*, note __ at 196.

¹³⁴ Rachel Chiu Li Hsien, *Clothing the Bare: The Enforcement of Arbitration Clauses in Singapore*, NYU LAW (March 2, 2018), .

¹³⁵ The SICC bench is comprised of twenty-two Singapore Supreme Court Judges and twelve International Judges. *Judges*, SICC (June 2018), <https://www.sicc.gov.sg/about-the-sicc/judges>.

¹³⁶ *Arbitral Courts*.

¹³⁷ Supreme Court of Judicature Act § 18K.

¹³⁸ Rules of the Court, Rule 23; Andrew Godwin, Ian Ramsay & Miranda Webster, *International Commercial Courts: The Singapore Experience*, 18 MELB. J. INT'L L. 219, 239 (2017).

Evidence, for example.¹³⁹ In terms of the overall legal structure of the court, both the court and the legislature have been receptive to criticism. For example, originally the SICC had a pre-action certification process designed to give parties an early indication on key issues, such as jurisdiction.¹⁴⁰ After parties complained about that process, the legislature removed it in 2017.¹⁴¹

The SICC does not hide its intention to compete with arbitration, to borrow some of its preferable characteristics and to address some of its shortcomings.¹⁴² For example, the SICC's international focus is in part intended to create a "freestanding body of international commercial law" and address the weaknesses of arbitration in creating law.¹⁴³ The SICC rules also has wide discretion to allow joinder of non-parties to the SICC agreement.¹⁴⁴ This permissive joinder rule was adopted to counter the difficulty in arbitration of joining parties that were not signatories of the arbitration agreement.¹⁴⁵ For appeals, SICC offers an opportunity to appeal to the Singapore High Court of Appeal but also allows parties to agree to limit or exclude that right.¹⁴⁶

Singapore has received recognition for its excellence in dispute resolution services. As a country, it boasts the shortest dispute resolution time worldwide and is ranked first on the ease of enforcing contracts.¹⁴⁷ Since the SICC was created in 2015, it has rendered 51 judgments.¹⁴⁸ Most of its cases have been referred by the Singapore High Court.¹⁴⁹ The cases have been high stakes; the

¹³⁹ Tiba, *supra* note __, at 32.

¹⁴⁰ Supreme Court of Judicature (Amendment) Act 2014.

¹⁴¹ Supreme Court of Judicature (Amendment) Bill (No. 47/2017) (Bill); *Singapore International Commercial Court to Have Jurisdiction Over Litigation Related to International Commercial Arbitration*, BAKER MCKENZIE (January 23, 2018), <https://www.bakermckenzie.com/en/insight/publications/2018/01/sicc-jurisdiction-over-litigation>.

¹⁴² Sundaresh Menon, *The Rule of Law and The SICC*, Singapore International Chamber of Commerce Distinguished Speaker Series, Jan. 10, 2018, https://www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/b_58692c78-fc83-48e0-8da9-258928974ffc.pdf; Sundaresh Menon, *Speech, International Commercial Courts* (2015), available at <https://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/opening-lecture--difc-lecture-series-2015.pdf>.

¹⁴³ Singapore International Commercial Court ('SICC') Committee, 'Report of the Singapore International Commercial Court Committee' (Report, SICC Committee, November 2013) at 10 ('SICC Committee Report').

¹⁴⁴ Rules of Court O 110 r 9; Drossos Stamboulakis & Blake Crook, *Joinder of Non-Consenting Parties*, 1 ERASMUS L. REV. 98 (2019).

¹⁴⁵ Johannes Landbrecht, *The Singapore International Commercial Court (SICC) – an Alternative to International Arbitration?*, 34 ASA BULL. 1/2016, 118 (March 2016).

¹⁴⁶ Walker at 15.

¹⁴⁷ *World Bank Doing Business Reports 2018*, available at <http://www.doingbusiness.org/en/data/exploretopics/enforcing-contracts>.

¹⁴⁸ See *Judgments*, SICC (last updated Feb. 7, 2020), <https://www.sicc.gov.sg/hearings-judgments/judgments>.

¹⁴⁹ See *id.* [Cite the one case where the contract chose SICC as the forum.]

first decision involved a S\$1.1 billion dispute (about US \$800 million).¹⁵⁰ The decisions in these cases have been delivered expeditiously—within three months of the hearing.¹⁵¹ Some were decided in less than a month.¹⁵² Singapore appears poised and ready to compete for adjudication business at an extremely high level. Its arbitration center and disputes resolution services are already making a name for themselves. The new SICC may soon join their ranks. In 2018, “[t]he legal industry contributed \$2.3 billion to Singapore’s GDP ... , up from \$1.5 billion in 2009.”¹⁵³

On the other hand, “the neutrality of Singapore’s courts has been questioned, particularly in politically sensitive cases.”¹⁵⁴ Tests of the SICC’s neutrality may come in the future as its cases become more complex and possibly involve government entities.

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

Several cities in Europe have either recently opened or are considering opening a new court, chamber, or division of their courts devoted exclusively to international commercial disputes. Commentators see these efforts straightforwardly as an attempt “to challenge the hegemony of English courts in international commercial litigation,”¹⁵⁵ especially given the uncertainty regarding the UK’s stature in Europe and worldwide in the aftermath of the Brexit vote.¹⁵⁶ Some feared UK judgments would no longer be easily enforceable throughout the EU,¹⁵⁷ and many cited that fear as a reason why other European states opened their own international commercial courts.¹⁵⁸ Many, but not all, of

¹⁵⁰ BCBC Singapore Pte Ltd. v PT Bayan Resources, SGHC(I) 01 (May 12, 2016), available at https://www.sicc.gov.sg/docs/default-source/modules-document/judgments/bcbc-singapore-pte-ltd-and-anor-v-pt-bayan-resources-tbk-and-anor_1a989d20-2254-46e4-8ed0-11473dee08bc_e58fcfb-1e9e-42ba-b279-eae60dbd4ce1.pdf.

¹⁵¹ See *Judgements*, SICC (October 5, 2018), <https://www.sicc.gov.sg/hearings-judgments/judgments>.

¹⁵² See *id.*

¹⁵³ Tham Yuen-C, *54 nations to attend S’pore Convention on Mediation signing*, STRAITS TIMES (July 30, 2019), <https://www.straitstimes.com/singapore/54-nations-to-attend-spore-convention-on-mediation-signing>.

¹⁵⁴ Erie, Legal Hubs, at 28 (citing Mark Tushnet, *Authoritarian Constitutionalism*, 100 Cornell L. Rev. 391 (2015)); Silverstein.

¹⁵⁵ Giesela Ruehl, *Doors Open for First Hearing of International Chamber at Paris Court of Appeal*, CONFLICT OF LAWS (June 5, 2018), <http://conflictoflaws.net/2018/doors-open-for-first-hearing-of-international-chamber-at-paris-court-of-appeal/>.

¹⁵⁶ Cf. Queen Mary, *supra* note __; Vogenauer_____. [both describing UK’s favorite status before Brexit.] See, e.g., Giesela Ruehl, *Judicial Cooperation in Civil and Commercial Matters After Brexit: Which Way Forward?*, 67 Int’l and Comp. L. Q. 99 (2018); Pippa Rogerson, *After Brexit: Is International Commercial Litigation in London Doomed?*, New Law Journal, Dec. 16, 2016; Wilske, *supra* note __ at 169 (calling the European international commercial courts “Brexit Wannabe Profiteers”).

¹⁵⁷ See, e.g., Ruhl.

¹⁵⁸ See *id.*; EU 2018 initiative.

the complicated questions about the enforceability of UK judgments post Brexit have now been resolved.¹⁵⁹ Brexit does not, however, directly affect London's prominence as an arbitration center¹⁶⁰ because recognition of arbitral awards had already been governed by a preexisting and unaffected international regime, the New York Convention. But the uncertainty surrounding what will happen with respect to London's status as an international financial and legal center over the long term may compromise London's attractiveness and the ease of enforcing judgments or arbitral awards within the UK itself, if defendants' assets leave the UK.¹⁶¹ Brexit also has come to represent the contradiction of some of English law's most appealing attributes: its predictability and stability.

This section will discuss the new international commercial courts established and proposed in Amsterdam, Paris, Frankfurt, and Brussels. These are the most prominent, but not the only examples of efforts to form international commercial courts within Europe. Other German cities have also opened similar international commercial chambers. Reports indicate that Zurich and Geneva are considering creating a specialized international commercial court chamber that would operate in English.¹⁶² Dublin has a commercial division that follows the "old school" model: it is not specifically dedicated to international disputes, but it could be well positioned to compete with the UK for cross-border dispute resolution in a post Brexit era when it is the only English-speaking and common law country in the EU.¹⁶³ There may be more in the future.

Amsterdam. The Netherlands has long been a hub of international commerce and is increasingly a litigation destination for certain kinds of transnational disputes, including global class actions.¹⁶⁴ Dutch courts already permitted parties to submit exhibits in English and sometimes permit hearings

¹⁵⁹ See Anna Pertoldi and Maura McIntosh, Enforcement of judgments between the UK and the EU post-Brexit: where are we now?, <http://disputeresolutionblog.practicallaw.com/enforcement-of-judgments-between-the-uk-and-the-eu-post-brexit-where-are-we-now/> (Jan. 20, 2020).

¹⁶⁰ See, e.g., Berardicurti, *supra* note __.

¹⁶¹ See Amie Tsang & Matthew Goldstein, *For Wall Street Banks in London, It's Moving Time*, N.Y. TIMES (Feb. 17, 2019), <https://www.nytimes.com/2019/02/17/business/brexit-banks-wall-street-london.html>.

¹⁶² Matic, *supra* note __; Eva Lein, *International Commercial Courts in Switzerland*, in INTERNATIONAL BUSINESS COURTS 115 (Kramer & Sorabji eds., 2019).

¹⁶³ *Promoting Ireland as a Leading Centre Globally for International Legal Services*, THE BAR OF IRELAND (May 9, 2018), <https://www.lawlibrary.ie/media/lawlibrary/media/Secure/Promoting-Ireland-as-a-leading-centre-globally-for-international-legal-services.pdf>.

¹⁶⁴ See Pamela Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. Rev. 767 (2017) (discussing WCAM); Xandra Kramer, *Securities Collective Action and Private International Law Issues in Dutch WCAM Settlements: Global Aspirations and Regional Boundaries*, 27 GLOBAL BUSINESS & DEVELOPMENT L.J. 235 (2014).

to be conducted in English.¹⁶⁵ Court judgments are rendered in Dutch but are accompanied by an English summary.¹⁶⁶

One unusual feature of Dutch procedure is the conservatory arrest, also known as Dutch freezing/Mareva injunctions. These orders prevent assets located in the Netherlands from being removed or otherwise disposed of during the proceedings. Dutch courts award these orders more readily than common law judges, which may attract potential plaintiffs.¹⁶⁷

On January 1, 2019, the Dutch launched the Netherlands Commercial Court, which includes a trial level and a dedicated appellate level court.¹⁶⁸

Despite the generalist name, the NCC's jurisdiction is limited to international disputes.¹⁶⁹ It does not require the parties to have any ties to the Netherlands if they consent to the NCC's jurisdiction.¹⁷⁰ The courts use Dutch procedure, but all proceedings and judgments are in English.¹⁷¹ Evidence may be submitted in Dutch, German, French, or English without requiring translation.¹⁷² Thus, the NCC's claim to fame is that it is "an English-language environment within a civilian jurisdiction."¹⁷³ Its website has a sleek video advertising that the court offers "the best of both worlds."¹⁷⁴ The website also boasts that Dutch courts are ranked number one worldwide by the World Justice Project and that "NCC judges are impartial, independent and experienced in complex international business matters."¹⁷⁵

The trial and appellate level courts are part of the ordinary Dutch judiciary as chambers of the Amsterdam trial level and appellate courts. The judges are selected from the Dutch judiciary for their experience in commercial disputes and their language skills. A panel of three judges and one law clerk hears disputes.¹⁷⁶ The appellate division hears appeals in English, but subsequent appeals to the highest court of the Netherlands take place in Dutch. Parties must

¹⁶⁵ Rotterdam courts permit maritime, transportation, and international trade cases to be held in English; the Hague courts allow the same for intellectual property rights cases.

¹⁶⁶ Friederike Henke, *Netherlands Commercial Court: English proceedings in The Netherlands*, CONFLICT OF LAWS (Oct. 25, 2018), <http://conflictoflaws.net/2018/netherlands-commercial-court-english-proceedings-in-the-netherlands/>.

¹⁶⁷ *Netherlands Commercial Court*, RECHTSPRAAK <https://www.rechtspraak.nl/English/NCC/>.

¹⁶⁸ *Id.*

¹⁶⁹ NCC Rules, art. 1.3.1; 1.3.1(b) (defining "international").

¹⁷⁰ "Article 107 of the Dutch Code of Civil Procedure allows jurisdiction over codefendants if sufficient connectivity exists between or among the claims – so article 107 is similar to article 8(1) of the Brussels I Regulation." <https://www.natlawreview.com/article/dutch-court-approves-collective-settlement-fortis-shareholders-claims>.

¹⁷¹ *Id.*

¹⁷² Henke, *supra* note __.

¹⁷³ *NCC and Arbitration Factsheet*, <https://www.rechtspraak.nl/SiteCollectionDocuments/factsheet-netherlands-commercial-court-and-arbitration.pdf>.

¹⁷⁴ *Rechtspraak*, DE RECHTSPRAAK, <https://www.rechtspraak.nl/>.

¹⁷⁵ *Id.*

¹⁷⁶ NCC Rules, Art. 3.5.2.

be represented by lawyers who are members of the Dutch bar, for only they can carry out “acts of process.”¹⁷⁷ Parties may not proceed pro se.¹⁷⁸

The NCC Rules focus on flexibility. The Rules provide that “at the parties’ request or of its own initiative, the Court gives all such directions as may facilitate the just, fair, and speedy disposition of the action.”¹⁷⁹ With some exceptions, the parties may agree to depart from the standard rules of evidence.¹⁸⁰ Confidentiality orders are permitted “for compelling reasons.”¹⁸¹ But the judgments are ordinarily public.¹⁸² The unsuccessful party bears the costs of lawyers’ fees and court fees,¹⁸³ which are substantially higher than the fees in ordinary Dutch courts.¹⁸⁴ The NCC rules also contemplate broad authority to add third parties or consolidate cases at either the parties’ or the court’s initiative.¹⁸⁵

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

Paris. Paris prides itself on being one of the most arbitration-friendly jurisdictions in the world.¹⁸⁸ It is home to the International Chamber of

¹⁷⁷ Art. 3.1.2.

¹⁷⁸ Art. 3.1.1.

¹⁷⁹ Art. 3.4.1.

¹⁸⁰ Art. 8.3.

¹⁸¹ Art. 8.4.2.

¹⁸² Art. 9.4.

¹⁸³ Art. 10.3.

¹⁸⁴ Kramer, *supra* note __.

¹⁸⁵ NCC Rules, Arts. 6.4, 6.5.

¹⁸⁶ N J Margetson & N H Margetson, *Arbitration Procedures and Practice in The Netherlands: Overview*, REUTERS PRACTICAL LAW (Aug. 1, 2018), [https://uk.practicallaw.thomsonreuters.com/4-542-6425?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/4-542-6425?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1).

¹⁸⁷ NCC and Arbitration Factsheet, <https://www.rechtspraak.nl/SiteCollectionDocuments/factsheet-netherlands-commercial-court-and-arbitration.pdf>.

¹⁸⁸ Shearman & Sterling, *supra* note __; Cuniberti, *Fordham Int’l L. J.*, *supra* note __, at 420 (“French law has now reached the extreme position where arbitration agreements are deemed valid and enforceable in all circumstances, irrespective of the traditional requirements of the French law of contract, or indeed of any other law.”).

Commerce (ICC), established in 1923,¹⁸⁹ which hosts the International Court of Arbitration, a leading global arbitral institution.¹⁹⁰

The development of an international commercial court in 2010 and of a new international chamber of the Court of Appeal in 2018 built upon this arbitration expertise.¹⁹¹ The 2010 chamber, a new division of the Paris courts, was created “to cater to international litigation and hear disputes between French and foreign companies or between foreign companies.”¹⁹² The chamber was marketed as enhancing Paris’s “attractiveness as a financial center,” and helping to turn Paris into “an indispensable legal marketplace.”¹⁹³ A 2010 invention, it was obviously not a reaction to Brexit. But it did not attract many cases.¹⁹⁴

In February 2018, a special international commercial chamber of the Paris Court of Appeal was created so supplement the trial level chamber.¹⁹⁵ The jurisdiction of both the trial level and appellate chambers is limited to “transnational commercial disputes” relating to international commercial contracts, transportation, unfair competition, anti-competitive commercial practices, and various kinds of financial transactions.¹⁹⁶

¹⁸⁹ JASON FRY & SIMON GREENBERG, INTERNATIONAL COMMERCIAL ARBITRATION PRACTICE: 21ST CENTURY PERSPECTIVES § 44.01 Introduction: Review of the International Court of Arbitration of the International Chamber of Commerce (Matthew Bender & Co. 2018).

¹⁹⁰ ICC *International Court of Arbitration*, INTERNATIONAL CHAMBER OF COMMERCE <https://iccwbo.org/dispute-resolution-services/icc-international-court-arbitration/>; Queen Mary 2018 Survey. Paris is also the seat of the Uniform Patent Court. Olivier Mandel, *The International Chambers of the Paris Court of Appeal and of the Paris Commercial Court (Paris: a venue for international dispute resolution)*, Powerpoint, [http://www.eurolegal.net/useruploads/files/doc/Majorca2017/Presentation%20of%20Olivier%20Mandel%20for%20the%20Eurolegal%20Conference%20\(April%2014%202018\).pptx](http://www.eurolegal.net/useruploads/files/doc/Majorca2017/Presentation%20of%20Olivier%20Mandel%20for%20the%20Eurolegal%20Conference%20(April%2014%202018).pptx).

¹⁹¹ France has had specialized commercial courts since the 16th century, and in many ways they have remained unchanged since that time. Nicole Stology, *How France’s Commercial Courts Stay Relevant Through the Centuries*, HEC PARIS (June 14, 2017), <https://www.hec.edu/en/knowledge/articles/how-frances-commercial-courts-stay-relevant-through-centuries> (In the sixteenth century, “judges were not officials trained in law, but tradesmen elected by other tradesmen to settle commercial disputes. Today, at the Tribunaux de commerce (1st degree commercial court), the elected positions remain voluntary and unpaid.”).

¹⁹² Shearman & Sterling, *supra* note __.

¹⁹³ *Our ambition for Paris’ Financial Centre*, MATIGNON PRESS OFFICE (July 6, 2017), https://www.gouvernement.fr/sites/default/files/locale/piece-jointe/2017/07/dossier_de_presse_-_notre_ambition_pour_la_place_de_paris_en-_07.07.2017.pdf.

¹⁹⁴ In theory, parties could use English, Italian, or Spanish in proceedings and could examine witnesses in their native languages, without the use of an interpreter. No proceedings since then have ever actually been made in a language other than French. Shearman & Sterling, *supra* note __; Biard at 27.

¹⁹⁵ Philippe Metais & Elodie Valette, *Paris as an International Jurisdiction: Creation of Chambers Specialized in Cross-border Disputes*, WHITE & CASE (Feb. 12, 2018) <https://www.whitecase.com/publications/alert/paris-international-jurisdiction-creation-chambers-specialized-cross-border>; Biard, *supra* note __.

¹⁹⁶ Protocol on Procedural Rules Applicable to the International Chamber of the Paris Commercial Court, § 1.0 hereinafter “CITC Protocol” (available at http://www.avocatparis.org/system/files/editos/protocole_barreau_de_paris_-_tribunal_de_commerce_de_paris_version_anglaise.pdf); Protocol on Procedural Rules Applicable to

The division opened in March 2018, staffed by French judges who spoke English and had “English common law capabilities.”¹⁹⁷ Parties, experts, third-party witnesses, and legal counsel (who are not French nationals) may speak in English at hearings.¹⁹⁸ However, when a party uses English in appearances before the courts under this provision, the party must arrange simultaneous translation and bear the costs.¹⁹⁹ Documentary evidence may be submitted in English.²⁰⁰ Pleadings and filings must be drafted in French.²⁰¹ Judgments will be delivered in French and accompanied by an official English translation.²⁰² Non-French lawyers are also allowed to appear before the International Chamber if accompanied by a member of the Paris Bar. Both the expanded use of English and the admission of foreign lawyers are considered radical departures from the traditionally deeply French institution’s previous procedures, although the practical changes are limited.²⁰³

Overall, the Protocols are touted as providing “highly innovative rules of procedure,” where the “parties appearing before those Chambers are given unprecedented flexibility.”²⁰⁴ The disputes will remain public, however, and parties may not opt into using the special division. For a case to proceed in the international chambers, the parties must select the Paris commercial court as their forum of choice and then the commercial court may refer the case to the special international commercial division.²⁰⁵ As of December 2018, “seventeen cases had been filed before the [new appellate chamber], and hearings of two of them had taken place.”²⁰⁶

Frankfurt. German scholars have been advocating for English-language proceedings in German courts for almost a decade. Aachen, Bonn, and Cologne have had English-language courts since 2010, although they have not had many cases.²⁰⁷ Early German proposals were not focused on creating an international commercial division that would compete with London, but rather on competing with *arbitration*, which offered, among other advantages, the availability of

the International Chamber of the Court of Appeals of Paris, § 1.0, hereinafter “CITC Protocol” (available at http://www.avocatparis.org/system/files/editos/protocole_barreau_de_paris_-_cour_dappel_de_paris_version_anglaise.pdf).

¹⁹⁷ White & Case, *The Role of the English Courts Post Brexit: Emerging Challengers?*, JD Supra (Oct. 31, 2018), <https://www.jdsupra.com/legalnews/the-role-of-the-english-courts-post-26537/>.

¹⁹⁸ CITC Protocol, § 2.4; CICAP Protocol, § 2.4.

¹⁹⁹ CITC Protocol, § 6.3; CICAP Protocol, § 3.3.

²⁰⁰ CITC Protocol, § 2.3; CICAP Protocol, § 2.2.

²⁰¹ CITC Protocol, § 2.2; CICAP Protocol, § 2.1.

²⁰² CITC Protocol, § 7; CICAP Protocol, § 7.

²⁰³ Ruehl, *supra* note __; Biard, at 29.

²⁰⁴ Shearman & Sterling, *supra* note __.

²⁰⁵ Shearman & Sterling, *supra* note __.

²⁰⁶ Biard, at 25.

²⁰⁷ See Daniel Saam, *Book Review—Herman Hoffmann’s Kammern für internationale Handessachen: Can Arbitration Serve as a Model for the Law of Civil Procedure?*, 14 GERMAN L.J. 949 (2013).

proceedings in English.²⁰⁸ In these efforts, Germans saw U.S. state business courts, especially New York's, as a model.²⁰⁹

In January 2018, the Frankfurt High Court opened a specialized chamber for international commercial matters.²¹⁰ The Chamber has jurisdiction over international commercial disputes if the parties have agreed to jurisdiction.²¹¹ The Chamber has three German judges: one experienced professional judge and two business experts who are not professional judges. The business experts are "appointed for a term of five years upon the recommendation of the local Chamber for Industry and Commerce."

In terms of procedures, the Chamber abides by the German Code of Civil Procedure (Zivilprozessordnung). The oral proceedings operate in English, but written documents and judgments must be in German.²¹² The Chamber's website declares that proceedings are "usually held in public."²¹³ The Chamber does not require additional fees and generally imposes costs on the non-prevailing party.²¹⁴ The Chamber "encourages settlement at every stage of the proceedings," and begins with a conciliation hearing. Similar chambers exist in Hamburg, Dusseldorf, and Munich.²¹⁵

There are a number of current proposals about how Frankfurt could strengthen its position as a potential legal hub for cross-border disputes in Europe.²¹⁶ Many commenters, however, question whether, and when, German international commercial chambers will attract cases.²¹⁷ German law is already arbitration-friendly and German authorities advertise Germany as a top arbitral forum, growing in popularity.²¹⁸

²⁰⁸ See "Yes to English court hearings," https://www.bundestag.de/dokumente/textarchiv/2011/36400205_kw45_pa_recht-206810.

²⁰⁹ Saam, at 958.

²¹⁰ Hess & Boerner, Erasmus L. Rev. at 33. Similar proposals had been put forth in Frankfurt in 2012 and 2016, but they gained traction after Brexit. See Ruhl n.57.

²¹¹ Baker McKenzie, *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>.

²¹² Requejo, *supra* note __ at 17.

²¹³ Chamber for International Commercial Disputes, *supra*, note __.

²¹⁴ *Id.*

²¹⁵ Ruehl, *supra*, note __; Requejo, *supra* note __ at 15.

²¹⁶ See generally, Hess & Boerner, describing current legislative proposals, at 38.

²¹⁷ See, e.g., Hess & Boerner at 33, 35 (advocating for "cautious optimism"); Niklas Luft & Philipp Wagner, *Would You Choose German Courts For Commercial Disputes If Proceedings Were Held Before Specialized Chambers In English?*, WAGNER ARBITRATION (Nov 1, 2018), <https://wagner-arbitration.com/en/journal/would-you-choose-german-courts-for-commercial-disputes-if-proceedings-were-held-before-specialized-chambers-in-english/>.

²¹⁸ LAW – MADE IN GERMANY, 27, (3d ed. 2014), https://www.lawmadeingermany.de/Law-Made_in_Germany_EN.pdf.

Thus far, however, the chambers have had limited success. Frankfurt has had at least one case since opening in January 1, 2018.²¹⁹ It has been quite successful in recruiting some of the financial industry displaced by Brexit,²²⁰ but the market share of the adjudication business has not come along with that industry—at least not yet.²²¹

Brussels. In October 2017, the Belgian Council of Ministers approved a draft bill to establish an international English-speaking commercial court in Brussels, the “Brussels International Business Court” (BIBC), expected to open by January 1, 2020.²²² In March 2019, however, political opposition blocked future development of this initiative.²²³

The proposal, nevertheless, was a fascinating example of a potential international commercial court. The BIBC promised court proceedings that closely mimic arbitration. Instead of Belgian procedures, the rules of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law (UNCITRAL) would apply (with some alterations). Jurisdiction of the court would encompass international commercial disputes, but no party needs to have a connection with Belgium.²²⁴

Reports indicated that the court’s focus would be on flexibility and the borrowing from arbitration is not subtle. In addition to the adoption of the UNCITRAL rules, the BIBC’s judges would include professional judges as well as international business law specialists, and did not have to be Belgian. Final judgments would not be subject to appeal. In another echo of arbitration, funding for the BIBC would come from the parties, rather than the state judiciary’s budget.²²⁵

²¹⁹ Hess & Boerner, at 35 (noting first case in December 2018).

²²⁰ See Tsang & Goldstein, *supra*.

²²¹ Germany has been advertising its law since 2008. See *Archiv, LAW – MADE IN GERMANY*, <https://www.lawmadeingermany.de/archiv.htm> (linking documents going back to founding of “Law Made in Germany” in 2008); *Law Made in Germany, LAW – MADE IN GERMANY* (December 2008), https://www.lawmadeingermany.de/pdfs/Law_made_Germany_Vossius_2008_12_.pdf (2008 brochure); *Federal Chamber of Notaries, LAW MADE - IN GERMANY*, https://www.lawmadeingermany.de/Law-Made_in_Germany_EN.pdf.

²²² *Id.*

²²³ Conflictflaws.net post March 27, 2019; Geert Van Calster, *The Brussels International Business Court – Council of State continues to resist*, GAVC LAW (last updated March 21, 2019) <https://gavclaw.com/2018/11/14/the-brussels-international-business-court-council-of-state-continues-to-resist/>; article in Dutch: Matthias Verbergt, *Controversiële ‘kaviaarrechtbank’ van Geens wordt begraven*, DE STANDAARD (March 21, 2019), http://www.standaard.be/cnt/dmf20190321_04272272.

²²⁴ *Id.*

²²⁵ Guillaume Croisant, *The Belgian Government unveils its plan for the Brussels International Business Court (BIBC)*, KLUWER ARBITRATION BLOG (June 25, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/06/25/the-belgian-government-unveils-its-plan-for-the-brussels-international-business-court-bibc/>.

The proposed BIBC strongly resembled a state-sponsored arbitral tribunal. These distinctive features, however, may have prevented the BIBC from seeing the light of day. MPs objected that the BIBC offered “two-tiered justice” and the establishment of a “caviar court” for the “super rich.” The judiciary itself fiercely opposed the BIBC on these grounds and also questioned the feasibility and costs of the court and whether it would be able to attract cases.²²⁶

C. CHINA: QUEST FOR CONTROL?

In December, 2018, China’s Supreme People’s Court (SPC) established two new Chinese international commercial tribunals, collectively known as the Chinese International Commercial Court (CICC), one in Shenzhen and another in Xi’an.²²⁷ The CICC is intended to “streamline and control” the flow of disputes arising out of China’s Belt and Road Initiative (BRI).²²⁸ The purpose of the CICC, according to its website, is “to try international commercial cases fairly and timely in accordance with the law, protect the lawful rights and interests of the Chinese and foreign parties equally, and create a stable, fair, transparent, and convenient rule of law international business environment.”²²⁹ One set of scholars explained China’s development of international commercial courts as an effort “to share the expanding international business dispute resolution market, better protect its investments and have a greater say in the harmonization of substantive international business law.”²³⁰ A functioning and legitimate dispute resolution system seems essential to the success of the BRI, to

²²⁶ Conflictoflaws.net; De Standaard, Controversial ‘caviar court’ by Geens is buried, March 21, 2019.

²²⁷ A Brief Introduction of China International Commercial Court, <http://cicc.court.gov.cn/html/1/219/193/195/index.html> (June 28, 2018); Erie, ASIL.

This section focuses on the fascinating new creation of the CICC, but it should be understood in the broader context of Chinese development of free-trade zones and courts for transnational disputes, often in the context of regional competition to shine in this area. Shenzhen, for example, contains a “Hong Kong Modern Services Cooperative District” (“the District”) based in a free trade zone that has special courts for transnational disputes, including the Shenzhen Qianhai Cooperative District People’s Court with jurisdiction over transnational disputes, Hong Kong jurors, and English-language proceedings.

²²⁸ Matthew S. Erie, *The China International Commercial Court: Prospects for Dispute Resolution for the “Belt and Road Initiative”*, 22(11) AMER. SOC. INT’L. L. (Aug. 31, 2018) https://www.asil.org/insights/volume/22/issue/11/china-international-commercial-court-prospects-dispute-resolution-belt#_ednref4; Freshfields Bruckhaus Deringer, *China Establishes International Commercial Courts to Handle Belt and Road Initiative Disputes*, OXFORD BUSINESS LAW BLOG (Aug. 17, 2018) <https://www.law.ox.ac.uk/business-law-blog/blog/2018/08/china-establishes-international-commercial-courts-handle-belt-and>.

²²⁹ A Brief Introduction of China International Commercial Court, CICC (last updated June 28, 2018), <http://cicc.court.gov.cn/html/1/219/193/195/index.html> (June 28, 2018).

²³⁰ Wei Cai & Andrew Godwin, *Challenges and Opportunities for the China International Commercial Court*, 68 INT’L & COMP. L. Q. 869 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3479860, draft at 3.

which President Xi is strongly committed.²³¹ The CICC's jurisdiction, however, is not limited to BRI disputes.²³²

These courts “mark[] the first time [China] is creating legal institutions for the world.”²³³ This development contrasts with a fascinating history, however, of the world creating legal institutions for itself within China.²³⁴ The CICC claims to be a “‘one stop shop’ for international commercial dispute resolution services, including mediation, arbitration, and litigation that are ‘organically integrated.’”²³⁵

The CICC's jurisdiction is limited to international commercial disputes, defined as involving one or more foreign parties or relevant foreign “objects” or “legal facts.”²³⁶ It will not hear investor-state disputes.²³⁷ Notably, the CICC does not have an entirely consent-based system of jurisdiction. There are two main categories: cases where the parties decide they should be brought before the CICC (if the amount in controversy is over RMB 300 million, or approximately \$44 million), and cases where the SPC decides.²³⁸ When jurisdiction is based on consent, “only cases with actual connection with China can be submitted to the CICC.”²³⁹ In December 2018, the CICC accepted its first set of cases, none of which specifically related to the Belt and Road Initiative.²⁴⁰ The first hearing, in May 2019, involved a four-hour-long hearing in a case unrelated to the BRI, brought by Thailand's Ruoychai International Group against Red Bull Vitamin

²³¹ See Zhengxin Huo and Man Yip, *Comparing the International Commercial Courts of China with the Singapore International Commercial Court*, 68 ICLQ 903 (2019).

²³² Matthew S. Erie, *Update on the China International Commercial Court*, OPINIO JURIS (May 13, 2019), <http://opiniojuris.org/2019/05/13/update-on-the-china-international-commercial-court%E2%82%AC%82%BF/>.

²³³ Erie, *supra* note __.

²³⁴ See Catherine Ladds, *China and Treaty-Port Imperialism*, *The Encyclopedia of Empire 4* (2016), <https://onlinelibrary.wiley.com/doi/pdf/10.1002/9781118455074.wbeoe079> (“Across the treaty ports, a bewildering array of consular courts meted out extraterritorial justice to treaty-power nationals.... By 1926 there were 32 British courts alone in China. Thus, colonial governance in China was a complicated mélange of overlapping systems and jurisdictions.”).

²³⁵ *Id.* Chinese courts were already very supportive of arbitration, readily enforcing arbitration agreements and awards. [fill in]

²³⁶ “The Regulations define ‘international commercial disputes’ as those whereby:

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

legal facts producing, changing, or destroying commercial relations in dispute occur outside the PRC.” Erie, *supra* note __ (footnotes omitted); see also <http://arbitrationblog.kluwerarbitration.com/2018/07/04/international-commercial-court-china-innovations-misunderstandings-clarifications/>

²³⁷ *Id.* It remains to be seen, however, how the CICC will differentiate between investor-state and commercial disputes. See Stratos Pahis, *Investment Misconceived: The Impact and Fallacy of the Investment-Commerce Distinction in ICSID Arbitration*, *Yale J. Int'l L.* (forthcoming 2020) (discussing the sometimes poorly designed distinction between those two kinds of disputes).

²³⁸ Cai and Godwin (Part IV.B.1.).

²³⁹ Article 34 of the Civil Procedure Law.

²⁴⁰ Finder, *supra* note __.

Drink, Co., and third party Inter-Biopharm Holding Ltd., disputing the qualifications of Red Bull shareholders.²⁴¹

In some ways, the CICC is designed with an eye toward establishing international expertise and reliability.²⁴² The CICC has an English-language website and provides a platform for e-filing and other kinds of electronic communications between the parties and with the courts.²⁴³ The judges are Chinese professional judges with expertise in international commercial disputes, conflicts of law, and English language. Three or more judges sit on a panel for any given case. Although it does not employ international jurists like the courts in Qatar or Singapore, the CICC has an International Commercial Expert Committee, comprised of Chinese and non-Chinese legal professionals, who may preside over mediation, provide advisory opinions on issues relating to international and foreign commercial law, and offer advice on judicial interpretations and policies.²⁴⁴

Unlike the DIFC or the SICC, which were products of constitutional amendments and have certain exemptions from local law, the CICC is a creation of the Supreme People's Court.²⁴⁵ The CICC therefore operates under Chinese law, which follows a modified civil/political law system.²⁴⁶ As *The Economist* recently described the system, "In the law courts of Communist China, power and political control count for more than fairness."²⁴⁷ Accordingly, the CICC judges will likely have less discretion and flexibility than judges in other

²⁴¹ Mu Xuequan, ed., *China's Int'l Commercial Court Tries First Case*, XINHUANET (May 30, 2019), http://www.xinhuanet.com/english/2019-05/30/c_138100724.htm.

²⁴² See A belt-and-road court dreams of rivalling the West's tribunals, *The Economist* (June 6, 2019), <https://www.economist.com/china/2019/06/06/a-belt-and-road-court-dreams-of-rivalling-the-west-tribunals>. (noting that the CICC's mission statement is "Fairness, Professionalism, Convenience").

²⁴³ *International Commercial Litigation and Diversified Dispute Resolution*, CHINA INTERNATIONAL COMMERCIAL COURT, cicc.court.gov.cn/html/1/219/index.html.

²⁴⁴ Susan Finder, *China International Commercial Court Starts Operating*, SUPREME PEOPLE'S COURT MONITOR (Jan. 14, 2019), <https://supremepeoplescourtmonitor.com/2019/01/14/china-international-commercial-court-starts-operating/>; Huang Jin, *An Educated Gentleman Cannot But Be Resolute And Broad-Minded, For He Has Taken Up A Heavy Responsibility And A Long Course*, Speech at the Opening Ceremony and the First Seminar of the International Commercial Expert Committee of the Supreme People's Court of China, Aug. 26, 2018, <http://cicc.court.gov.cn/html/1/219/199/203/1058.html>. List of experts: <http://cicc.court.gov.cn/html/1/218/19/151/index.html#>.

²⁴⁵ *Erie*, *supra* note __. The CICC shares this trait in common with its Dutch, French, and German counterparts. Most U.S. state business courts have also been created as a division of existing local courts. See Coyle, *Business Courts*, *supra* note __.

²⁴⁶ For a description of the Chinese legal system and the difficulties that Western scholars face in trying to understand it, see Don Clarke, *Puzzling Observations in Chinese Law: When is a Riddle Just a Mistake?*, 93-121 in UNDERSTANDING CHINA'S LEGAL SYSTEM (Stephen Hsu, ed. 2003).

²⁴⁷ A belt-and-road court dreams of rivalling the West's tribunals, *The Economist* (June 6, 2019), <https://www.economist.com/china/2019/06/06/a-belt-and-road-court-dreams-of-rivalling-the-west-tribunals>.

jurisdictions, and parties will have less control over proceedings than parties would have in the SICC, for example.²⁴⁸

Much is still unclear about how the CICC will function, but the CICC Procedure Rules offer some information. The proceedings will be in Chinese, but evidence may be submitted in English and need not be translated if the opposing party consents to the English submission.²⁴⁹ The CICC offers translation services at the parties' expense.²⁵⁰ The rules provide that the CICC will apply foreign law if chosen by the parties to govern their dispute.²⁵¹ To establish jurisdiction, the plaintiff will have to file a written agreement to submit to the court's jurisdiction.²⁵² The CICC encourages pre-trial mediation.²⁵³

To improve the enforceability of CICC judgments (among other reasons), China, along with Singapore and the EU, was involved in negotiations over the Hague Convention on the Recognition and Enforcement of Foreign Judgments.²⁵⁴ China has signed but not yet ratified the convention.²⁵⁵ Additionally, China is considering ratifying the Hague Convention on the Choice of Court Agreements (COCA).²⁵⁶ Without signing these treaties, enforcement uncertainty may hinder the development of the CICC: parties will not be able to reliably predict whether a foreign jurisdiction will recognize a CICC judgment.²⁵⁷ Even with these agreements, enforceability may still be less certain than with arbitration awards.

Some experts view the CICC with excitement.²⁵⁸ Matthew Erie notes that "[t]he CICC is potentially most innovative in providing multiple mechanisms for dispute resolution."²⁵⁹ But he also recognizes the challenges facing the CICC:

²⁴⁸ See Erie, *supra* note __.

²⁴⁹ CICC Rules, Art. 9; <http://arbitrationblog.kluwerarbitration.com/2018/07/04/international-commercial-court-china-innovations-misunderstandings-clarifications/> (clarifying that proceedings before the court cannot be in English).

²⁵⁰ Procedural Rules for the China International Commercial Court of the Supreme People's Court, Art. 6, CHINA INTERNATIONAL COMMERCIAL COURT (updated Dec. 5, 2018) <http://cicc.court.gov.cn/html/1/219/208/210/1183.html> [hereinafter CICC Rules].

²⁵¹ Art. 7.

²⁵² *Id.*, Art. 8.

²⁵³ *Id.*, Art. 17.

²⁵⁴ Freshfields Bruckhaus Deringer, *China Establishes International Commercial Courts to Handle Belt and Road Initiative Disputes*, OXFORD BUSINESS LAW BLOG (Aug. 17, 2018) <https://www.law.ox.ac.uk/business-law-blog/blog/2018/08/china-establishes-international-commercial-courts-handle-belt-and>.

²⁵⁵ <https://communications.freshfields.com/SnapshotFiles/30d385d8-07d3-494d-acea-95a37747720b/Subscriber.snapshot>.

²⁵⁶ *Id.*

²⁵⁷ Zhou, *supra* note 34; see Mark Feldman presentation.

²⁵⁸ Zihao Zhou et al., *Survey Results: Rules on China's International Commercial Courts*, 3 CHINA L. CONNECT (Dec. 2018) <https://cgc.law.stanford.edu/commentaries/clc-3-201812-26-zhou-harpainter-cao/>.

²⁵⁹ Erie, *supra* note __; Susan Finder, *Comments on China's International Commercial Courts*, SUPREME PEOPLE'S COURT MONITOR, (July 9, 2018), <https://supremepeoplescourtmonitor.com/page/1/> ("The mechanism to link mediation, arbitration and litigation is an important part of the judicial reform

“uneven enforcement, Chinese language, and authoritarian government.”²⁶⁰ Susan Finder, a member of the CICC’s International Commercial Expert Committee, writes, “As a court focused on international commercial issues staffed by some of China’s most knowledgeable judges in that area, the court is likely to have a positive effect on the competence of the Chinese judiciary regarding international trade and investment issues, particularly as the SPC leadership knows that the international legal community is monitoring the court’s operation.”²⁶¹ The CICC has a lot of potential upside for China. According to one of the CICC’s advisors, Shan Wenhua, the CICC responds to the “‘great risks’” that Chinese businesses face “in belt-and-road countries where legal systems are not of ‘very high’ quality.” He also described the CICC as a way of “‘creating a better system,’” explaining that “having to rely on foreign legal systems is ‘out of keeping with [their] status as a major power.’”²⁶²

The Economist’s take is more sanguine. Its Chinese bureau opined: “The tribunals could one day matter a lot, should they be used to export a vision of international law that reflects [their] worldview [that independent courts are a fallacy]. At the moment, an obsession with power and order is hobbling the new tribunals. But that could change: China’s autocrats may not be as clumsy forever.”²⁶³

While the CICC seems marketed toward being an internationally respected institution, it is unclear whether the court will establish itself as independent or consistent with international standards.²⁶⁴ To date, for example, all of the arbitration and mediation associations that have been selected to work with the CICC have been Chinese institutions, which has raised concerns that the system will be biased in favor of Chinese parties.²⁶⁵ There is also some fear that these ADR offerings will become mandatory or that parties will feel forced into them, which is contrary to the consent-based foundations of arbitration and mediation.²⁶⁶ In the supreme court’s president’s annual report to the legislature

measures) (mentioned in this blogpost on diversified dispute resolution). Which mediation and arbitration institutions will link to the CICC are unclear (and the rules for selecting those institutions), but the policy document underpinning the CICC refers to domestic rather than foreign or greater China institutions. The Shenzhen Court of International Arbitration and Hong Kong Mediation Centre have entered into a cooperative arrangement to enable cross-border enforcement of mediation agreements, so presumably, this is a model that can be followed for Hong Kong.”)

²⁶⁰ Erie, Legal Hubs, at 40.

²⁶¹ Susan Finder, *Comments on China’s International Commercial Courts* (July 9, 2018), <https://supremepeoplescourtmonitor.com/page/1/>.

²⁶² *The Economist*, June 6, 2019.

²⁶³ *The Economist*, June 6, 2019.

²⁶⁴ See Cai and Godwin, draft at 4-5 (noting challenges to CICC becoming “well recognized and popular” including questions about Chinese judicial neutrality, particularly when government and government-owned entities are involved in cases).

²⁶⁵ Zhou, *supra* note __.

²⁶⁶ Zhou, *supra* note __.

in March, President Zhou Qiang pledged “to uphold the Communist Party’s ‘absolute leadership’ over the work of Chinese courts, ... [and] called for strict implementation of rules requiring judges to seek Communist leaders’ instructions when ‘major matters’ arise.”²⁶⁷

III. WHAT DRIVES THE CREATION OF INTERNATIONAL COMMERCIAL COURTS?

Most of the literature analyzing international commercial courts assumes that these institutions have recently emerged as states’ efforts to compete with international arbitration or with the London Commercial Court.²⁶⁸ According to this narrative, the rise of international commercial courts is a positive story of competition driving states to create better mousetraps for dispute resolution. In other words, this competition is predicted to yield a “race to the top” with all these jurisdictions striving to improve upon litigation and arbitration in international commercial disputes.

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

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

²⁶⁷ The Economist, June 6, 2019; id. (noting that “China rejects judicial independence, calling it a false Western ideal”).

²⁶⁸ See supra __ (listing scholarship); e.g., Walker, supra note __, at 23 (discussing the “race to excellence between specialized courts”).

A. THE STANDARD ACCOUNT

The standard account of global competition fits into an extensive body of scholarship conceiving of law—including the provision of dispute resolution services—as a market.²⁶⁹ For example, scholars argue that states support the establishment of arbitration centers “not just because they are perceived to create a favorable aura for international investment, but because arbitration generates revenue”—by bringing in people who pay for real estate, local legal services, hotels, food, etc.²⁷⁰ International commercial arbitration “has become a business in itself.”²⁷¹ Scholars debate, however, whether and how much national courts participate in this market and compete with private arbitration.²⁷² International commercial courts prove that at least some courts do compete on these levels.

Thus, parties “shopping” for a forum to select in their contracts can choose where and how to resolve their disputes, and courts and arbitral tribunals try to “sell” themselves in this market. Scholarship typically considers forum shopping in contracts to be efficient²⁷³ and forum shopping by plaintiffs in non-contractual disputes to be, to put it mildly, inefficient.²⁷⁴ In the former context,

²⁶⁹ See, e.g., Erin A. O’Hara O’Connor & Larry E. Ribstein, *The Law Market* (Oxford University Press, 2009); Horst Eidenmuller, *The Transnational Law Market, Regulatory Competition, and Transnational Corporations*, 18 IND. J. GLOBAL LEGAL STUD. 707 (2011); Donald Earl Childress III, *General Jurisdiction and the Transnational Law Market*, 66 VAND. L. REV. EN BANC 67 (2013); William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979).

²⁷⁰ Deborah R. Hensler & Damira Khatam, *Reinventing Arbitration: How Expanding the Scope of Arbitration is Re-Shaping Its Form and Blurring the Line Between Private and Public Adjudication*, 18 NEV. L.J. 381 (2018); Anselmo Reyes, *The Business of International Dispute Resolution*, 4 J. INT’L COMP. L. 68 (2017).

²⁷¹ *Id.*

²⁷² Some argue there is no market for law or adjudication. See O’Hara O’Connor & Rutledge, *supra*, note __, at 89 (citing critics). States, after all, are driven by a multitude of factors aside from economic competition. See John F. Coyle, *Business Courts and Interstate Competition*, 53 WM. & MARY L. REV. 1915 (2012). Others argue that arbitration is a “partner of formal adjudication” along with courts, rather than a competitor. Thomas O. Main, *Arbitration, What Is It Good For?*, 17 NEV. L.J. 457, 459 (2018). Still others posit that some large states, like the UK and New York, compete in this market, while courts in smaller states “might in fact be better off reducing their docket as much as possible.” Julian Nyarko, *We’ll See You in . . . Court! The Lack of Arbitration Clauses in International Commercial Contracts*, INT’L REV. L. & ECON. (forthcoming 2019) at 5, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3031976; cf. Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679 (2002).

²⁷³ “The theory of optimal contract design, which has been extended to the negotiation of procedural rules between sophisticated parties assumes that parties will agree on the dispute settlement mechanism that maximizes their joint utility.” Nyarko, *supra*, note __ (citations omitted); Scott and Triantis.

²⁷⁴ This kind of “forum shopping” has been called the “longest four-letter word in international litigation.” Louise Ellen Teitz, *Where to Sue: Finding the Most Effective Forum in the World*, in INTERNATIONAL LITIGATION STRATEGIES AND PRACTICE 49 (Barton Legum, ed. 2005). In earlier work, I have dissected the meaning of “forum shopping,” arguing that it can have a “broad, value-neutral definition” in addition to the conventional definition of forum shopping as “cheating” by choosing the most advantageous forum. See Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. 579, 588-93 (2017).

there is thought to be desirable and beneficial “interjurisdictional competition.”²⁷⁵ The latter context, scholars argue, leads to “forum shopping” by plaintiffs, “forum selling” by courts,²⁷⁶ and an overall “race to the bottom.”²⁷⁷

This narrative is often repeated in accounts of the rise of international commercial courts. Scholars say that the London Commercial Court, for example, became a prime forum choice in international contracts “not by adapting ... to an international standard, but by themselves setting the standards for transnational commercial litigation.”²⁷⁸ The rise of international commercial courts around the world, likewise, is attributed to new courts competing with London or with arbitration to provide better dispute resolution and thus become the new market leader.²⁷⁹ Scholars tout the positive effects of this competition: international commercial courts will “learn[] the best from other countries, improve[] their own procedures,” and, hopefully, eventually “transfer[] best practices to domestic civil litigation.”²⁸⁰

This account has intuitive appeal. All else being equal, sophisticated international parties with equal bargaining power may prefer a combination of reduced legal risk and an expeditious process.²⁸¹ More choices in this area could push all providers to improve on both of these accounts. Courts that fail to do so will not be chosen by parties. To the extent that their jurisdiction is entirely consent based, the court then may, in effect, go out of business.

The competition model is in some ways a satisfying description of the courts discussed in Part I. The old-school legal hubs, London and New York, are still innovating and trying to attract more adjudication business.²⁸² In describing themselves, spokespeople for the Singapore and European courts express the

²⁷⁵ Nyarko, *supra*, note __ at 4; Wagner, *supra* note __, at 1089.

²⁷⁶ Klerman & Reilly, *supra*, note __.

²⁷⁷ Wagner, *supra* note __, at 1090.

²⁷⁸ Walker, *supra* note __, at 23 (discussing the “race to excellence between specialized courts”). Others attribute the “success of the English Commercial court” “to the benefits of English substantive law, which is generally considered to be sophisticated, well-developed and fair to all parties.” Strong, *International Commercial Courts and the United States*, *supra* note __, at n.4 (drawing similar conclusions about New York).

²⁷⁹ See, e.g., Walker, *supra* note __, at 22 (describing the rise of European international commercial courts as designed “to attract some of the global dispute resolution market previously served by the English Commercial Court”); S.I. Strong, ‘*International Commercial Courts and the United States: An Outlier by Choice and by Constitutional Design?*’ In *International Business Courts – A European and Global Perspective*, (University of Missouri School of Law Legal Studies Research Paper No. 2019-08) (forthcoming) at 2 (arguing that countries have developed international commercial courts to “cure certain failings associated with” international commercial arbitration); Gary F. Bell, *The New International Commercial Courts—Competing with Arbitration? The Example of the Singapore International Commercial Court*, 11 CONTEMP. ASIA ARB. J. 193 (2018), available at https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3295801.

²⁸⁰ Hess & Boerner at 40.

²⁸¹ Thanks to Paul Stephan for help articulating this point.

²⁸² See *supra* [].

courts' desire to compete for adjudication business by providing excellent English-language court options.²⁸³ Even Dubai and Qatar assert that their missions are to compete to offer the best dispute resolution mechanisms in the world. These states' advertising campaigns develop this message.²⁸⁴

Moreover, in order to attract cases, these courts probably have to establish some kind of international legitimacy, which likely depends on quality dispute resolution.²⁸⁵ These "market" forces may drive these courts to establish basic levels of fairness, impartiality, and other markers of legitimacy.²⁸⁶ The market also requires some amount of transparency to regulate itself. That is, international commercial courts must be at least somewhat public about process and judges' decisions in order to build a trustworthy reputation in the market. These market incentives may drive a "race to the top."

B. CRACKS IN THE STANDARD ACCOUNT

While the competition account has intuitive appeal, it tends to glide over the more complicated back stories behind international commercial courts that Part II illuminated. As a definitional matter, if there is competition, it is likely regional more than global—as the Asian, European, and Middle Eastern examples suggest—and it exists as between and among all forms of dispute resolution, not just courts vs. arbitration—as demonstrated by the role of mediation in China and Singapore.²⁸⁷

But there are four additional reasons why the efficient competition story falters on closer inspection. First, Part II helps reveal that international commercial courts, if they are competing, are not necessarily all competing towards the same end. Second, the competition among international commercial courts can lead to "forum selling"²⁸⁸ and benefits repeat players to the detriment of others. In similar contexts, scholars have documented that specialization can lead to capture. Third, it is difficult to define what the "top" would be if there were a "race to the top" in the adjudication market. Fourth, the practical realities of the "demand" side—both how parties choose the forum selected in their

²⁸³ See Hwang, *supra* note __; See *supra*; see, e.g., Peetermans & Lambrecht, *supra* note __, at 55 ("Clearly, by establishing the BIBC, Belgium is seeking to acquire a share of the global market for resolving international trade disputes."); Biard, *supra* __, at 25 ("Brexit as catalyst").

²⁸⁴ See, e.g., Gilles Cuniberti, *The International Market for Contracts: The Most Attractive Contract Laws*, 34 NW. J. INT'L L. & BUS. 455, 457 (2014) (discussing UK and German marketing efforts).

²⁸⁵ See, e.g., LEGITIMACY AND INTERNATIONAL COURTS (Grossman, Cohen, et al., eds. 2014).

²⁸⁶ See Tom Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003).

²⁸⁷ See Gilles Cuniberti, *The International Market for Contracts: The Most Attractive Contract Laws*, 34 NW. J. INT'L L. & BUS. 455 (2014) (finding a strong regional connection between the location of the parties and the forum chosen).

²⁸⁸ See Hess & Boerner at 33 (noting that German courts had historically been seen as in the business of providing justice, but have recently gotten into the business of forum selling).

contracts and how international commercial courts define their jurisdiction—undermine the efficient competition account. In short, just as the corporate law debate about whether competition produced a race to the top turned out to be more complicated than it appeared,²⁸⁹ there is likely a more complicated situation with courts as well.

First, as Part II revealed, there is also not global uniformity on what international commercial courts are *for*. Litigation destinations seem to be competing for the business of adjudication, i.e., for cases, but even they differ on whether they seem to be seeking cases in their courts, or cases more generally in their cities—whether they be in courts, arbitration, or other forms of ADR. These differences matter for the future support of arbitration law. Singapore seems to see arbitration, litigation, and other offerings as potentially growing the overall dispute resolution “pie,” but other nations, like Germany and the Netherlands, seem focused on courts without a parallel emphasis on attracting arbitration. Why do they want cases? Those courts that do not allow foreign lawyers to appear unless accompanied by local counsel may be catering to the preferences of the local bar. The SICC, by contrast, allows foreign counsel to practice and even provides an ethics code for such lawyers.

Investment-minded courts and China, on the other hand, seem focused on different ultimate goals. Despite their assertions about aspiring to provide courts for the world, investment-minded courts seem primarily to address a need for stable legal structures to protect local and regional investments. As Amna Sultan Al Owais, Chief Executive & Registrar, DIFC Courts, explained in a 2018 speech, “The driving force has not been competition between courts for cases, but rather competition between countries for investment.”²⁹⁰ She put the issue in blunt economic terms: “[T]hose [countries] ranked highest by the World Bank, as well as an increasing number of emerging economies, have recognized that investing in efficient, well-respected business courts ... is not a nice-to-have, but rather a need-to-have if they want to compete globally for investment.”²⁹¹

The “race to the top” analogy could be compatible with investment seeking.²⁹² Building good courts will also attract investment, at least in theory.

²⁸⁹ See Moon.

²⁹⁰ Wilske, *supra* note __ (quoting 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/>).

²⁹¹ Al Owais, *supra* note __, <https://www.difccourts.ae/2018/01/25/global-and-local-challenges-in-commercial-dispute-resolution/>. Even if specialized courts are not effective tools for attracting investment as an empirical matter, *See* Coyle, *Business Courts*, *supra* note __, that does not mean that promoting investment is not a consideration within the governments that form these courts.

²⁹² See, e.g., The Hon Justice John Middleton, The Rise of the International Commercial Court, The 2018 Hong Kong International Commercial Law Conference, para. 13, 21 Sept. 2018, <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-middleton/middleton-j->

But the incentives are not necessarily aligned. States seeking to attract investment by establishing courts are not necessarily motivated to create something new and different and “better,” but rather to replicate mechanisms that give assurances of stability and predictability—to the extent the market requires, and possibly no more.²⁹³ The adoption of the common law responds to such incentives.²⁹⁴ These courts try to offer and support fairly conventional courts as well as arbitration to give investors the dispute resolution options that they have come to expect elsewhere. As Singapore has shown, a nation can “develop an effective and efficient legal system that wins high praise from global business” even if it disregards other aspects of liberal democracy, like separation of powers and freedom of the press.²⁹⁵ Such a model could lead to courts with more government influence than might be desirable. For example, the DIFC court does not have a track record of ruling against the DIFC Authority.²⁹⁶

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

These sets of success metrics do not measure the quality of the courts. They do not consider the fairness of procedures, outcomes, or jurists; the courts’ transparency or efforts to prevent corruption; the speed of case resolution; cost-effectiveness; the quality of the procedural or substantive law generated; or the court’s ability to adapt.²⁹⁷ Having these qualities might contribute to courts’ success at attracting either investment or litigation business. But they might instead reflect a courts’ expanding jurisdiction or ability to cater to certain constituencies—whether private parties or the state—at the expense of others.

20180921 (“Establishing international commercial courts does not take away from the usefulness of international commercial arbitration, but gives another option of dispute resolution that is available to parties involved in international commerce.”).

²⁹³ See Alyssa King, *Global Civil Procedure*, draft on file with author.

²⁹⁴ Even the French initiatives are stated to be oriented toward incorporating procedures known to work in other contexts, rather than reinventing the wheel. See Biard, *supra* note __, at 28 (quoting HCJP).

²⁹⁵ Gordon Silverstein, *Singapore: The Exception that Proves the Rule*, in *RULE BY LAW* (Ginsburg & Moustafa 2008).

²⁹⁶ See *supra*.

²⁹⁷ Cf. *Ad Hoc Procedure*.

It is also possible, of course, that many of these courts will fail on these metrics. To date, the DIFC court and the SICC already consider themselves a success, based on caseload and designation in forum-selection clauses.²⁹⁸ But their caseloads are paltry in comparison to the London Commercial Court's, if that is an appropriate baseline.²⁹⁹ The European courts and the CICC are still at their very beginning stages—their “success,” however defined, remains to be seen. The point is that these courts have different—and multiple—driving forces, which may or may not motivate them to improve upon dispute resolution from an objective viewpoint.

Second and relatedly, international commercial courts seek to serve a certain market of repeat players. This market dynamic could make them more solicitous of those parties' needs than of other values, should the two conflict. Scholars of specialized courts warn that specialization does not necessarily make courts more efficient.³⁰⁰ It can make courts more prone to compete with each other (and with arbitration),³⁰¹ and thus more prone to judicial capture.³⁰² In other words, specialized judges and arbitrators are known to be more likely to cater to particular constituencies that regularly appear before them. Some worry that international arbitrators are particularly susceptible to such capture because arbitrators are supposed to be both “agents of contracting parties, and . . . [a]gents of a larger global community.”³⁰³ That is, critics argue that arbitrators are, in some senses, working for the parties who selected them. Judges on international commercial courts may develop similar roles.

Scholars of specialized courts recommend that lawmakers creating such courts “should consider restricting venue options . . . to reduce court competition”³⁰⁴ and thus thwart capture. Notably, the emerging international commercial courts appear to take the opposite approach. They open themselves up to litigants from all over the world, without imposing venue-like limitations that require cases to have links to the forum state.³⁰⁵

²⁹⁸ See *supra* Part II.B.2 and Part II.C.1.

²⁹⁹ Compare https://www.judiciary.uk/wp-content/uploads/2019/02/6.5310_Commercial-Courts-Annual-Report_v3.pdf p. 10 (London) with https://issuu.com/difccourts/docs/difc-annualreview2017_jpgs?e=29076707/58783045_p_20-21 (Dubai, 54 cases in 2017); and <https://www.sicc.gov.sg/hearings-judgments/judgments> (Singapore, 43 judges since inception).

³⁰⁰ See Coyle, *Business Courts*, *supra* note __, at 1921.

³⁰¹ J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631, 636 (2015).

³⁰² J. Jonas Anderson, *Court Capture*, 59 B.C. L. REV. 1543, 1550 (2018) (citing LAWRENCE BAUM, *SPECIALIZING THE COURTS* (2011) (explaining that courts' increasing specialization has led to changes in judicial policy)).

³⁰³ Alec Stone Sweet, *Investor-State Arbitration: Proportionality's New Frontier*, 4 LAW & ETHICS HUM. RTS. 47, 48 (2010).

³⁰⁴ Anderson, *supra*, note __, at 637.

³⁰⁵ On the other hand, specialization can address other issues, such as the impact of high rates of arbitration on squelching the development of substantive law. Mark Weidemaier suggests that

The threat of catering to those contracting parties who choose international commercial courts may seem benign, especially if one assumes the parties have freely consented to the court's jurisdiction. But the law made for these parties — in these domestic courts — will be generally applicable law. Those legal decisions could be more likely to disregard the interests of non-represented but interested parties, like shareholders, labor, or consumers. Likewise, prioritizing efficient procedures for international commercial courts but not for other parts of the judiciary could lead to further disparities in quality of judicial offerings. Reflecting this fear, some of the political opposition to the establishment of these courts in democracies has focused on the fear of creating “caviar courts” — exceptional procedures for the 1%.³⁰⁶

Another way in which international commercial courts could disregard third party interests is by aggressively expanding jurisdiction or flexing their power over non-consenting third parties. International commercial courts may be tempted to assert such jurisdiction in order to distinguish themselves from arbitration, which lacks jurisdiction over third parties. The SICCC, for example, has a broad mandate to join non-consenting third parties.³⁰⁷

Third, it is difficult to define the “top” in this market. In the corporate law context, maximization of firm value can allow academics to judge success of a corporate law by objective metrics. But even with that metric, the debate about the normative direction of corporate law is complicated.³⁰⁸ Here, defining the success of courts, especially compared to each other, is particularly difficult. Using popularity, docket size, or the stakes of the disputes can be a poor measure of *comparison*, even if those may be the metrics on which the courts internally judge their own success. Trying to compare dispute resolution time or efficiency or fairness is likewise problematic because it is difficult to compare each of these issues and weigh them vis-à-vis each other. It is also difficult to identify the proper baseline for comparison.³⁰⁹ In addition, different parties and different kinds of disputes may lend themselves to different kinds of adjudication. Attempts to define quality adjudication can also be elusive.

In spite of these difficulties, the Part II case studies reveal a market for a respected, independent set of decisionmakers to resolve disputes. London's Commercial Court had long been considered the gold standard on this front,

specialization can assist a theory that understands arbitrators to create precedent. W. Mark C. Weidemaier, *Toward A Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895, 1899 (2010).

³⁰⁶ See [supra re Belgium]; see also https://www.eerstekamer.nl/verslagdeel/20181204/engelstalige_rechtspraak_bij (statement of Mrs. Bikker (Christian Union)) (“My group is concerned with the financing of this court, the court fees and the position of small and medium-sized businesses, in particular the smaller entrepreneur, who is being [left] behind.”) (google translate).

³⁰⁷ See supra.

³⁰⁸ See Moon, Nw. L. Rev. (summarizing the debate).

³⁰⁹ Walker at 20.

but some of those very same judges are now sitting on the DIFC, SICC, or the QIC.³¹⁰

More broadly, those jurisdictions seem to rely heavily on the international composition of their judiciaries as proof that the courts will be independent, fair, and legitimate. Perhaps no one knows exactly how to define excellence in dispute resolution, but there are certain judges whose reputations bring with them assurances of reliability, fairness, and independence. The international commercial courts in Europe, however, with the exception of the Belgian experiment, all employ national judges who are subject matter experts and English speakers, but who might be tempted (at least as much as any national judges) to favor locals, a common criticism of national judges. Those European international commercial courts in this respect hew more closely to traditional court models and perhaps, relying on their democratic legitimacy, do not see the need for—or cannot spend the political capital on—employing foreign judges.

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

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

As a matter of contract bargaining, one also should not automatically assume equality of bargaining power from the international commercial context. Superior bargaining power—rather than compromise—may be more likely to drive choice-of-forum designations in contracts.³¹¹ That construct further undermines the idea that forum selection in contracts is much different from forum shopping in other contexts.³¹² Put another way, international commercial courts seem to be engaging in “forum selling” in ways that seem not that different from the efforts to attract patent and other specialized kinds of litigation that Dan Klerman and his co-authors have documented in U.S.³¹³

³¹⁰ Compare the Delaware judges as arbitrators example.

³¹¹ See Albert Choi & George Triantis, *The Effect of Bargaining Power on Contract Design*, 98 VA. L. REV. 1665 (2012); Economist, June 2019.

³¹² Cf. *supra* note __ and accompanying text (exploring the general consensus that forum shopping by plaintiffs after disputes arise drives courts into a “race to the bottom” while forum shopping by both parties in contracts drives a “race to the top”).

³¹³ See Klerman & Reilly, *supra* note __.

and German courts³¹⁴ because strong parties are engaging in “forum shopping.” This explanation has particular force when applied to the Chinese “Belt and Road” courts, where it seems possible that China or Chinese state-owned entities might insist on CICC forum selection clauses in BRI contracts.³¹⁵ The same might be true, however, for government or government-influenced contracts in other countries.

Even if one assumes arm’s length negotiations, however, studies on how parties—whether individually or together—select the forum for their contract disputes also suggest that parties are not necessarily looking for the best dispute resolution. Instead, parties’ first priorities both in choice-of-law and choice-of-forum decisions are having a home-court advantage and a familiar forum, then the sophistication of the legal system.³¹⁶ These priorities reinforce the possibility that the growth of international commercial courts may be an effort to cater to the preferences of the local bar and other local business interests.

This leads to a fundamental question that is often raised by observers of international commercial courts: Is there actually demand for these courts? It is not entirely clear, for example, whether companies are dissatisfied with current litigation and arbitration offerings, or, more to the point, whether they would prefer a local specialized court alternative. It is likewise unclear that these courts are aimed at serving the needs of the international businesses, local lawyers, or other constituencies.³¹⁷ Observers often doubt whether any of these new national courts will “manage to convince internationally active companies to settle their disputes on the European continent rather than in London.”³¹⁸ The proliferation of international commercial courts in light of this skepticism suggests either bold faced optimism in spite of it, or the skepticism may suggest that attracting cases is not the only reason for establishing these

³¹⁴ Stefan Bechtold, Jens Frankenreiter, & Daniel Klerman, *Forum Selling Abroad*, 92 S. CAL. L. REV. (forthcoming 2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3256183.

³¹⁵ See Beech, *supra* note __.

³¹⁶ Vogenauer, *supra* note __, 44-45, 77; Lein, et al., *Factors Influencing International Litigants’ Decisions to Bring Commercial Claims to the London Based Courts*, 2015, Ministry of Justice, London https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/396343/factors-influencing-international-litigants-with-commercial-claims.pdf; Eris Themeli, *Matchmaking International Commercial Courts and Lawyers’ Preferences in Europe*, *Erasmus L Rev* 70 (2019); *see also* John F. Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 WASH. L. REV. 631, 631-35 (2017) (discussing what parties truly seek with choice-of-law clauses, and suggesting that parties care more about choice of forum than choice of law).

³¹⁷ See Eris Themeli, *Matchmaking International Commercial Courts and Lawyers’ Preferences in Europe*, *Erasmus L. Rev* (2019) (arguing that “lawyers are the most important group of choice makers and that their preferences are not sufficiently matched by the new courts,” and that “while the new courts are an improvement compared with the existing courts, they do not sufficiently address lawyers’ preferences”).

³¹⁸ Ruehl, *supra* note __.

courts. International commercial courts may instead be trying to balkanize the market or appease local interests.

C. OTHER LENSES

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

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

Local interests. As the discussion in Part I reveals, in each state, there is likely a more complicated domestic political economy driving, or blocking, the creation of international commercial courts. For example, Brexit has been a *catalyst*, as Alexandre Biard has put it when describing France, but Brexit propelled machinations already in the making.³¹⁹ It is worth asking: who stands to benefit from the establishment of these courts?

International commercial courts may be trying to cater to a local rather than global clientele—and that local constituency may be lawyers rather than businesses.³²⁰ In other contexts, scholars have noted that lawyers have strong incentives to lobby states to supply new legal “products” that will generate revenues for the lawyers.³²¹ This might be an accurate account of the evolution of the New York Commercial Division.³²² Further research may reveal similar origin stories among some of the courts discussed here, especially in Europe. Interestingly, while the Qatar, Dubai, and Singapore examples generate business for local lawyers, they also employ a fair number of foreign judges and

³¹⁹ Alexandre Biard, *International Commercial Courts in France: Innovation without Revolution?*, 1 *Erasmus Law Review* 24, 25 (2019) (“the drivers of the development of international commercial courts in France are manifold and by no means recent”).

³²⁰ See Coyle, *supra* note __, at 1930 (discussing local lawyers’ benefits from state business courts).

³²¹ Jonathan R. Macey & Geoffrey P. Miller, *Origin of the Blue Sky Laws*, 70 *TEX. L. REV.* 347 (1991).

³²² See *supra* [section discussion NY]; Coyle, *supra* note 222 at 1932 n.61.

foreign lawyers, who may practice before the courts.³²³ The CICC, of course, relies heavily on Chinese lawyers, judges, and experts.

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

As further evidence of the influence of local considerations, within Europe, an EU-wide European Commercial Court might compete more effectively with London³²⁴ than a proliferation of courts on the Continent. But such a court has not yet materialized (and faces substantial legal and political obstacles).³²⁵ Instead, localities are establishing their own, national options that permit English-language proceedings and cling to their own procedural cultures in different ways and to different degrees, and often privilege local lawyers (for example, foreign lawyers may appear at the NCC but only when accompanied by members of the local Bar). This evidence suggests that international commercial courts—especially the aspiring litigation destinations in Europe—are responding to local forces, rather than (or at least in addition to) global competition.

Law and political economy. Questions of law and political economy rely on “the insight that the ‘the economy’ cannot be separated from questions of power, distribution, and democracy.”³²⁶ In Belgium and the Netherlands, the legislative debates about whether to create international commercial courts reflect an appreciation that these courts would cater to the largest business interests. These courts often require large amounts in controversy and purport to offer gold-star standards of adjudication, potentially leaving other parts of the judiciary unfunded or otherwise neglected. The potential for capture by repeat players or parties to international commercial contracts with the stronger bargaining power—including potentially state-owned companies—leads to further reasons to question the benefits that these courts may offer when viewed through a law and political economy lens.

³²³ See *infra* notes __ and accompanying text; see also William Moon, *Delaware’s New Competition*, [draft on file with author] (documenting the rise of offshore business courts in nations considered to be tax havens, like the Cayman Islands and Bermuda).

³²⁴ Giesela Ruehl, *Building Competence in Commercial Law in the Member States*, EUROPEAN PARLIAMENT THINK TANK, [http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2018\)604980;REquejo; EU Parliament 2018/2079\(INL\) \(recommendation for expedited proceedings on commercial matters \[fill in\]\)](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2018)604980;REquejo;EU%20Parliament%202018/2079(INL)%20(recommendation%20for%20expedited%20proceedings%20on%20commercial%20matters%20[fill%20in])).

³²⁵ See Hess & Boerner.

³²⁶ *Inaugural LPE Project Conference – Call for Papers!*, LPE Blog, <https://lpeblog.org/2019/07/18/inaugural-lpe-project-conference-call-for-papers/>.

Sociology. Sociological institutional theory, sometimes called “institutional isomorphism,” posits that driving forces behind legal and institutional innovations and borrowing can take on various forms besides competition, such as outside pressure, a desire for legitimacy, and “the influence of formal education and professional networks in disseminating ideas.”³²⁷ Diffusion theory states that diverse laws spread through various mechanisms such as mimicry and learning in addition to competition.³²⁸

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

History. A full understanding of the origins of international commercial courts would also benefit greatly from historical accounts of legal institutions in these host states, especially historic treaty ports in Asia. The concept of local courts designed for foreigners did not originate with international commercial courts. Treaty ports had courts established *by foreigners* for foreigners. By contrast, international commercial courts are established by locals for foreigners, but, like treaty port courts, they still integrate foreign, often common law, traditions and are interested in making foreign investment more secure.³²⁹ It is, again, beyond the scope of this Article to fully explore this history and its impact on international commercial courts, especially in Asia, but such studies would likely yield fascinating results that would also complement the other lenses.

Geopolitics. From today’s perspective, the international commercial courts with the most potential for influence are in Asia.³³⁰ For example, emphasizing and developing neutrality and expertise, Singapore seems to be trying to

³²⁷ See Coyle, *Business Courts*, *supra* note __, at 1966; Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 150-54 (1983).

³²⁸ See Bookman, *Unsung Virtues*, *supra* note __, at 618 (collecting sources).

³²⁹ See CHINA’S FOREIGN PLACES.

³³⁰ See THE FUTURE IS ASIAN.

establish itself as a neutral “Switzerland” of dispute resolution for both litigation and arbitration, building on its leadership in other service areas like manufacturing, transportation, shipping, and financial services.³³¹ For dispute resolution, there may still be questions about Singapore’s neutrality in cases involving the government, but they have established an excellent reputation for following the rules of law in international commercial adjudication.³³²

China, however, seems to be flexing its muscles most obviously. It will be important to watch whether the CICC emerges as a leader in international commercial dispute innovation or as a cost of doing business with the Belt and Road Initiative. The CICC’s jurisdiction is not entirely consent-based and some have raised concerns that incorporating various forms of ADR will make parties feel compelled to submit to mediation or arbitration.³³³ Technically, “the CICC is not mandatory for BRI deals; rather it is one option amongst an increasingly competitive field of dispute resolution forums in Asia.”³³⁴ But even consent-based jurisdiction may take on a different valence if China exercises its considerable bargaining power in Belt-and-Road-related projects to effectively require parties to designate the CICC for resolution of disputes arising out of those contracts.³³⁵ If the Chinese do pressure counterparties to accept CICC jurisdiction, that may lead to a flow of cases to the court. With those cases, the CICC will be able to gain experience—but the cases will also offer the CICC the opportunity to gain or lose the world’s trust.³³⁶

As *The Economist* noted, reporting on the CICC’s first hearings, “[t]oo many belt-and-road contracts are secretive, unequal and reward local power-brokers in opaque ways, reflecting deep cynicism about global norms. Some experts wonder if China secretly envies the ability of American judges in civil suits to demand the seizure of assets on the other side of the world. Though Chinese officials denounce America as a bully with a long reach, some scholars wonder

³³¹ Silverstein at 77. Cf. Eichensehr, Digital Switzerland.

³³² See Erie; Silverstein 98.

³³³ Zhou, *supra* note __.

³³⁴ Erie, *Opinio Juris*.

³³⁵ See, e.g., Hannah Beech, ‘We Cannot Afford This’: Malaysia Pushes Back Against China’s Vision, <https://www.nytimes.com/2018/08/20/world/asia/china-malaysia.html?WT.nav=top-news&action=click&clickSource=story-heading&hp&module=first-column-region&pgtype=Homepage®ion=top-news> (“From Sri Lanka and Djibouti to Myanmar and Montenegro, many recipients of cash from Chinese’s huge infrastructure financing campaign, the Belt and Road Initiative, have discovered that Chinese investment brings with it less-savory accompaniments, including closed bidding processes that result in inflated contracts and influxes of Chinese labor at the expense of local workers.”).

³³⁶ Eriks Selga, *China’s New International Commercial Courts: Threat or Opportunity?* May 29, 2019, <https://www.fpri.org/article/2019/05/chinas-new-international-commercial-courts-threat-or-opportunity/>

whether China might one day begin issuing more extraterritorial judgments of its own.”³³⁷

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

The opportunity for these potential power grabs may be emerging in part because of the weakening of London and New York’s status as the paragon of legal stability. It may be not only the Brexit vote, but the chaos that followed it, that seems to open up the field for others to assert themselves in various subsections of the market. A weakened United States on the world stage likewise has ramifications for New York’s prominence as an adjudication hub. New York’s prominence is also affected by Supreme Court development of “litigation isolationism”—doctrines that keep transnational cases out of U.S. courts—including in ways that keep out arbitration-related litigation.³³⁸

These developments can affect not only London and New York’s ability to attract adjudication business, but also the ability of English and New York law to govern international commercial transactions. As of yet, international commercial courts seem to be selling themselves for selection in choice-of-forum clauses, but not necessarily for designation in choice-of-law clauses. Even if Singapore or Dubai courts are interpreting cases under contracts that designate English law, however, that exerts a certain influence over the development of that law.³³⁹ And over time, it seems likely that some of these courts, especially in Asia, will use these courts to exert influence over not only procedural questions, but substantive ones as well.

IV. LITIGATION VS. ARBITRATION

The rise of international commercial courts also sheds light on common assumptions about the relationship between litigation and arbitration. International commercial courts provide an important rebuttal to assumptions that litigation and arbitration are starkly contrasting modes of dispute

³³⁷ The Economist, June 6, 2019.

³³⁸ Bookman, *Litigation Isolationism*; Bookman, *Arbitration-Litigation Paradox*.

³³⁹ Cf. Issacharoff & Florencia Marotta-Wurgler, *Hollowed Out Common Law*, UCLA L. Rev. (forthcoming)

resolution and they offer potential insights into scholarly debates about the forum preferences of parties to international commercial contracts.

A. UNDERSTANDING THE DIFFERENCES BETWEEN LITIGATION AND ARBITRATION

The rise of international commercial courts described in Part II undermines traditional conceptions about the differences between litigation and arbitration and the relationship between them. According to the conventional U.S. understanding, often articulated in Supreme Court decisions, litigation and arbitration are opposite forms of dispute resolution that exist in an antagonistic relationship toward each other. International commercial courts reveal that litigation and arbitration, which historically may have had many distinctive characteristics, appear to be converging in certain ways.³⁴⁰ This discussion leads to questions about what remains distinctive about litigation and arbitration.

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

The first point is a contrast between the U.S. federal perspective and these global trends. The U.S. Supreme Court is well known for its “liberal federal policy favoring arbitration agreements”³⁴¹ and also for its hostility to litigation.³⁴² But much of the rest of the world, including New York, recognizes that welcoming multiple variations on dispute resolution can increase a locality’s attractiveness to business generally and to the adjudication business in particular. Singapore’s focus on developing itself as a legal hub for litigation, arbitration, and ADR is a prime example.

These developments suggest that the Supreme Court’s attitude toward arbitration and litigation as opposites and antagonists is misplaced. In previous work, I have explained how courts provide an important support network for arbitration: recognizing and enforcing arbitration agreements and awards, and otherwise supporting ongoing arbitration, for example, by helping direct the collection of evidence or appointing arbitrators where parties cannot agree.³⁴³

³⁴⁰ For early scholarship acknowledging this point, see Aragaki, *supra* Metaphysics; Tiba, *supra* Emergence of Hybrid International Commercial Courts. See also *Arbitral Courts*.

³⁴¹ *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

³⁴² Bookman, *The Arbitration-Litigation Paradox*, *supra* note __.

³⁴³ Bookman, *The Arbitration-Litigation Paradox*, *supra* note __ (draft at 3).

And I argued that to be “arbitration-friendly,” U.S. federal courts should embrace a deeper understanding of the role of courts in supporting arbitration when crafting both arbitration law and access-to-court doctrines.

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

Second, in international commercial disputes, the conventional distinctions between arbitration and litigation are dissolving. Neither arbitration nor litigation has a monopoly on various procedures once thought to belong to one or the other, like confidentiality, discovery, expert adjudicators, or appellate review.³⁴⁴ It is already well known that arbitration is increasingly judicialized, looking more and more like international commercial litigation.³⁴⁵

The study here demonstrates that international commercial litigation is also becoming more arbitralized.³⁴⁶ Many international commercial courts are designed to offer some of the most attractive aspects of arbitration and also to satisfy some of arbitration’s shortcomings (like jurisdiction over third parties). They offer English-language proceedings, three judge panels,³⁴⁷ and expert judges. Although parties may not select their particular judges by name, they do know that their judge will be selected from a slate of experts listed on the court’s website. Moreover, unlike in arbitration, where it can be difficult finding time on a busy arbitrator’s calendar, courts offer judges’ prompt availability (at least for now).³⁴⁸

These courts also offer options for confidentiality. Court proceedings are typically open to the public and opinions are typically published.³⁴⁹ That is the default status for new international commercial courts, but they offer varying degrees of confidentiality in both proceedings and opinions.³⁵⁰

³⁴⁴ See Hiro N. Aragaki, *The Metaphysics of Arbitration*, 18 NEV. L.J. 541 (2018).

³⁴⁵ See, e.g., ALEC STONE SWEET & FLORIAN GRISEL, *THE EVOLUTION OF INTERNATIONAL ARBITRATION JUDICIALIZATION, GOVERNANCE, LEGITIMACY* (2017). Modern international commercial arbitration can include multi-party arbitration, *Abaclat v. Argentina* (permitting class treatment within ICSID dispute), and controversies over evidence, discovery, and challenges to arbitrators. Remy Gerbay, *Is the End Nigh Again? An Empirical Assessment of the ‘Judicialization’ of International Arbitration*, 25 AM. J. INT’L ARB. (2014). It can be high stakes and slow. Hiro N. Aragaki, *Constructions of Arbitration’s Informalism: Autonomy, Efficiency, and Justice*, 2016 J. DISP. RESOL. 141, 156–57 (2016); Gary Born & Claudio Salas, *The United States Supreme Court and Class Arbitration: A Tragedy of Errors*, 2012 J. DISP. RESOL. 21, 39 (2012). It can also be expensive. In contrast to government-subsidized courts, arbitrators and arbitral tribunals charge considerable fees that are often a percentage of the size of the award.

³⁴⁶ See Bookman, *Arbitral Courts*.

³⁴⁷ See *supra* text accompanying nn. 176 (NCC), 243 (CICC).

³⁴⁸ See Walker.

³⁴⁹ Cf. Merritt McAllister, *Examining Unpublished Decisions* (draft on file with author).

³⁵⁰ See Aragaki, *supra* Metaphysics, at 558-559.

Many of these courts are unabashedly open to private customization of procedure.³⁵¹ Parties can opt out of standard procedures, including the rules of evidence or appellate review.³⁵² Although creatures of the state, these international commercial courts are also highly receptive to criticism from private parties, as the quick changes to Singapore's procedure demonstrate.

Putting aside the problem of determining whether arbitration is public or private law,³⁵³ the fundamental distinction between litigation and arbitration is often thought of as the difference between public and private adjudication, or between state-mandated procedures and party-designed or designated ones, or between confidential proceedings and public ones, or between consent-based jurisdiction and state-power-based ones.³⁵⁴ These distinctions are becoming more elusive.³⁵⁵ The design of international commercial courts has the hallmarks of a joint public-private enterprise.

The third point, however, is that some differences of course remain.³⁵⁶ Courts can join third parties and issue injunctive relief, for example, which arbitral tribunals typically cannot do. They can exert jurisdiction over non-consenting parties. Singapore, in particular, seems to offer these capabilities as a way to contrast with arbitration. But it is unclear what the international law boundaries are on international commercial courts' authority over non-consenting third parties.³⁵⁷

³⁵¹ The new courts in Brussels and Singapore are particularly good examples of this phenomenon, which it interesting to map onto the domestic court debate about private ordering in procedure. *See, e.g.*, Robin Effron, *Ousted: The New Dynamics of Privatized Procedure and Judicial Discretion*, 98 B.U. L. REV. 127 (2018); Scott Dodson, *Party Subordination in Federal Litigation*, 83 GEO. WASH. L. REV. (2014); David Hoffman, *Whither Bespoke Procedure?*, 2014 U. ILL. L. REV. 389.

³⁵² *See, e.g.*, SICC; DIFC Court (following evidence rules from arbitration).

³⁵³ Cf. Ralf Michaels, *International Arbitration as Private or Public Good*, (Duke Law School Public Law & Legal Theory Series No. 2017-57), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3019557 (calling the question whether arbitration is public or private law "a problematic categorical distinction").

³⁵⁴ *See* Walker at 20 ("Unlike arbitration, parties in litigation are not generally required to pay the compensation and expenses of judges"); *id.* (hard to compare because it is "very difficult to create plausible baselines"); Strong (book chapter).

³⁵⁵ *See* *Arbitral Courts*.

³⁵⁶ Lord Justice Kerr listed the following benefits of litigation in response to the question "Is litigation so bad after all?": "the possibility of consolidating related disputes by the 'third party' procedure before one tribunal; the certainty of a consistent approach by the application of the same legal principles to different disputes raising similar issues; the control exercisable by the parties over the proper progress and conduct of the proceedings within a prescribed framework by means of a known and enforceable procedure; the availability of a neutral professionally qualified tribunal with the single objective of deciding cases according to law; and the existence of rights of appeal, if necessary, to reverse decisions which are plainly wrong." Kerr, *Arbitration v. Litigation: The Macao Sardine Case*, Annex, in AS FAR AS I REMEMBER (2002).

³⁵⁷ *See* Bookman, *Toward the Fifth Restatement of Foreign Relations Law; Joinder of Non-Consenting Parties: The Singapore International Commercial Court Approach Meets Transnational Recognition and Enforcement*, Erasmus L. Rev. (2019).

One important distinction is courts' ability to declare what the law is and to create binding precedent. Indeed, many judges and commenters have lamented arbitration's popularity because it has hampered courts' ability to develop substantive law.³⁵⁸ This may be less of a problem in civil law traditions, where the law depends less heavily on judicial opinions and precedent.³⁵⁹ But commenters in the UK, the United States, and other common law jurisdictions have recognized this effect of arbitration's growing popularity as a serious issue.³⁶⁰

It is unclear what role international commercial courts will play in substantive law development. For the most part, the new courts discussed here are offering adjudication services, not lawmaking services.³⁶¹ They promise to enforce parties' choice-of-law provisions and they offer procedures to make proving foreign law easier.³⁶² But how this works in practice remains to be seen. If foreign courts apply English common law (because it was designated in a choice-of-law clause), that would not contribute to the development of the English common law per se. Foreign courts' interpretation of English common law does not technically count as precedent.

But they might contribute to a common law more generally. These new courts could conceivably lead to a resurgence of a new *lex mercatoria* or Law Merchant, which some scholars describe as a body of law primarily developed in arbitration.³⁶³ Others suggest that these courts may contribute more generally to the "continuum of precedential decisions."³⁶⁴ Justice Middleton of the Federal Court of Australia has argued for "harmonization" of substantive laws, practices, and ethics in international commerce. Arbitration cannot do this, and it is not supposed to.³⁶⁵ Chief Judge Menon of the SICC has said that developing transnational commercial law is a goal of that institution. This gap presents an important role for international commercial courts to fill.

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

³⁵⁸ [cites from UK judges; Australia].

³⁵⁹ Sabrina DeFabritiis, *Lost in Translation: Oral Advocacy in A Land Without Binding Precedent*, 35 *Suffolk Transnat'l L. Rev.* 301, 328 (2012).

³⁶⁰ See Smith, *supra* note __ (reporting on speech in which former Lord Chief Justice laments arbitration's interference with English courts' ability to develop common law); *Arb-Litigation Paradox* (explaining this debate).

³⁶¹ See Erie.

³⁶² See *supra* Part II.A.2, Part II.B.1, Part II.C.1, Part II.C.2 and Part II.D for courts that hold public hearings; compare with Part II.B.2 and Part II.C.2 for courts that allow full or partial confidentiality

³⁶³ See Alec Stone Sweet, *The New Lex Mercatoria and Transnational Governance*, 13 *J. EUR. PUB. POL'Y* 627 (2006).

³⁶⁴ Walker at 18.

³⁶⁵ Middleton at para. 15.

proceedings. The CICC showcased open proceedings in its first hearings.³⁶⁶ Both the CICC and the NCC plan to make judgments available online.³⁶⁷ Qatar, the DIFC, the AGDM all have open court proceedings and the DIFC posts videos of its proceedings on its website.³⁶⁸ But proof of the transparency and publicity of these courts will be in the pudding. Confidential proceedings likely will yield confidential decisions. And it is unclear how transparent courts will be about their confidential docket items or their decision making process for granting confidentiality requests.

In arbitration, meanwhile, there are heated debates about confidentiality as well.³⁶⁹ These norms appear to be shifting and it is unclear where the fault lines will come to rest. For those watching for possible convergence between litigation and arbitration, it is interesting to note other commenters propose allowing arbitration to establish precedent under certain circumstances.³⁷⁰ This would further elide distinctions between litigation and arbitration.

B. PARTY PREFERENCES

The proliferation of international commercial courts also raises questions about parties' presumed preferences for private dispute resolution, especially arbitration.³⁷¹ Some empirical studies of contracts have worked toward debunking the assumption that parties to international commercial contracts mostly choose arbitration.³⁷² The emergence of new international commercial courts could further undermine that understanding.³⁷³ On the other hand, it could be that the rise of international commercial courts reflect local lawyers' or other constituencies' interests, and may not reflect party preferences—or at least not reflect preferences that are strong enough to overcome traditional

³⁶⁶ [cite news reports]

³⁶⁷ Walker at 19.

³⁶⁸ Walker at 19.

³⁶⁹ See Walker (discussing the controversy).

³⁷⁰ Weidemaier, *Toward a Theory of Precedent in Arbitration*, *supra* note __.

³⁷¹ See Margaret L. Moses, *Introduction*, PRINCIPLES AND PRACTICES OF INTERNATIONAL ARBITRATION (2d ed., 2012) (“Today, international commercial arbitration has become the norm for dispute resolution in most international business transactions.”); Sundanesh Menon, *The Transnational Protection of Private Rights*, 108 ASIL Proc. 219, 234 (2014); Redfern, *supra* note __, at § 1.129 (“At one time, the comparative advantages and disadvantages of international arbitration versus litigation were much debated.... That debate is now over: opinion has moved strongly in favour of international arbitration for the resolution of international disputes.”).

³⁷² See, e.g., Nyarko; Christopher Whytock, *Litigation, Arbitration, and the Transnational Shadow of the Law*, 18 Duke J. Int'l Comp. L. 449 (2009); Eisenberg, Miller & Sherwin, *Arbitration's Summer Soldiers*, at 876; Drahozal & Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses*.

³⁷³ See, e.g., Daisy Mallet, Partner, King & Wood Mallesons, <https://www.kwm.com/en/au/knowledge/insights/the-rise-of-the-courts-20181119> (comparing international commercial courts to arbitration and concluding that arbitration remains more attractive in light of ease of enforcement, confidentiality, and neutrality).

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

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

In assessing party preferences, one must also be vigilant to consider the role of consent to jurisdiction. Many of the courts discussed here, especially those that do not require a connection to the locality as a basis for jurisdiction, like the NCC, seem to rely primarily on consent-based jurisdiction. But jurisdiction tends not to be *limited* to consent-based jurisdiction, and indeed, one of courts' primary advantages over arbitration is the ability to consolidate cases, join additional parties, and exercise jurisdiction without parties' consent.³⁷⁴ These courts may test the boundaries of how far such jurisdiction can reach extraterritorially.³⁷⁵

For example, the SICC thus far has mostly relied on referrals from the ordinary Singapore courts.³⁷⁶ Likewise, the CICC is not limited to consent-based jurisdiction, and has had cases referred by the SPC. Moreover, if consent to the CICC's jurisdiction becomes a condition of Chinese investment through the Belt and Road Initiative, the CICC may gain prominence—but not necessarily legitimacy—relatively quickly. As a lawyer with years of Chinese experience told *The Economist*, “Where you go to resolve a dispute is more or less a question of your bargaining power.”³⁷⁷ The CICC's bargaining position may also allow it to retain control over its courts and potentially to circumvent treaty agreements about investment dispute resolution. This dynamic may require adjusting assumptions that forum-selection clauses reflect free choice and party agreement—and therefore may require adjusting metrics for judging a particular court's “popularity.”

³⁷⁴ Walker at 11 (“one feature that specialized commercial courts emphasize is their capacity to join and consolidate claims, with or without the unanimous consent of the parties”).

³⁷⁵ See Bookman, *Testing the Boundaries of Adjudicatory Jurisdiction*, OUP Chapter on the Restatement (considering whether international commercial courts will test the international law boundaries of adjudicatory jurisdiction)

³⁷⁶ See Hess & B___ (noting that the SICC has had one case where the forum selection clause designated the SICC).

³⁷⁷ *The Economist*, June 6, 2019.

V. EVALUATING INTERNATIONAL COMMERCIAL COURTS

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

On one hand, international commercial courts represent the vanguard of innovation in international commercial dispute resolution. They seem to represent the triumph of choice, competition, and innovation, as well as a convergence of norms around best practices in international commercial dispute resolution. Courts and arbitral centers alike recognize the benefits of English-language proceedings, party control over procedure, confidentiality, the availability of opting in or out of appellate review and other procedural rules, three-judge panels, expert adjudicators, and deference to parties' choice of law and forum. Those courts that are part of new legal hubs may become home to a synergistic interaction between litigation, arbitration, and other ADR mechanisms.³⁷⁸ These developments could be understood to represent the fruits of a positive kind of forum shopping whereby parties, through lobbying efforts, advocacy by lawyers, and ultimately their choices in forum-selection clauses, drive procedural innovation and reform.³⁷⁹ Ideally, improvements in judicial processes in commercial courts will spread to other parts of the judiciary.³⁸⁰

Notably, moreover, most of the states studied here strongly embrace arbitration on its own as well as in combination with litigation (and other forms of ADR); they seem to recognize the complementarity between courts and arbitration. How this will operate in practice remains to be seen. For now, China's CICC recognizes cooperation with only Chinese arbitration centers. If they open their cooperative stance to include foreign or international arbitration centers, that may assuage some fears that China's main priority is to assert further state control over dispute resolution. But China faces an uphill battle at ensuring integrity and freedom from political corruption and influence.³⁸¹

Despite some reasons for optimism, more complicated dynamics drive these developments, with unclear results. Some of these courts may disappear over time from neglect, lack of use, or reduced support from host states. But if they continue and build substantial dockets, there are two sets of possible concerns. First, international commercial courts could represent potentially troubling trends towards a reassertion of state sovereignty in an area that has recently seemed to be dominated by private arbitration. In this context, at least some international commercial courts, most prominently the CICC, may create new

³⁷⁸ See Erie.

³⁷⁹ But cf. Christopher R. Drahozal, Diversity and Uniformity in International Arbitration Law, 31 *EMORY INT'L L. REV.* 393, 399 (2017) (advocating diversity in national arbitration laws).

³⁸⁰ See, e.g., Biard; NCC debates.

³⁸¹ See Middleton; *The Economist*.

environments for flexing disparate bargaining power or exerting state control. In this sense, international commercial courts may reveal a reassertion of state sovereignty and a rejection of both arbitration and globalization. Today, some arbitration scholars fear that the rising trend of economic nationalism threatens states' support for arbitration.³⁸² The rise of international commercial courts could be a piece of that puzzle, representing state efforts to reject arbitration and replace it with these courts, which might be more sympathetic to state interests, particularly as they rely on host state support for their existence.³⁸³ Proponents of international commercial courts also have touted them as institutions to develop transnational commercial law, in contrast to arbitration, which has not been able to declare and develop law in these areas. If they do seize on the ability to develop law, international commercial courts should be careful when doing so not to favor government parties or government interests, but also not to cater too much to repeat players before them.

This caution relates to the other set of concerns about international commercial courts, which is that instead of catering to sovereign interests, these courts could become captured by private interests. International commercial courts' resemblance to arbitration may be troubling for the same reasons scholars worry about arbitration replacing courts in the United States.³⁸⁴ They could represent a new way of privatizing public courts. In this sense, international commercial courts may become less public or less interested in law declaration in the general public interest; they may focus their legal analysis more on the interests of the parties regularly before them and they may focus court resources on a few cases with high amounts in controversy. They may subordinate other judicial roles to resolving disputes according to parties' preferred procedures, competing for adjudication business, and catering to potential plaintiffs. If that happens, public court values and functions will suffer. Likewise, it remains to be seen whether international commercial courts will follow the lead of other specialized courts that have fallen victim to incentives

³⁸² *Id.*

³⁸³ Call for Papers, *supra* note __ ("In Asia, international arbitration is seen more and more often as a mechanism to protect Chinese companies doing business abroad, while the implementation of modern arbitration standards within mainland China remains sporadic. In fact, in June 2018 China established the first and second International Commercial Courts, to offer companies a court of justice as an alternative to arbitration. Should this be interpreted as a sign that China wants to move away from arbitration, assume a stronger state control over dispute settlement, and curtail the growing use by Chinese companies of international arbitration?"); Erie, Legal Hubs (discussing legal hubs' reliance on host states).

³⁸⁴ See, e.g., Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, The Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2809 (2015); Maria Glover, *Disappearing Claims*, YALE L.J.; Silver-Greenberg & Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES: DEALBOOK (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> (first of three-part series on such arbitration clauses).

to cater only to certain parties, leaving other interests of justice to the side.³⁸⁵ One criticism of arbitration is that sometimes it can prize efficiency over fairness;³⁸⁶ international commercial courts should not.

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

CONCLUSION

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

³⁸⁵ See *supra* [discussion of specialization leading to court capture and “forum selling”].

³⁸⁶ See Aragaki, [NYU], *supra* note ____.