

THE ADJUDICATION BUSINESS

Pamela K. Bookman*

Forthcoming, *Yale Journal of International Law*, 2020

The traditional account of the competitive relationship between and among courts and arbitral tribunals for the business of adjudication includes three familiar narratives: First, this competition is a positive force, driving a “race to the top” for the most efficient dispute resolution. Second, litigation and arbitration are two very different alternatives. Third, parties prefer arbitration to resolve disputes arising from international commercial contracts.

This Article argues that the recent proliferation of international commercial courts around the world challenges all three of these common narratives. London and New York have long been competing to be designated the forum of choice in international commercial contracts — whether parties opt for litigation or arbitration. More recently, 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. These jurisdictions are embracing litigation at the same time that they are making their laws favorable to arbitration.

A closer look at the rise of these courts suggests first that the “race to the top” narrative is an odd fit. A desire to create the best possible dispute resolution mechanism is not the only or the primary driving force behind these courts, and will not be the metric against which their success is measured domestically. Second, despite the common U.S. rhetoric that litigation and arbitration are opposite methods of dispute resolution, or that a preference for one would indicate a disdain for the other, many governments look to attract both. New international commercial courts borrow some of arbitration’s most attractive features, like expert adjudicators, confidentiality, and customizable procedures. These courts thus raise questions about what characteristics of arbitration and litigation are fundamental and the public/private divide that they are assumed to represent. Third, while the future popularity of these new courts remains to be seen, their proliferation undermines accounts that parties “always” do or will prefer arbitration for international commercial disputes. The Article concludes by exploring the normative implications of this phenomenon and setting forth research questions for examining the future of these courts.

* Associate Professor of Law, Fordham Law School. For helpful conversations, I am grateful to Jane Baron, John Coyle, Matthew Erie, Mark Feldman, Susan Finder, Maggie Gardner, Mitu Gulati, Rebecca Ingber, Alyssa King, Eva Lein, David Noll, Rachel Rebouche, Danya Reda, Marta Requejo Isidro, Giesela Ruehl, Aaron Simowitz, 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 me comments at pbookman@fordham.edu.

TABLE OF CONTENTS

INTRODUCTION	1
I. ARBITRATION AND LITIGATION	7
A. The Adjudication Market.....	7
B. The Differences between Arbitration and Litigation	10
C. The Preference for Arbitration	13
II. INTERNATIONAL COMMERCIAL COURTS AND THE RISE OF LEGAL HUBS	17
A. Old School “International” Commercial Courts.....	18
1. London	19
2. New York.....	22
B. Investment-Minded Courts	25
1. Qatar	27
2. Dubai	28
C. Aspiring Litigation Destinations	31
1. Singapore	32
2. Courts on the Continent: Could They Be Contenders?	34
D. China: Quest for Control?	42
III. THE DISRUPTION OF THE NEW INTERNATIONAL COMMERCIAL COURTS	47
A. Disrupting the “Race to the Top”	47
B. Disrupting the Differences between Litigation and Arbitration	56
C. Disrupting Assumptions About Party Preferences.....	61
IV. THE PATH FORWARD.....	62
A. Tentative Takeaways.....	62
B. Areas for Research	64
CONCLUSION	67

INTRODUCTION

The adjudication of international commercial disputes has become a highly competitive business. When parties to international commercial transactions draft their contracts, it is essential to designate in advance where possible disputes should be resolved. But the parties have a variety of available options. Will they choose to designate a court or arbitral tribunal, or require some other non-binding alternative dispute resolution (ADR) mechanism? In which country or city? In which court or under which arbitral center’s authority?

These are the considerations from the “demand” side. On the supply side, courts and arbitral tribunals are said to “compete” with each other. The orthodox view typically assumes that this competition for forum selection in contracts drives a “race to the top” for tribunals to develop the best, most efficient procedures to resolve disputes.¹ It assumes that arbitration and litigation present starkly different options for binding dispute resolution.² It further assumes that parties prefer private arbitration over public litigation in courts.³ As for location, London and New York have long been go-to fora for international commercial litigation. The traditional top choices for seating arbitration include London, Paris, New York, and Geneva, home to “the oldest and most popular arbitral institutions.”⁴

A recent phenomenon—the proliferation of English-language-friendly courts specializing in international commercial disputes—paints the competition between litigation and arbitration in a different light and calls into question many of these assumptions.⁵

¹ 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.”); [O’Hara & Ribstein].

² See, e.g., Michael A. Helfand, *Arbitration’s Counter-Narrative: The Religious Arbitration Paradigm*, 124 YALE L.J. 2994 (2015); Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 282 (2015).

³ See, e.g., Barak D. Richman, *The Antitrust of Reputation Mechanisms: Institutional Economics and Concerted Refusals to Deal*, 95 VA. L. REV. 325, 339 (2009) (“most commercial parties choose arbitration to reduce the costs of litigating in public courts”).

⁴ Aceris Law, *The Seat of Arbitration International Commercial Arbitration*, Aug. 11, 2017, <https://www.acerislaw.com/seat-arbitration-international-commercial-arbitration/>.

⁵ Scholarship considering these courts’ rise is also only just emerging. See, e.g., Matthew Erie, *The New Legal Hubs*, forthcoming Va. J. Int’l L.; 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*

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.⁶ Since the Brexit vote in 2015, this phenomenon has echoed in Europe. Germany,⁷ France,⁸ the Netherlands,⁹ Belgium,¹⁰ and Switzerland¹¹ 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.¹²

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).

⁶ See Erie, *New Legal Hubs*, *supra* note 2; Nicolás Álvaro Zambrana-Tévar, *The Court of the Astana International Financial Center in the Wake of Its Persian Gulf Predecessors*, https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3308296 (Dec. 31, 2018) (Kazakhstan).

⁷ Christoph Just, *A New Landmark In International Commercial Litigation? The Frankfurt High Court Installed A Specialized Chamber For International Commercial Matters*, Jan. 26, 2018, <https://www.schulte-lawyers.com/schulteblog/2882017-6y2e6>.

⁸ *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>.

⁹ Friederike Henke, *Netherlands Commercial Court: English proceedings in The Netherlands* (Oct. 25, 2018), <http://conflictoflaws.net/2018/netherlands-commercial-court-english-proceedings-in-the-netherlands/>; *Netherlands Commercial Court (NCC)*, <https://www.rechtspraak.nl/English/NCC/>.

¹⁰ Guillaume Croisant, *The Belgian Government Unveils Its Plan for the Brussels International Business Court (BIBC)*, 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. <https://gavclaw.com/2018/11/14/the-brussels-international-business-court-council-of-state-continues-to-resist/>; article in Dutch: http://www.standaard.be/cnt/dmf20190321_04272272.

¹¹ 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+Commercial+Court> (discussing different cities in Switzerland).

¹² 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; 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> (“Saudi Arabia launched commercial courts in three main cities last month, its justice minister said, a move aimed at easing investment to help wean the kingdom off its reliance on oil by diversifying the economy.”); John Balouziyeh, *Judicial Reform in Saudi Arabia: Recent Developments in Arbitration and Commercial Litigation*, <http://arbitrationblog.kluwerarbitration.com/2017/12/31/judicial-reform-saudi-arabia-recent-developments-arbitration-commercial-litigation/>; Middleton, <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?*, <http://www.mondaq.com/australia/x/504084/International+Courts+Tribunals/Is+an+international+commercial+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

These courts add to, and are intended to complement, these localities' international commercial dispute resolution offerings. These states do not embrace litigation instead of arbitration. Rather, they simultaneously have "arbitration-friendly" legal regimes, favorably inclined toward arbitration clauses and deferential in their recognition and enforcement of arbitration awards.¹³ 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.

The United States' position in this landscape is complicated. On one hand, New York has long been devoted to positioning itself as a leader in international commercial dispute resolution, be it in litigation or arbitration.¹⁴ In 1995, New York opened a specialized Commercial Division to develop expertise and favorable procedures for complicated, high-stakes commercial cases, with an eye toward transnational disputes.¹⁵ On the other hand, over the past fifteen years, U.S. federal courts have grown increasingly hostile to litigation and

sense to establish an international commercial court in Australia."); Requejo at fn. 197 (describing discussions in Spain about opening an international commercial court).

¹³ See Hwang, *infra* note __, at 194 (defining "arbitration-friendly"). See also Arbitration-Litigation Paradox (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).

¹⁴ See *infra* Part II.A.2. Many other U.S. state courts, solicitous of the commercial adjudication business, have opened commercial courts, following New York's lead as a trend-setter. John F. Coyle, *Business Courts and Interstate Competition*, 53 WM. & MARY L. REV. 1915 (2012). But few focus on international disputes or have had much success attracting even domestic disputes. Stacie 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* (Eleven International Publishing, 2019, Forthcoming (available on SSRN)).

¹⁵ Delaware also tries to compete for transnational litigation. One innovative effort came in 2009, when Delaware amended its code to allow parties to agree to designate Delaware Chancery Court judges as arbitrators in cases with over \$1 million involving a Delaware business entity. The proceedings would be confidential, be held in the Delaware courthouse, allow parties to opt out of standard Delaware procedures, and be appealable to the Delaware Supreme Court under the FAA standard of review. The Third Circuit held the Delaware code provisions establishing this "government-sponsored arbitration" violate the First Amendment's guarantee of public access to courts. *Delaware Coal. for Open Gov't, Inc. v. Strine*, 733 F.3d 510, 521 (3d Cir. 2013). In dissent, Judge Roth emphasized that Delaware's efforts reflected increased competition in the international adjudication market. *Id.* at 524. Since that decision, Delaware has enacted the Rapid Arbitration Act to make Delaware a more attractive arbitral seat. See Chris Drahozal, *Innovation in Arbitration Law: The Case of Delaware*, 43 PEPPERDINE L. REV. 493 (2016). At least some parties are beginning to use this expedited procedure where at least one party is a Delaware business entity (as the Act requires). See *GAR The Guide to M&A Arbitration*, Amy Kläsener, ed., at 105, <http://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.26290.18.pdf> (2018).

hospitable to arbitration.¹⁶ As I have written elsewhere, federal courts have become especially hostile to *transnational* litigation,¹⁷ and their mostly pro-arbitration stance has some negative consequences for courts' ability to support and promote international commercial arbitration.¹⁸ These federal law developments hamper New York's efforts to compete for international adjudication business.¹⁹

This Article creates a typology for understanding why other countries are choosing to open international commercial courts and considers reasons to reframe the conventional accounts of why these courts have emerged. The Article then begins to sort out the implications of this phenomenon for the ways that we understand courts, arbitration, choice of forum, and the adjudication business more generally.

As commentary on these courts begins to grow, it is often assumed that they are driven by a common drive to compete with each other and with arbitration.²⁰ The role of lawyers—and what they have to gain from these developments—is also surprisingly absent from the current discussions of these courts.

This Article seeks to place the emergence of these new international commercial courts in context. Some of these courts have appeared as part of a movement by localities to become new legal hubs 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).²¹ Specialized courts are not an inevitable part of such efforts. Until recently, for example, Singapore had established itself as a go-to forum for international commercial *arbitration* while using courts primarily to support arbitration, not to compete for adjudication business.²² It recently added a specialized court to complement its prominence in arbitration and to “grow” the dispute resolution “pie.”²³ Conversely, international commercial courts can emerge without a parallel emphasis on developing the locality as a go-to destination for arbitration or other kinds of ADR, as appears to be the case in

¹⁶ See Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081 (2015); Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 72 VAND. L. REV. 1119 (2019); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097 (2006) (discussing the Supreme Court's embrace of arbitration as a pillar of its hostility to litigation).

¹⁷ Bookman, *Litigation Isolationism*, *supra* note __.

¹⁸ Bookman, *The Arbitration-Litigation Paradox*, *supra* note __.

¹⁹ See *id.* [Arb-Lit Paradox]

²⁰

²¹ 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.”).

²² As of 2011, Australia, India, and Ireland had all “established specialized courts to handle international arbitration matters.... Several other jurisdictions well-known for international arbitration, including France, the United Kingdom, Switzerland, Sweden and China, have designated certain courts or judges to hear cases to challenge or enforce arbitration awards.” NYSBA 2011 document.

²³ See *infra* [section on Singapore].

Amsterdam and could have happened in Brussels.²⁴ Other locations, such as Dubai and Astana, Kazakhstan, see courts with dispute resolution expertise as an integral part of establishing a complete, sophisticated legal hub.²⁵ China's aim seems keyed to exercising control over Belt and Road disputes, though they may have broader, longer-term goals as well.²⁶

In contrast to the U.S. view, most of these localities conceive of different kinds of dispute resolution services as complementary offerings rather than solely as substitutes or competitors. Some see international commercial courts as key to promoting international investment in their economies or to asserting regional economic dominance. Designing the best mousetrap (or adjudication system) is not the primary motivator behind these changes.

In time, the success of these courts will be keyed to the forces that led to their creation. Investment-minded courts may be judged based on whether 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. The lawyers who pushed for the creation of these courts may evaluate them based on their own metrics. *If* these courts achieve these results, that 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.²⁷

There are other ways that these courts disrupt traditional narratives about international commercial dispute resolution. These courts often borrow procedural devices, like party-driven design and confidentiality, that are typically thought to be characteristics distinguishing arbitration from litigation. The courts disrupt conventional accounts of the differences between the two. 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.

This Article explores the implications of new international commercial courts for understanding the relationship between national courts and

²⁴ See *infra* Part II.C.2.

²⁵ See *infra* Part II.B.

²⁶ See *infra* Part II.D.

²⁷ See Moon, *Nw. L. Rev.* (forthcoming 2020) (discussing the corporate law debates).

arbitration²⁸ and the market for law and dispute resolution services.²⁹ It argues that courts and arbitration have a more symbiotic relationship than is commonly assumed, especially by the U.S. Supreme Court and U.S. academic literature.³⁰ The Article promotes viewing the market for the adjudication business and drivers for change in courts and arbitration as multi-dimensional and driven by local motivations as well as global or regional competition. This Article also holds insights for a broader range of studies, such as the role of law and legal actors in promoting legal change and legal institution building,³¹ comparative procedure and studies of the importance of culture in procedure,³² the literature on forum shopping,³³ and the position of courts and dispute resolution in the evolving geo-economic world order.³⁴

Part I explores the current scholarship on the relationship between arbitration and litigation. Part II canvases the 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, the nature of arbitration and litigation, and parties' supposed preference for arbitration. Part IV concludes with some initial reflections on the normative implications of the growth of international commercial courts and an agenda for further research.

²⁸ See, e.g., S.I. Strong, *Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration*, 2012 J. DISP. RESOL. 1, 4 (2012); W. Michael Reisman & Heide Iravani, *The Changing Relation of National Courts and International Commercial Arbitration*, 21 AM. REV. INT'L ARB. 5, 34 (2010); Luca G. Radicati di Brozolo, *The Impact of National Law and Courts on International Commercial Arbitration: Mythology, Physiology, Pathology, Remedies and Trends*, [2011] PARIS J. INT'L ARB. 663; Margaret Moses, *Arbitration/Litigation Interface: The European Debate*, 35 NW. J. INT'L L. & BUS. 1, 17 (2014).

²⁹ 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).

³⁰ See Bookman, *The Arbitration-Litigation Paradox*, *supra* note __ (summarizing this view and collecting sources).

³¹ See, e.g., Mark Massoud, *International Arbitration and Judicial Politics in Authoritarian States*, 39 LAW & SOC. INQUIRY 1 (2014).

³² See, e.g., Oscar G. Chase, *American Exceptionalism and Comparative Procedure*, 50 AM. J. COMP. L. 277 (2002); Ronald J. Allen, *Idealization and Caricature in Comparative Scholarship*, 82 NW. U. L. REV. 785 (1988); John H. Langbein, *Comparative Civil Procedure and the Style of Complex Contracts*, 35 AM. J. COMP. L. 381 (1987); Richard Abel, *A Comparative Theory of Dispute Institutions in Society*, 8 LAW & SOC'Y REV. 217 (1973).

³³ See, e.g., Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. (2016); Christopher Whytock, *The Evolving Forum Shopping System*, CORNELL L. REV. (2011); Klerman & Reilly, *supra* note __.

³⁴ See Anthea Roberts, Henrique Choer Moraes & Victor Ferguson, *The Geoeconomic World Order*, LAWFARE, <https://www.lawfareblog.com/geoeconomic-world-order>.

I. ARBITRATION AND LITIGATION

The conventional understanding of the competitive relationship between arbitration and litigation relies on three assumptions. These assumptions are not always strongly supported, but they stand quietly in the background of many conversations about international commercial dispute resolution and the adjudication business. First, scholars consider the competition for adjudication services to be a “race to the top” because fora are chosen in forum-selection clauses by parties bilaterally and before a dispute arises. Therefore, one presumes, both parties are not choosing based on the forum that is unilaterally most advantageous to them, but rather the forum that can offer the most efficient and fair procedures to resolve any future disputes. Second, the choice between arbitration and litigation is thought to be a choice between two starkly different options, with some inherent and immutable characteristics. Third, it is widely stated that parties to international commercial contracts prefer arbitration. This Part discusses and unpacks these three assumptions.

A. THE ADJUDICATION MARKET

An extensive body of scholarship explores conceiving of law—including the provision of dispute resolution services—as a market.³⁵ Much of the scholarship on how jurisdictions adapt their laws to compete for the business of adjudication has focused on international arbitration.³⁶ As scholars have noted, 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.³⁷ International commercial arbitration “not only supports international commerce, it has become a business in itself.”³⁸

Scholars debate, however, the extent to which national *courts* participate in this market and compete with private arbitration.³⁹ Some contend that while

³⁵ 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).

³⁶ Erin O’Hara O’Connor & Peter B. Rutledge, *Arbitration, the Law Market, and the Law of Lawyering*, 38 INT’L REV. L. ECON. 87 (2014).

³⁷ 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).

³⁸ *Id.*

³⁹ Some argue there is no market for law or adjudication. “Critics of the law market concept tend to question the extent to which states actually compete for the provision of laws.” O’Hara O’Connor & Rutledge, *supra*, note __, at 89. States, after all, are driven by a multitude of factors aside from economic

there can be incentives for states to compete for adjudication business in their courts, “only a very limited number of countries and states, such as the UK [and] New York . . . , have sufficient incentives to do so,” while other smaller states “might in fact be better off reducing their docket as much as possible.”⁴⁰ Others see the growth of business courts in states within the United States, for example, as evidence that at least some states *seek* to compete for adjudication business not only by cultivating laws that support arbitration but also by making their courts more attractive. States may be driven by similar financial incentives—to collect the revenue that accompanies lawyers and litigation—or to retain the power of crafting law. States recognize, moreover, that courts compete not only with each other, but also with arbitration for commercial disputes.⁴¹ Whether those business courts, even state-of-the-art ones, are successful at attracting adjudication business, however, is a different story.⁴²

Some studies on markets for dispute resolution focus on the competition between courts,⁴³ between localities as arbitral seats,⁴⁴ or between arbitration centers.⁴⁵ Like states, however, the parties to a commercial transaction also recognize that the relevant market is the market for dispute resolution services more broadly.⁴⁶ This market includes courts, arbitration, and many varieties of alternative dispute resolution (ADR), such as conciliation and mediation.⁴⁷ Importantly, especially in international commercial contracts, one may select from this menu of options as offered in a number of different locations and subject to a range of different national and private regulatory regimes. Some of these options include multiple offerings from the menu. As Gerhard Wagner

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).

⁴⁰ 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).

⁴¹ “[S]everal states have experimented with the provision of business courts designed to resolve corporate and commercial law disputes, and lawyers, judges, academic, and legal trade journals have characterized these innovations as state efforts to compete with arbitration.” O’Hara O’Connor & Rutledge, *supra*, note __ at 90 (citing Drahozal (2009)). See also Coyle, *Business Courts*, *supra* note __.

⁴² Coyle, *Business Courts*, *supra* note __ (demonstrating that within the United States, state business courts tend not to attract adjudication business); see *infra* Part __ (discussing how to measure the “success” of international commercial courts).

⁴³ See, e.g., Klerman & Reilly, *supra* note __.

⁴⁴ See, e.g., Loukas A. Mistelis, *Arbitral Seats: Choices and Competition*, arbitrationblog.kluwerarbitration.com/2010/11/26/arbitral-seats-choice-and-competition.

⁴⁵ See, e.g., Mohamed Abdel Raouf, *Emergence of New Arbitral Centers in Asia and Africa: Competition and Contribution to the Rule of Law* 325, in *THE EVOLUTION AND FUTURE OF INTERNATIONAL ARBITRATION* (2016).

⁴⁶ See Nyarko, *supra* note __ (discussing intra- and inter-industry competition).

⁴⁷ Gerhard Wagner, *The Dispute Resolution Market*, 62 BUFF. L. REV. 1085, 1095 (2014).

points out, “[m]any disputes start out with negotiations between the parties that may then lead to mediation, and from there to arbitration, in order to reach the courts after the award was made and an application for leave to enforce was filed.”⁴⁸

This law-and-economics-based view often lies beneath the surface of much of the literature on forum shopping. The market for dispute resolution between courts and arbitration is widely considered a positive competitive force when those tribunals are competing to be chosen in contracts’ forum-selection clauses.⁴⁹ Such competition—when parties choose a forum for their disputes *ex ante* and *bilaterally*, for example in a business contract between parties of relatively equal bargaining power—is thought to drive dispute resolution service providers to make their products more efficient, fair, and unbiased for both sides.⁵⁰ This competition is often considered a negative force, on the other hand, when the forum is chosen *ex post* and *unilaterally*, for example, by patent trolls or tort plaintiffs seeking the most favorable forum for their suits.⁵¹ In the former context, there is desirable and beneficial “interjurisdictional competition.”⁵² The latter context, scholars argue, leads to “forum shopping” by plaintiffs,⁵³ “forum selling” by courts,⁵⁴ and an overall “race to the bottom.”⁵⁵

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 their bench, procedure or law to an international standard, but by themselves setting the standards for transnational commercial litigation.”⁵⁶ The rise of international commercial courts around the world, likewise, is attributed

⁴⁸ *Id.*

⁴⁹ “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).

⁵⁰ Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814 (2006).

⁵¹ See Bookman, *Unsung Virtues*, *supra* note __ (exploring definition of forum shopping and contesting the conventional wisdom that forum shopping is entirely harmful).

⁵² Nyarko, *supra*, note __ at 4; Wagner, *supra* note __, at 1089 (“In essence, unilateral choice, inevitable as it may be, is something the legal system needs to worry about and should take care to limit and rein in. In contrast, bilateral choices made by both parties deserve to be given full deference. Consensual choice of forum not only implements the preferences of the parties, but also stimulates a competitive process of constant improvement of dispute resolution processes.”).

⁵³ See Bookman, *Unsung Virtues*, *supra* note __.

⁵⁴ Klerman & Reilly, *supra*, note __.

⁵⁵ Wagner, *supra* note __, at 1090.

⁵⁶ 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).

to new courts trying to compete either with courts like London's or with arbitration to provide better dispute resolution and thus become the new market leader.⁵⁷

The emerging phenomenon of new international commercial courts furthers our understanding of the market for dispute resolution services. As explored in Part III, in some ways, this phenomenon reinforces some principles of the literature—such as the existence of a competitive and growing market for adjudication services between public and private adjudication providers, including both courts and arbitration centers. The courts also upend some commonly held assumptions, for example, assumptions about whether this competition is best described as a “race to the top,” and what incentives are driving states to “compete.”

B. THE DIFFERENCES BETWEEN ARBITRATION AND LITIGATION

Arbitration is typically understood as a “dispute resolution system where private decision-makers outside a public court system” adjudicate claims and deliver a binding resolution.⁵⁸ Scholars and courts alike conceive of arbitration as a “creature of contract,” and see arbitration law's key purpose as enforcing parties' choice to avoid courts and proceed with private, binding dispute resolution.⁵⁹ Litigation, meanwhile, refers to the process of resolving disputes in a public court system.⁶⁰

In the United States and elsewhere, moreover, it is commonly said that the “essence” of arbitration lies in the ways it differs from litigation. That is, the two are defined in reference to each other. The U.S. Supreme Court, for example, has described the “essence” of arbitration as resting on the fact that it is “informal,” “speedy,” “efficient,” “inexpensive,” and “individualized.” In short, arbitration is everything litigation is not.⁶¹ The Court's liberal “pro-arbitration” policy thus includes criticisms of litigation as a mechanism for resolving disputes. For example, the Court has declined enforcement of an arbitration clause that

⁵⁷ 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*, 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*, https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3295801.

⁵⁸ David L. Noll, *Response: Public Litigation, Private Arbitration?*, 18 NEV. L.J. 477, 477-78 (2018) (internal quotation marks omitted).

⁵⁹ See Hiro N. Aragaki, *Arbitration: Creature of Contract, Pillar of Procedure*, 8 Y.B. ARB. & MEDIATION 2 (2016); cf. Hiro N. Aragaki, *The Metaphysics of Arbitration: A Reply to Hensler and Khatam*, 18 NEV. L.J. 541 (2018) (asking “what is arbitration?”).

⁶⁰ *Litigation*, WEX, <https://www.law.cornell.edu/wex/litigation>.

⁶¹ *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

preserves de novo judicial review in part because doing so would undermine arbitration's essential attribute of resolving cases "straightaway."⁶² The Court's approach to being "pro-arbitration" also corresponds to and includes doctrinal trends that make it harder for plaintiffs to access courts.⁶³

Others see the key distinction between arbitration and litigation in the fact that arbitration's procedures are customizable by the parties, whereas litigation is presumed to proceed according to pre-set procedures established by law.⁶⁴ Still others emphasize other differences as key, for example that arbitration proceedings are consensual while litigation is compulsory; or that arbitration proceedings are confidential while litigation is public; or that parties may select their own arbitrators, but not their own judges.⁶⁵ One of the most attractive and distinctive attributes of arbitration is easy enforceability. Under a treaty signed by over 150 countries, the New York Convention,⁶⁶ arbitral awards will be recognized and enforced all over the world. Another convention, the Hague Convention on Choice of Courts Agreements (COCA), would make states enforce court judgments arising from cases where jurisdiction is based on exclusive forum-selection clauses (i.e., clauses that require suit exclusively in a particular forum).⁶⁷ But the COCA is far less popular, and therefore court judgments are less widely enforceable.

The example of international commercial arbitration demonstrates that arbitration's stylized procedural differences from litigation are *not*, in fact, essential characteristics of arbitration.⁶⁸ Over the past few decades, as international commercial arbitration has increased in frequency and complexity, it has acquired many litigation-like attributes. It can be high-stakes,⁶⁹ lengthy, and complicated. It can involve appellate processes,⁷⁰ multi-party arbitration,

⁶² Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008).

⁶³ See Bookman, *The Arbitration-Litigation Paradox*, *supra*, note __.

⁶⁴ See, e.g., Requejo, *supra* note __, a 1; but cf., e.g., Robert G. Bone, *Forum Shopping and Patent Law – A comment on TC Heartland*, 96 TEX. L. REV. 141 (2017) (on customizable procedures in U.S. courts).

⁶⁵ See generally CHILDRESS, RAMSEY, & WHYTOCK, *TRANSNATIONAL LEGAL PRACTICE* 545-548 (2015) (describing the difference between litigation, negotiation, mediation, and arbitration).

⁶⁶ Parties to the Hague Choice of Court Convention (2005) agree to recognize exclusive forum-selection agreements, stay proceedings outside the chosen court, and recognize judgments by the chosen court. See Convention on Choice of Court Agreements (30 June 2005) <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98> (full text of treaty). The United States has signed but not ratified the Convention.

⁶⁷ COCA, art. 3 (defining "exclusive choice of court agreements").

⁶⁸ See Bookman, *The Arbitration-Litigation Paradox*, *supra* note __.

⁶⁹ Compare AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350 (2011) ("[a]rbitration is poorly suited to the higher stakes of class litigation") with Adam Raviv, *Too Darn Bad: How the Supreme Court Has Undermined Arbitration*, 6 Y.B. ON ARB. & MEDIATION 220 (2014) (contesting that position).

⁷⁰ Hiro N. Aragaki, *Constructions of Arbitration's Informalism: Autonomy, Efficiency, and Justice*, 2016 J. DISP. RESOL. 141, 156–57 (2016); Born & Salas, *supra* note __, at 39.

jurisdictional disputes, and extensive discovery.⁷¹ Indeed, parties are now known to complain about arbitration becoming too judicialized.⁷²

The enforceability distinction is a function of international law, not an immutable characteristic.⁷³ As more countries join the COCA, court judgments may be able to compete evenly with arbitration on the enforceability front.⁷⁴ Interestingly, the proliferation of international commercial courts may motivate more nations to join the Hague Convention—but given the current political climate (and the history of the COCA in the United States) it may be unlikely that the United States will join the ranks of signatories any time soon.⁷⁵

The emergence of international commercial courts and legal hubs demonstrates the converse point: international commercial courts are becoming more like arbitration in certain aspects. These courts may offer confidential proceedings; customizable procedures; and lay, expert decisionmakers. Contrary to the common rhetoric, especially in the United States, arbitration and litigation can have much in common.

In addition, international commercial courts are being established in states that have modern, arbitration-friendly laws⁷⁶ and that value a diverse, mutually reinforcing menu of dispute resolution offerings. These developments demonstrate that litigation and arbitration (as well as other kinds of ADR) can be promoted by governments simultaneously, rather than as two sides of a zero-sum game.⁷⁷

⁷¹ Remy Gerbay, *Is the End Nigh Again? An Empirical Assessment of the 'Judicialization' of International Arbitration*, 25 AM. J. INT'L ARB. (2014).

⁷² See, e.g., *id.*; QUEEN MARY UNIVERSITY OF LONDON, *supra* note ____.

⁷³ See Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 33 (2008).

⁷⁴ Dammann and Hansmann recognize that the Hague Convention, which still has not gained traction (and the United States does not look ready to sign on), remains insufficient. *Id.* at 48 (“[T]he Hague Convention is an important step in the right direction. Yet, even if it were ratified by a significant number of countries, which remains problematic, it would still be insufficient to ensure that extraterritorial litigation becomes generally available at the global level.”).

⁷⁵ See Keynote Speech, Harold Hongju Koh, Legal Adviser, United States Department of State, *The Obama Administration and International Law* (March 25, 2010) (recounting the situation at State, the fight between the ALI and ULC about how to implement treaty domestically).

⁷⁶ See, e.g., N.Y. State Bar Ass'n, Task Force on N.Y. Law in Int'l Matters, Final Report 4 (June 25, 2011) (“[J]urisdictions around the world, many with government support, are taking steps to increase their arbitration case load. New arbitration laws were enacted in 2010 and 2011 in France, Ireland, Hong Kong, Scotland, Ghana and other nations to enhance their attractiveness as seats of arbitration....”); *id.* at 38, available at <http://www.nysba.org/workarea/DownloadAsset.aspx?id=34027>.

⁷⁷ See Aragaki, *The Federal Arbitration Act as Procedural Reform*, *supra* note ____ (criticizing the zero-sum game approach).

C. THE PREFERENCE FOR ARBITRATION

Many who study or practice international commercial arbitration make three interrelated assertions about parties' preference for arbitration. First, they assert that international commercial businesses *should* prefer arbitration to dispute resolution in domestic courts.⁷⁸ Second, they assert that parties *do* prefer arbitration—that is, they opt for arbitration more often (or almost always) in their contracts.⁷⁹ Third, they assert that arbitration is the predominant method of resolving business-to-business disputes, especially transnational ones.⁸⁰ Sometimes the prevalence of arbitration is said to be proven by parties' expressed preference for arbitration.⁸¹ Others make contrary, but just as impressionistic statements like, "The bulk of international commercial disputes are resolved by national courts."⁸²

In the United States especially, business parties' preference for arbitration is often tied specifically to their opposition to litigation. Stereotypically, international parties choose arbitration because courts are incompetent or corrupt.⁸³ In the United States, business interests also complain that litigation is

⁷⁸ See, e.g., Giles Cuniberti, *Beyond Contract – The Case for Default Arbitration in International Commercial Disputes*, 32 FORDHAM INT'L L.J. 417 (2008); Daisy Mallet, Partner, King & Wood Mallesons, <https://www.kwm.com/en/au/knowledge/insights/the-rise-of-the-courts-20181119> (concluding that arbitration remains more attractive than litigation in light of ease of enforcement, confidentiality, and neutrality).

⁷⁹ See, e.g., ALEC STONE SWEET & FLORIAN GRISEL, *THE EVOLUTION OF INTERNATIONAL ARBITRATION: JUDICIALIZATION, GOVERNANCE, LEGITIMACY* (2017) at 1 (quoting Juenger) (parties "nearly universal[ly]" seek to "keep transnational commercial disputes out of the courts, and thereby beyond the reach of local laws"). [Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 HARV. NEGOT. L. REV. 1, 45 (2014).]

⁸⁰ 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."); Sundaesh 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. For one of the most effective, and certainly the most entertaining, critiques of arbitration see Kerr, 'Arbitration v litigation: The Macao Sardine case', in Kerr, *As Far As I Remember* (Hart, 2002), Annex. That debate is now over: opinion has moved strongly in favour of international arbitration for the resolution of international disputes.").

⁸¹ "[L]arge commercial disputes are predominantly resolved within arbitration proceedings (63% of the companies studied prefer arbitration to court proceedings when conducting cross-border transactions)." Eidenmuller, *supra* note __.

⁸² Tiba, *supra* note __. These statements are not universal. Other observers recognize the more complicated choices facing parties to international commercial disputes. See, e.g., John F. Coyle & Christopher R. Drahozal, *An Empirical Study of Dispute Resolution Clauses in International Supply Contracts*, VAND. J. INT'L L. (forthcoming 2019); Matic, *supra* note __ ("It is widely acknowledged that arbitration proceedings are not always the ideal way to go in in all dispute cases due to cost considerations and since arbitral rulings can only be challenged to a limited extent.").

⁸³ See Karton book at 4.

too time and cost intensive. As the U.S. Council for International Business explained in an amicus brief to the Supreme Court, U.S. parties use international arbitration services widely and they situate their arbitration in U.S. cities. They do this because they hold positive views of arbitration and of U.S. courts as being supportive of international arbitration, even though those views “contrast with the negative perceptions held by foreign investors and businesses of the U.S. legal system generally.”⁸⁴

But while the view that businesses “always” prefer arbitration seems widely held,⁸⁵ scholars trying to prove the point empirically have found evidence contradicting this view. The statement is likely at least exaggerated.⁸⁶ The empirical evidence among U.S. businesses especially is unclear. The studies on how much U.S. businesses actually use arbitration among themselves have mixed results.⁸⁷ The preeminent study ten years ago suggested that U.S. corporations may use arbitration less than one might think, and that they use it primarily in consumer and employment contracts, not in business-to-business contracts.⁸⁸ The scholars explained this discrepancy by suggesting that perhaps, among themselves, businesses understand the value of litigation—for example, that it affords more in-depth discovery (and thus access to factual development), the opportunity for appellate review, and access to state-salaried judges and clerks, rather than having to pay for arbitrators and other arbitration center personnel.⁸⁹

⁸⁴ Brief of U.S. Council for International Business as Amicus Curiae, *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 2007 WL 2707883, 28-29 (Sept. 14, 2007).

⁸⁵ See *supra* note __ [starting with Moses] and accompanying text.

⁸⁶ “Because arbitration proceedings are often confidential, it is difficult to cite numbers to support these assertions. Klaus Peter Berger, a German international arbitration scholar, has stated that 90% of international economic contracts have an arbitration clause. This may be an exaggeration. But any suggestion that a “flight from arbitration” is occurring is incorrect when it comes to international commerce. Data from the major international arbitration institutions demonstrates a steady growth in the number of disputes they administer.” Ank Santens & Romain Zamour, *Dreaded Dearth of Precedent in the Wake of International Arbitration—Could the Cause Also Bring the Cure?*, 7 Y.B. ON ARB. & MEDIATION 73, 75 (2015); GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 97 (2d ed. 2014) (calling Berger’s claim without empirical support and “almost certainly inflated: in reality, significant numbers of international commercial transactions - certainly much more than 10% of all contracts - contain either forum-selection clauses or no dispute resolution provision at all.”).

⁸⁷ Chris Whytock, *Litigation, Arbitration, and the Transnational Shadow of the Law*, 18 DUKE J. INT’L COMP. L. 449 (2009).

⁸⁸ Theodore Eisenberg, Geoffrey P. Miller, & Emily Sherwin, *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J. L. REF. 871, 876 (2008).

⁸⁹ Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV 335 (2007) (finding, contrary to the authors’ initial hypotheses, that both domestic and international contracts between sophisticated parties have a low rate of arbitration); Charles W. Tyler, *Lawmaking in the Shadow of the Bargain: Contract Procedure As A Second-Best Alternative to Mandatory Arbitration*, 122 YALE L.J. 1560, 1566–67 (2013) (summarizing the literature questioning the Eisenberg and Miller studies’ results).

Subsequent studies, however, have questioned whether the contracts surveyed were appropriately representative, and show that the use of arbitration clauses is in fact rampant in many business sectors.⁹⁰ Still other studies suggest that certain kinds of businesses particularly value court access in certain contexts and specifically craft arbitration clauses with judicial opt-outs for certain kinds of disputes.⁹¹ Another possibility is that “[a]rbitration is widely used in some sectors, such as the oil and gas industry, and less widely used in others [such as financial services industry].”⁹² Perhaps international arbitration hosts a disproportionately high percentage of higher stakes disputes.⁹³ Likewise, international arbitration may be more prevalent among foreign or international companies than with U.S.-based companies.⁹⁴ If that is true, it might call into question the conventional wisdom that American businesses prefer arbitration because it enables them to opt-out of the perceived evils of *American* litigation.⁹⁵

A 2018 study of international commercial contracts further undermines the

⁹⁰ Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433 (2010); Whytock, *supra* note __. Drahozal and Ware contend that “[b]ecause the litigation process receives government subsidies, ... the fact that a contract does not include an arbitration clause does not indicate that litigation is more efficient than arbitration, but only that parties prefer a subsidized dispute resolution process to an unsubsidized one.” Drahozal & Ware, *supra* note __, at 435-436.

⁹¹ See Coyle & Drahozal, *supra* note __; Erin O’Hara O’Connor & Christopher R. Drahozal, *The Essential Role of Courts for Supporting Innovation*, 92 TEX. L. REV. 2177 (2014).

⁹² Freshfields, *10 International Arbitration Trends in 2017*, at 6. “In terms of arbitration procedure itself, the financial institutions surveyed by the ICC highlighted a number of perceived shortcomings of arbitration that deterred its wider use by the industry, including:

- questions about whether it would be possible to secure effective interim relief on an urgent basis;
- the perceived lack of availability of ‘summary judgment’ or similar mechanisms in arbitration;
- impediments to joining third parties to arbitrations or consolidating multiple related disputes into a single arbitration; and
- the fact that arbitration awards do not set binding precedents for future cases.”

But see Matteo Zambelli, *LIDW 2019: The Rise of Arbitration in Financial Services Disputes*, 7 May 2019, <http://arbitrationblog.kluwerarbitration.com/2019/05/08/lidw-2019-the-rise-of-arbitration-in-financial-services-disputes-7-may-2019/>.

⁹³ “Although the number of cases going to international arbitration may seem negligible when compared to the number of cases filed with domestic courts, on average international arbitration largely outgrows domestic cases in terms of financial stages. For instance, the aggregate value of all disputes pending before the ICC in 201 amounted to approximately USC 110 billion (or an average amount of USC 43.5 million per case.” Alec Stone Sweet & Florian Grisel, *The Evolution of International Arbitration, Delegation, Judicialization, Governance*, in *INTERNATIONAL ARBITRATION AND GLOBAL GOVERNANCE* 22 (2014).

⁹⁴ Whytock, *supra* note __; see QUEEN MARY UNIVERSITY OF LONDON, *supra* note __ (90% of respondents, corporate counsel who actively use international commercial litigation, name arbitration as their preferred dispute resolution mechanism).

⁹⁵ Some studies suggest that businesses find it particularly important to preserve their right to access U.S. courts. See Erin O’Hara O’Connor & Christopher R. Drahozal, *The Essential Role of Courts for Supporting Innovation*, 92 TEX. L. REV. 2177, 2180-811 (2014).

conventional wisdom that parties to such contracts usually opt for arbitration.⁹⁶ Analyzing over half a million material international contracts of public companies registered with the SEC between 2000 and 2016, Julian Nyarko found that only 25% included arbitration clauses, while 34% had forum-selection clauses choosing domestic courts.⁹⁷ He drew the conclusions that “U.S. parties and those with close economic ties to the U.S. only rarely rely on arbitration” and “little evidence . . . suggest[s] that litigating in another countries’ court is a general concern for parties.”⁹⁸ (If one contracting party’s home country is unlikely to enforce a U.S. court decision, however, “parties are much more likely to refer disputes to the U.S. judiciary than to arbitration.”⁹⁹) A law firm’s 2014 study of how commercial disputes are resolved similarly concluded that while companies would prefer to avoid both litigation and arbitration (perceiving both as relatively costly methods compared to mediation or negotiation), over half of disputes are resolved through one of those methods, with litigation being more prevalent than arbitration.¹⁰⁰

The scholarship and the pro-arbitration rhetoric thus seem to underestimate the extent to which whether to include an arbitration clause in a contract can be a difficult decision.¹⁰¹ As possibilities for dispute resolution, litigation and arbitration offer different pros and cons.¹⁰² Indeed, sometimes the pros are the cons: for example, an expert arbitrator may know the business well, but not other areas of the law. The lack of judicial review can be a double-edged sword depending on one’s opinion of the arbitrators’ final decision. The lack of binding precedent from one arbitral decision may hinder a company’s attempt to foster favorable law in a certain area or contain a disappointing result.

⁹⁶ Nyarko, *supra*, note __; see also Coyle & Drahozal, *supra* note __ (finding arbitration in 55% of studied international supply agreements).

⁹⁷ Nyarko, *supra* note __, at 3.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Eversheds, *Companies in conflict: How commercial disputes are won* (2014) (interviewing 82 general counsels at companies and financial institutions around the world, finding that 37% of disputes were resolved through litigation, 18% through arbitration, and the remainder through mediation or negotiation).

¹⁰¹ Julie K. Bracker & Larry D. Soderquist, *Arbitration in the Corporate Context*, 2003 COLUM. BUS. L. REV. 1, 3 (2003); GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 97 (2d ed. 2014).

¹⁰² For a thorough, practice-oriented guide to deciding whether to include an arbitration clause in a contract, see <https://corporate.findlaw.com/human-resources/things-to-consider-before-including-an-arbitration-clause-in-your.html>; see also Julie K. Bracker & Larry D. Soderquist, *Arbitration in the Corporate Context*, 2003 COLUM. BUS. L. REV. 1, 32–33 (2003) (discussing the pros and cons of arbitration and litigation); internal cross-reference.

This extensive research focuses on the demand side of the market for dispute resolution.¹⁰³ The supply side often gets shorter shrift.¹⁰⁴ Dan Klerman and Greg Reilly's scholarship on forum selling is an important exception, but they focus on competition for ex post, unilateral forum selection. The next Part offers an in-depth exposition of current events in the supply side of the market for adjudication typically as designated in contracts—often ex ante and bilaterally.

II. INTERNATIONAL COMMERCIAL COURTS AND THE RISE OF LEGAL HUBS

London and New York have enjoyed the status of being preeminent, well respected epicenters of legal activity for over a century. Both of these cities have cultivated their reputation for providing high quality adjudication services and developing high quality substantive law that parties regularly choose to govern their private agreements. They invest significant resources in their courts, the laws that make their courts welcoming to international commercial disputes and supportive of international commercial arbitration, and marketing that advertises their desirability as a forum for adjudicating disputes.

London and New York thus represent the “old school” model for establishing a premier court for international commercial disputes. They developed a sophisticated *domestic* commercial court that welcomes international disputes and attracts them by virtue of their expertise, efficiency, and broad jurisdiction, among other characteristics.

The modern trend is to embrace the international aspect of commercial disputes head-on. A growing number of localities are opening courts and dispute resolution centers that specifically and exclusively cater 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.¹⁰⁵ Unlike London and New York, these new courts distinguish

¹⁰³ See also, e.g., Chris Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481 (2011) (providing empirical research that transnational litigation in the United States has decreased over the past few decades).

¹⁰⁴ See, e.g., Wagner, *supra* note __ at 1098 (discussing the supply side in a few lines).

¹⁰⁵ 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 has a commercial court open to domestic and international disputes [CITE – Wilske?]; 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.”¹⁰⁶

But while several studies examine the growth of these courts as a unified global phenomenon,¹⁰⁷ this Part describes four categories of international commercial courts.¹⁰⁸ The first category is the old-school model, exemplified by London and New York, of domestic commercial courts that become global standards. Second, investment-seeking courts, such as Qatar and Dubai, were established to attract investment into the country and the region. Third, Singapore and the emerging courts in Europe purport to be striving to become regional gold-standards as go-to fora for international commercial dispute resolution. I dub these “litigation destinations.” Litigation destinations usually (but need not) exist in a local legal environment friendly to arbitration. Finally, 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.¹⁰⁹ It has unique potential for global influence.

A. OLD SCHOOL “INTERNATIONAL” COMMERCIAL COURTS

For over a hundred years, London and New York have been legal hubs: hospitable to both international commercial litigation and arbitration, and creators of widely consumed substantive law.¹¹⁰ They have led not only as a premier seat for arbitration, but also as a premier court chosen through choice-of-forum clauses, and often as the source of substantive law chosen through

¹⁰⁶ Erie, Legal Hubs, at 49.

¹⁰⁷ See sources cited in footnote [5].

¹⁰⁸ “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).

¹⁰⁹ 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.*

¹¹⁰ 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).

choice-of-law clauses.¹¹¹

Neither London nor New York specifically established themselves as “international” commercial courts. Both have specialized commercial divisions that are designed to be so attractive to commercial disputes that they draw sophisticated forum-seekers from around the world.

1. London

In 1895, the Queen’s Bench established a special division called the London Commercial Court.¹¹² It was not set up to be an international commercial court, but it became very attractive for such disputes. In 2015, 63% of disputes at the Commercial Court involved foreign nationals,¹¹³ and 52% of the contracts drafted in English in the Middle East and North Africa chose London as the seat of jurisdiction for disputes.¹¹⁴ The Law Society of London and Wales boasts that a “staggering 80% of cases” in London’s specialized Commercial Court involve foreign parties.¹¹⁵ Another study reports that between 2008 and 2016, about 80% of all commercial cases before the London Commercial Court involved at least one foreign party, and almost 50% of all claims involved only foreigners.¹¹⁶

London, the UK government, and the UK bar all appreciate the importance of welcoming both litigation and arbitration and enforcing party choice broadly. They have done so for over a century.¹¹⁷ The UK’s Justice Department advertises both UK courts and UK law as an important export.¹¹⁸

First, the London Commercial Court prides itself as a litigation destination and developer of substantive law. London is well known for its judges’ business

¹¹¹ 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 __.

¹¹² Wilske, *supra* note __, at 160.

¹¹³ 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>).

¹¹⁴ Requejo, *supra* note __.

¹¹⁵ THE LAW SOCIETY OF ENGLAND AND WALES, *supra* note __, at 5.

¹¹⁶ Requejo, *supra* note __, at 14 (citing __).

¹¹⁷ Chloe Smith, *Arbitration Hindering Development Of Common Law – LCJ*, THE LAW SOCIETY GAZETTE (March 21, 2016), <https://www.lawgazette.co.uk/law/arbitration-hindering-development-of-common-law--lcj/5054358.article> (discussing speech of Lord Thomas of Cwmgiedd lamenting that “in retrospect the UK took a ‘wrong turning’ in 1979 and in 1996 when it introduced measures to make arbitration more attractive in the international market.”).

¹¹⁸ THE LAW SOCIETY OF ENGLAND AND WALES, ENGLAND AND WALES: THE JURISDICTION OF CHOICE, <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.”).

sophistication, independence, and respect for the rule of law. It is particularly attractive to foreign parties because of its broad concept of jurisdiction,¹¹⁹ flexible procedural rules designed to accommodate complex commercial cases,¹²⁰ and its proclivity toward compelling parties to disclose documents beyond standard disclosures.¹²¹ 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.¹²²

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.¹²³ English law, likewise, enjoys a favorable reputation around the globe. It is the most selected law to govern business contracts within the EU.¹²⁴ It is sought after for its familiarity, stability, and predictability, as well as its reputation for fairness and efficiency.¹²⁵ The doctrine of precedent offers predictability but also flexibility to adapt to the modern business world.¹²⁶ English law also is quite favorable towards enforcing contracts.¹²⁷

London also hosts one of the most popular commercial arbitration centers, the London Court of International Arbitration (LCIA),¹²⁸ and is one of the most popular choices for an arbitral seat, regardless of which arbitration center administers the arbitration.¹²⁹ UK law liberally supports arbitration. In 1996, Parliament revised the Arbitration Act, modeling it after the UNCITRAL Modern Rules for Arbitration,¹³⁰ which requires courts to support arbitration and limit judicial interference. The previous Arbitration Act had permitted

¹¹⁹ See Delphine Nougayrede, *Outsourcing Law in Post-Soviet Russia*, 3 J. EURASIAN L. 6 (2015) (discussing Russian oligarchs' use of UK courts and law).

¹²⁰ Robin Byron, *Update on Dispute Resolution in England and Wales: Evolution or Revolution*, 75 TUL. L. REV. 1297, 1301 (2001).

¹²¹ *Id.*

¹²² See John F. Coyle, *Rethinking Judgments Reciprocity*, 92 N.C. L. REV. 1109 (2014).

¹²³ Tsedal Neeley, *Global Business Speaks English*, HARVARD BUSINESS REVIEW, May 2012, <https://hbr.org/2012/05/global-business-speaks-english>.

¹²⁴ *Providing A Cross-Border Civil Judicial Cooperation Framework: A Future Partnership Paper*, at 4, available at: <https://www.gov.uk/government/publications/providing-a-cross-border-civil-judicial-cooperation-framework-a-future-partnership-paper>.

¹²⁵ See Vogenauer, *supra* note __.

¹²⁶ 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).

¹²⁷ *Id.*

¹²⁸ QUEEN MARY UNIVERSITY OF LONDON, 2018 INTERNATIONAL ARBITRATION SURVEY: THE EVOLUTION OF INTERNATIONAL ARBITRATION, 2 (2018), available at <http://www.arbitration.qmul.ac.uk/research/2018/>.

¹²⁹ See *Arbitral Seats*, *supra* note __.

¹³⁰ Byron, *supra* note __ at 1316.

appeals of questions of law from arbitration to the courts. The 1996 law ended that practice.

Many wonder whether the uncertainty of Brexit potentially weakens London's stature in this field.¹³¹ Some fear UK judgments will no longer be easily enforceable throughout the EU.¹³² Indeed, this fear is an oft-cited reason for other European states to open their own international commercial courts.¹³³ Some law firms had proposed amending forum-selection clauses to protect against circumstances post-Brexit that don't allow for easy enforcement of UK judgments.¹³⁴ The UK has now signed the COCA with a caveat that it is joining only if and when Brexit goes through, which may address some of these issues.¹³⁵ Because the EU is also a member of COCA, this treaty would make some UK judgments enforceable throughout the EU even without EU membership. But the COCA applies only where contracts include an exclusive forum-selection clause and of course do little to help enforceability of non-contract-based disputes. Enforcement under COCA is still not as automatic as it would be under the Brussels Regulation. It is thus difficult to gauge precisely Brexit's impact on London's status as an international litigation hub.

Most observers do not expect Brexit to have a direct effect on London's prominence as an arbitration center, however.¹³⁶ This is in part 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 may compromise the ease of enforcing judgments or arbitral awards within the UK itself, if defendants' assets leave the UK.¹³⁷ Brexit also has come to represent the contradiction of some of British law's most attractive attributes: its predictability and stability. Moreover, as we shall see in a moment, increased competition is putting a dent in London's

¹³¹ Cf. Queen Mary, *supra* note __; Vogenauer_____. [both describing UK's favorite status before Brexit.] See, e.g., Giesela Rühl, *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.

¹³² See, e.g., Rühl.

¹³³ See *id.*; EU 2018 initiative.

¹³⁴ See, e.g., LK Shields; WCSR.

¹³⁵ Tobias Lutz, *UK Ratifies Hague Choice of Court and Hague Maintenance Conventions*, Jan. 3, 2019, <http://conflictoflaws.net/2019/uk-ratifies-hague-choice-of-court-and-hague-maintenance-conventions/>. But cf. Bianca Berardicurti, *Brexit: Could Arbitration Be A Port in the Storm?*, *Kluwer Arb. Blog*, May 12, 2019, <http://arbitrationblog.kluwerarbitration.com/2019/05/12/brexit-could-arbitration-be-a-port-in-the-storm/> (questioning the effectiveness of this method of signing COCA and describing the limitations of COCA as compared to the Brussels Regulation that applies when the UK is part of the EU).

¹³⁶ See, e.g., Berardicurti, *supra* note __.

¹³⁷ 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>.

market share. Whereas 52% of English-language contracts drafted in the Middle East chose to resolve their disputes in London in 2015, at the end of 2016, the percentage dropped to 25%.¹³⁸ The Dubai International Financial Centre (DIFC) Courts appear to have picked up the London defectors. In that time, its market share increased to 42%.¹³⁹

2. New York

Like London, New York has long been a sought-after legal hub and is 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 Latin American choice-of-law and choice-of-forum clauses in international commercial contracts (whether as a seat of litigation or arbitration).¹⁴⁰

Like English law, New York 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.¹⁴¹

New York's courts have long 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."¹⁴² New York courts vigorously enforce arbitration clauses, forum-selection clauses, and choice-of-law clauses.¹⁴³ At the same time as they champion party choice, however, New York courts also have been *expanding* their jurisdiction to consider business disputes beyond disputes that have a

¹³⁸ Requejo, *supra* note __.

¹³⁹ *Id.*

¹⁴⁰ 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. [INSERT CITES from FN 5]. 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. But New York has the distinction both of having a widely used substantive law and of being a popular litigation destination.

¹⁴¹ Miller & Eisenberg, *supra* note __; Sarath Sanga, *Choice of law: An Empirical Analysis*, 11 J. EMP. L. STUDIES 894 (2014).

¹⁴² 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.").

¹⁴³ 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.

connection to the state.

New York piloted its Commercial Division in 1993 and established it permanently in Manhattan in 1995.¹⁴⁴ These courts responded to business leaders' and judges' concerns that New York courts were losing "business" to arbitration, federal courts, and Delaware courts.¹⁴⁵ The division designated certain judges to hear only commercial cases to create consistency in case management and cultivate judicial expertise.¹⁴⁶ The Division focuses on expeditious resolution of disputes and efficient judicial case management.¹⁴⁷ It places special emphasis on incorporating ADR within its procedures. Most cases are ordered to mediation at some point.¹⁴⁸

The Commercial Division's jurisdiction is limited to commercial cases with large amounts in controversy. In the Manhattan courts, disputes must be in excess of \$500,000.¹⁴⁹ 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.¹⁵⁰ These statutes were enacted in 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.¹⁵¹

The Commercial Division prides itself on its flexibility and efficiency. It offers a number of desirable features in this regard. For example, under Rule 9 ("Accelerated Adjudication Actions"), the parties may agree in their contract to opt out of the ordinarily applicable procedures and instead use "accelerated

¹⁴⁴ § 1:5. *The turn of a new century: Birth of the Commercial Division*, 2 N.Y. Prac., Com. Litig. in New York State Courts § 1:5 (4th ed.). On its website, the New York Supreme Court commercial division (its trial level court dedicated to disputes) explained its mission: "to improve the efficiency with which [commercial] matters were addressed by the court and, at the same time, to enhance the quality of judicial treatment of those cases." *Commercial Division – NY Supreme Court*, NEW YORK STATE UNIFIED COURT SYSTEM <https://www.nycourts.gov/courts/comdiv/history.shtml>.

¹⁴⁵ § 1:5. *The turn of a new century: Birth of the Commercial Division*, 2 N.Y. Prac., Com. Litig. in New York State Courts § 1:5 (4th ed.)

¹⁴⁶ Mitchell L. Bach, Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 Bus. Law. 147, 152-53 (2004).

¹⁴⁷ Danya Shocair Reda & Nicholas Frayn, *Global Dimensions of Court Reform: Lessons From a Chinese Commercial Court*, COLUM. J. TRANSNAT'L L. (forthcoming 2019). [Sept. 2018 draft at 18].

¹⁴⁸ Reda & Frayn, *supra* note __ (quoting Herman Cahn, *Advantages and Pitfalls of the Commercial Division*, N.Y.L.J. August 10, 2009).

¹⁴⁹ NY Court Rules § 202.70(a).

¹⁵⁰ 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).

¹⁵¹ Miller & Eisenberg, *The Market for Contracts*, 30 CARDOZO L. REV. 2073, 2091 (2009).

procedures.” Rule 9 procedures promise to be complete 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. Discovery under Rule 9 procedures is also strictly confined, for example, it is limited to no more than seven interrogatories and seven depositions of no more than seven hours.¹⁵²

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.¹⁵³ It continues to innovate in other ways as well. 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.¹⁵⁴

The New York Commercial Division also has various provisions permitting documents to remain confidential.¹⁵⁵ 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 decision, the court sanctioned Google for aggressively over-designating documents as confidential.¹⁵⁶

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.”¹⁵⁷ New York has “engaged in vigorous efforts to attract” adjudication business for much of the last century.¹⁵⁸ The New York Chamber of Commerce offered arbitration services as early as 1768.¹⁵⁹ In the early twentieth century, the New York business community led the push for state arbitration statutes, and later the Federal Arbitration Act, which requires courts to enforce arbitration clauses and

¹⁵² N.Y. Comp. Codes. R. & Regs. Tit. 22, & 2.70(9).

¹⁵³ 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).

¹⁵⁴ 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.

¹⁵⁵ See Rule 11, CPLR 3103(a).

¹⁵⁶ See Thomas J. Hall & Judith A. Archer, *Use and Abuse of Confidentiality Orders*, NYLJ, 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).

¹⁵⁷ Reda & Frayn, *supra* note __ (quoting Advisory Council Report on Rules Changes at 3).

¹⁵⁸ Miller & Eisenberg, *The Market for Contracts*, at 2079.

¹⁵⁹ *Id.* at 2080.

recognize arbitration awards.¹⁶⁰ An Advisory Council Report recommended designating one New York County Justice responsible for “all international arbitration-related matters” under the Commercial Division’s jurisdiction.¹⁶¹ These efforts, which were implemented, sought to make New York a more attractive arbitral seat for commercial parties. The Task Force specifically sought to compete against London, Paris, Hong Kong, and Singapore for the business of hosting international arbitration. The Task Force specified that the designation of one “arbitration Justice” would be mostly for marketing the courts because all the Commercial Division Justices have expertise in international arbitration issues.¹⁶²

The Commercial Division is widely hailed as a success story.¹⁶³ It dramatically improved resolution time for cases and dramatically increased the number of cases that settled before trial.¹⁶⁴ It generates New York law, which is widely chosen as the law governing contracts.¹⁶⁵ Within the United States, New York is also the most widely chosen forum for commercial litigation and arbitration.¹⁶⁶ Internationally, New York is a major player. International dispute settlement in New York is estimated to create \$2 billion in revenue for New York-headquartered law firms, about 10% of their total revenue.¹⁶⁷ The Nyarko study mentioned earlier finds that New York is designated as the forum in 34% of the studied domestic contracts (retrieved from U.S. SEC filings) and 45% of international ones.¹⁶⁸

B. INVESTMENT-MINDED COURTS

Some international commercial courts have developed in light of a deeply local need for foreign investment and a desire to promote international

¹⁶⁰ *Id.* at 2083-87.

¹⁶¹ Reda & Frayn, *supra* note __.

¹⁶² *Id.* (“In recommending the designation of specific Justices to take lead responsibility in international arbitration matters, the Task Force is not identifying a substantive need.”).

¹⁶³ *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>.

¹⁶⁴ *Id.*

¹⁶⁵ Coyle & Drahozal, *supra* note __ (finding New York law often chosen in studied contracts and reviewing empirical literature that also reflects popularity of New York law); Vogenauer at 37, 44.

¹⁶⁶ *Id.*; Miller & Eisenberg, *The Flight to New York*, *supra* note __.

¹⁶⁷ Nyarko, *supra* note __, at 5.

¹⁶⁸ Nyarko, *supra* note __, at 15.

commerce.¹⁶⁹ Localities such as Qatar, Dubai, Abu Dhabi, and Astana (now Nur-Sultan), Kazakhstan, have established financial centers and free trade zones, complete with a full menu of international commercial dispute resolution options, including international commercial courts, to reassure foreign investors and the international financial world that their investments in those countries and in the region 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.¹⁷⁰ Especially at first, their innovations primarily came in the form of transplanting English practices.

This Part 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,¹⁷¹ and the Abu Dhabi Global Market Courts (ADGMC),¹⁷² 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 necessarily expect to siphon off considerable “market share” from the London courts.¹⁷³

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

¹⁶⁹ 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).

¹⁷⁰ See, e.g., Frances Gibb, *The Times*, 1 February 2018, UK judges head new court in Kazakhstan, <http://www.mfa.gov.kz/en/london/content-view/uk-judges-head-new-court-in-kazakhstan> (announcing that former lord chief justice Lord Woolf and eight other foreign judges will run the AIFC court).

¹⁷¹ Nicolás Álvaro Zambrana-Tévar, *The Court of the Astana International Financial Center in the wake of Its Persian Gulf Predecessors*, https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3308296 (Dec. 31, 2018) (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, Feb. 26, 2019, <http://aifc-court.kz/press-releases>.

¹⁷² 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.”).

¹⁷³ See, e.g., Gibb, *supra* note __, (“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.’”).

Dubai courts are the oldest courts discussed in this Article. Their track record demonstrates that the difference between being an investment-minded court and an aspiring legal hub can be fluid.

1. Qatar

In 2005, Qatar established the Qatar Financial Centre (QFC) to attract international investment to the country.¹⁷⁴ 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 (QICDRC), also known as the Qatar International Court (QIC).¹⁷⁵ 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."¹⁷⁶ Nevertheless, the original impetus for creating the court was to promote investment and demonstrate stability.¹⁷⁷

The QIC is open to claims regardless of their connection with Qatar.¹⁷⁸ 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).¹⁷⁹ It follows common law procedures,¹⁸⁰ and parties can choose the substantive law applicable to their claims. The judges are international jurists both from Qatar

¹⁷⁴ Zain Al Abdin Sharar & Mohammed Al Khulaifi, *The Courts in Qatar Financial Centre and Dubai International Financial Centre: A Comparative Analysis*, 46 HKLJ at 533 (2016).

¹⁷⁵ See *The Court Overview*, QATAR INTERNATIONAL COURT AND DISPUTE RESOLUTION CENTRE, <https://www.qicdrc.com.qa/court-overview-0>.

¹⁷⁶ Wilske, *supra*, note __ at 164.

¹⁷⁷ Sharar & Al Khulaifi, *supra* note __, at 533.

¹⁷⁸ Requejo, *supra*, note __, at 9.

¹⁷⁹ Walker at 7.

¹⁸⁰ "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.

and retired judges from both common and civil law countries.¹⁸¹ Decisions are typically unappealable and confidential proceedings are available for “good reason.”¹⁸²

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 law¹⁸³ 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.¹⁸⁴

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.¹⁸⁵ It aims to be a one-stop shop for all international commercial dispute resolution needs.¹⁸⁶ As an unusual feature, the QIC has no fees.¹⁸⁷

There are no available statistics on the number of cases the QIC has heard or the number of contracts designating the QIC.¹⁸⁸ 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.¹⁸⁹ The recent establishment of an eCourt, the QICDRC Case Management System, may address some of these issues.¹⁹⁰

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 finance and . . . a regional express way for capital and investment.”¹⁹¹ It became

¹⁸¹ Sharar & Al Khulaifi, *supra* note __, at 534; Wilske, *supra* note __, at 163-164; Walker, at 7.

¹⁸² QIC Rules, Article 28(3).

¹⁸³ *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.

¹⁸⁴ 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/>.

¹⁸⁵ Walker at 7.

¹⁸⁶ Wilske, *supra*, note __ at 164-165.

¹⁸⁷ *Id.*

¹⁸⁸ Requejo, *supra* note __, at 10.

¹⁸⁹ Requejo, *supra* note __, at 10.

¹⁹⁰ *Id.*

¹⁹¹ 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).

fully operational in 2006.¹⁹² 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.¹⁹³ Dubai hired prominent British law firms to draft the DIFC legislation.¹⁹⁴ 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.¹⁹⁵

It has its own court system as well as an arbitration center. The DIFC Courts have six foreign judges and three Emirati judges.¹⁹⁶ The DIFC proclaims that its laws are based on global best practices in international financial and commercial law.¹⁹⁷ 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."¹⁹⁸ It has a liberal approach to allowing proceedings to be held confidentially.¹⁹⁹ The DIFC Courts are "set up to promote settlement."²⁰⁰ Over 90% of cases settle before final judgment.²⁰¹

In 2011, the DIFC removed the requirement that disputes have physical connections to Dubai, and recognized consent-based jurisdiction whether the parties agreed pre- or post-dispute.²⁰² The jurisdictional expansion makes the DIFC courts resemble an arbitral tribunal more than a state court although there are other courts, including in London and New York, that recognize this basis for jurisdiction.²⁰³ According to Jayanth Krishnan, this development emboldened the DIFC 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*.²⁰⁴ In another case, the Court established that it would fully recognize and enforce an English judgment

¹⁹² Requejo, *supra* note __.

¹⁹³ Erie, Legal Hubs, at 32.

¹⁹⁴ Erie, Legal Hubs, at 33.

¹⁹⁵ Erie, Legal Hubs, at 33.

¹⁹⁶ 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.

¹⁹⁷ *Id.*; *Dubai International Financial Centre*, <http://www.difc.ae/discover-difc>.

¹⁹⁸ Erie, Legal Hubs, at 32.

¹⁹⁹ 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").

²⁰⁰ 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.

²⁰¹ Krishnan, *supra* note __, at 60.

²⁰² Requejo, *supra*, note __, at 7-8; Krishnan, *supra* note __, at 40.

²⁰³ Cf. Erie, at 35 (Calling the DIFC courts "innovative in terms of jurisdiction").

²⁰⁴ Krishnan, *supra* note __.

as though it were a Dubai judgment. In the same period, foreign courts began enforcing DIFC judgments.²⁰⁵ On joinder, in DIFC court, “connected contracts and parties can be joined, and proceedings can be consolidated.”²⁰⁶ 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.”²⁰⁷

The DIFC Courts have also been recognized as being “entrepreneurial in terms of enforcement.”²⁰⁸ DIFC Court judgments are fully enforceable within the DIFC. To enforce DIFC judgments elsewhere in Dubai or the UAE, prevailing parties can follow specified procedures.²⁰⁹ 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.²¹⁰

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).²¹¹ 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.²¹²

The DIFC has established itself as a hospitable legal environment for investment as well as for dispute resolution. In 2014, the tribunal heard its first case in a dispute arising out of a contractual agreement that assigned DIFC jurisdiction.²¹³ In 2016, DIFC decided 217 disputes involving, in the aggregate, more than \$500 million.²¹⁴ As noted, the Singapore Academy of Law reported that between 2015 and 2016, the number of contracts drafted in English in the Middle East and North Africa choosing London as the seat for disputes went from 52% to 25%, while the DIFC’s percentage increased to 42%.²¹⁵ The high settlement rate for DIFC cases could be seen as a sign that “the court is doing its

²⁰⁵ *Id.* (discussing Australian court’s enforcement of DIFC judgment).

²⁰⁶ Walker at 11 (DIFC Court rules pt. 20).

²⁰⁷ Walker at 15.

²⁰⁸ Erie, Legal Hubs, at 35.

²⁰⁹ Erie at 35.

²¹⁰ Erie at 36 & n.217.

²¹¹ Wilske, *supra* note __, at 163; Requejo, draft at 9.

²¹² *See supra* [discussion of New York Convention].

²¹³ Hwang, *supra* note __, at 197.

²¹⁴ Shearman & Sterling, *supra* note __ (discussing global trend).

²¹⁵ Requejo, *supra* note __.

job” and creating “certainty and trust.”²¹⁶ 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.²¹⁷

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.”²¹⁸ Thus, this investment-minded court appears to be trying to transform itself into a legal hub.

The DIFC’s modern laws include a modern Arbitration Law.²¹⁹ 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 competition between courts for cases, but rather competition between countries for investment.”²²⁰

C. ASPIRING LITIGATION DESTINATIONS

The states and localities discussed in this section have all proclaimed that they hope to become a global leader in international commercial dispute resolution. To do so, they have built or established new courts or judicial

²¹⁶ 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.’”).

²¹⁷ Erie a 38.

²¹⁸ *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 Court, <https://www.courts.state.md.us/businesstech>.

²¹⁹ 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.”).

²²⁰ *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/>.

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 arbitration-friendly domestic law, but are not otherwise go-to arbitration destinations. These courts are for *litigation*—not just enforcing arbitration clauses and awards. Their 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.

These courts are often modeled on or inspired by the London Commercial Court. They have broad jurisdiction: Many do not require any local or regional 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. They robustly enforce choice-of-law clauses and otherwise seem to apply local law.

These courts 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.

1. Singapore

Singapore has its eyes set on becoming the go-to destination for all international dispute resolution needs, especially in Asia.²²¹ In 1991, it established the Singapore International Arbitration Centre, which has become one of the top three choices for arbitration internationally in a survey of international arbitration users.²²² In 2014, Singapore established a mediation center to supplement its ADR offerings.²²³

Then, in 2015, Singapore opened the Singapore International Commercial Court (SICC) as a division of the Singapore High Court.²²⁴ 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.”²²⁵

²²¹ *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/>.

²²² See QUEEN MARY UNIVERSITY OF LONDON, *supra* note 18; Requejo, *supra*, note __.

²²³ See Erie, Legal Hubs, at 28.

²²⁴ *Id.*; Supreme Court of Judicature Act (Singapore, cap 322, 2007 rev. ed.) s 18A (“Supreme Court of Judicature Act”).

²²⁵ 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.

Even before the SICC opened, Singapore courts had an “unequivocal judicial policy of facilitating and promoting arbitration.”²²⁶

While it had already established state-of-the-art arbitration and mediation centers and law highly deferential to arbitration agreements,²²⁷ Singapore saw the SICC as an important complement to its dispute resolution offerings. To this end, the SICC is staffed by international judges,²²⁸ and permits admission of foreign lawyers, confidential proceedings, and limitations on appellate review. It is also receptive to parties’ customization of evidence and procedure rules.²²⁹

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.²³⁰ Parties may opt out of the Singapore Rules of Evidence, for example.²³¹ 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.²³² After parties complained about that process, the legislature removed it in 2017.²³³

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. 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.²³⁴ The SICC rules also allow joinder of non-parties to the SICC agreement²³⁵ if the party consents to SICC jurisdiction

²²⁶ Rachel Chiu Li Hsien, *Clothing the Bare, The Enforcement of Arbitration Clauses in Singapore* (Mar. 2, 2018), <https://blogs.law.nyu.edu/transnational/2018/03/clothing-the-bare-the-enforcement-of-arbitration-clauses-in-singapore/>.

²²⁷ Rachel Chiu Li Hsien, *Clothing the Bare, The Enforcement of Arbitration Clauses in Singapore* (Mar. 2, 2018), <https://blogs.law.nyu.edu/transnational/2018/03/clothing-the-bare-the-enforcement-of-arbitration-clauses-in-singapore/>.

²²⁸ 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>.

²²⁹ Supreme Court of Judicature Act § 18K.

²³⁰ 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).

²³¹ Tiba, *supra* note __, at 32.

²³² Supreme Court of Judicature (Amendment) Act 2014.

²³³ 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>.

²³⁴ Singapore International Commercial Court (‘SICC’) Committee, ‘Report of the Singapore International Commercial Court Committee’ (Report, SICC Committee, November 2013) at 10 (‘SICC Committee Report’).

²³⁵ Rules of Court, O 110, r 9.

or is properly served, which requires leave from the SICC.²³⁶ This permissive joinder rule was adopted to counter the difficulty in arbitration of joining parties what were not signatories of the arbitration agreement.²³⁷ 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.²³⁸

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.²³⁹ Since the SICC was created in 2015, it has heard twenty cases,²⁴⁰ all of which have been referred by the Singapore High Court.²⁴¹ The cases have been high stakes; the first decision involved a S\$1.1 billion dispute (about US \$800 million).²⁴² The decisions in these cases have been delivered expeditiously – within three months of the hearing.²⁴³ Some were decided in less than a month.²⁴⁴ 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.

On the other hand, “the neutrality of Singapore’s courts has been questioned, particularly in politically sensitive cases.”²⁴⁵

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

²³⁶ Rules of Court O 110 r 9(1); Johannes Landbrecht, *The Singapore International Commercial Court (SICC) – an Alternative to International Arbitration?*, 34 ASA BULL. 1/2016, 118 (March 2016). “[I]n the case of a state or sovereign ..., joinder may occur where the state has submitted to the SICC.” Walker at 11.

²³⁷ Johannes Landbrecht, *The Singapore International Commercial Court (SICC) – an Alternative to International Arbitration?*, 34 ASA BULL. 1/2016, 118 (March 2016).

²³⁸ Walker at 15.

²³⁹ *World Bank Doing Business Reports 2018*, available at <http://www.doingbusiness.org/en/data/exploretopics/enforcing-contracts>.

²⁴⁰ See *Judgements*, SICC (October 5, 2018), <https://www.sicc.gov.sg/hearings-judgments/judgments>.

²⁴¹ See *id.*

²⁴² *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.

²⁴³ See *Judgements*, SICC (October 5, 2018), <https://www.sicc.gov.sg/hearings-judgments/judgments>.

²⁴⁴ See *id.*

²⁴⁵ Erie, *Legal Hubs*, at 28 (citing Mark Tushnet, *Authoritarian Constitutionalism* (2015)).

in international commercial litigation,"²⁴⁶ especially given the uncertainty that has emerged regarding the UK's stature in Europe and worldwide in the aftermath of the Brexit vote.

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 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.²⁴⁷ Dublin has a commercial division that is not specifically dedicated to international disputes, but it could be well positioned to compete with the UK for cross-border dispute resolution after Brexit.²⁴⁸ 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.²⁴⁹ Dutch courts already permitted parties to submit exhibits in English and sometimes permit hearings to be conducted in English. 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. Court judgments are rendered in Dutch but are accompanied by an English summary.²⁵⁰

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.²⁵¹

On January 1, 2019, the Dutch launched the Netherlands Commercial Court, which includes the NCC, the trial level court, and the Commercial Court of

²⁴⁶ 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/>.

²⁴⁷ Matic, *supra* note __.

²⁴⁸ *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>.

²⁴⁹ 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).

²⁵⁰ Friederike Henke, *Netherlands Commercial Court: English proceedings in The Netherlands* (Oct. 25, 2018), <http://conflictoflaws.net/2018/netherlands-commercial-court-english-proceedings-in-the-netherlands/>.

²⁵¹ *Netherlands Commercial Court*, RECHTSPRAAK <https://www.rechtspraak.nl/English/NCC/>.

Appeal (NCCA).²⁵² The NCC's slogan is "Pioneering English-language dispute resolution in a civil law jurisdiction."²⁵³

Despite the generalist name, the NCC's jurisdiction is limited to international disputes.²⁵⁴ It does not require the parties to have any ties to the Netherlands if they consent to the NCC's jurisdiction. The courts will use Dutch procedure, but all proceedings and judgments will be in English.²⁵⁵ Evidence may be submitted in Dutch, German, French, or English without requiring translation.²⁵⁶ Thus, the NCC's claim to fame is that it is "an English-language environment within a civilian jurisdiction."²⁵⁷ Its snazzy new website has a sleek video announcing that the court offers "the best of both worlds."²⁵⁸ 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."²⁵⁹

The NCC and NCCA are part of the ordinary Dutch judiciary as chambers of the Amsterdam trial level and appellate courts. The judges have been 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.²⁶⁰ Appeals from the NCC will go to the NCCA. Appeals from the NCCA will go to the highest court of the Netherlands and take place in Dutch. Parties must be represented by lawyers who are members of the Dutch bar, for only they can carry out "acts of process."²⁶¹ Parties may not proceed *pro se*.²⁶²

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."²⁶³ With some exceptions, the parties may agree to depart from the standard rules of evidence.²⁶⁴ Confidentiality orders are permitted "for compelling reasons."²⁶⁵ But the judgments are public.²⁶⁶ The unsuccessful party bears the costs of

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ NCC Rules, art. 1.3.1; 1.3.1(b) (defining "international").

²⁵⁵ *Id.*

²⁵⁶ Henke, *supra* note __.

²⁵⁷ NCC and Arbitration Factsheet, <https://www.rechtspraak.nl/SiteCollectionDocuments/factsheet-netherlands-commercial-court-and-arbitration.pdf>.

²⁵⁸ <https://www.rechtspraak.nl/>.

²⁵⁹ *Id.*

²⁶⁰ NCC Rules, Art. 3.5.2.

²⁶¹ Art. 3.1.2.

²⁶² Art. 3.1.1.

²⁶³ Art. 3.4.1.

²⁶⁴ Art. 8.3.

²⁶⁵ Art. 8.4.2.

²⁶⁶ Art. 9.4.

lawyers' fees and court fees,²⁶⁷ which are substantially higher than the fees in ordinary Dutch courts.²⁶⁸ The NCC rules also contemplate broad authority to add third parties or consolidate cases either at the parties' or the court's initiative.²⁶⁹

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.²⁷⁰ 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.²⁷¹ 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.²⁷² It is home to the International Chamber of Commerce (ICC), established in 1923,²⁷³ which hosts the International Court of Arbitration, a leading global arbitral institution.²⁷⁴ Paris is also the seat of the Uniform Patent Court.²⁷⁵ The development of an international commercial court in 2010 and of a new international chamber of the Court of Appeal in 2018 was seen as building upon this arbitration expertise. The international chambers

²⁶⁷ Art. 10.3.

²⁶⁸ Kramer, *supra* note __.

²⁶⁹ NCC Rules, Arts. 6.4, 6.5.

²⁷⁰ N J Margetson & N H Margetson, *Arbitration Procedures and Practice in The Netherlands: Overview*, [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) (Aug. 1, 2018).

²⁷¹ NCC and Arbitration Factsheet, <https://www.rechtspraak.nl/SiteCollectionDocuments/factsheet-netherlands-commercial-court-and-arbitration.pdf>.

²⁷² 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.").

²⁷³ 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).

²⁷⁴ *ICC International Court of Arbitration*, INTERNATIONAL CHAMBER OF COMMERCE <https://iccwbo.org/dispute-resolution-services/icc-international-court-arbitration/>; Queen Mary 2018 Survey.

²⁷⁵ 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).

were marketed as enhancing Paris's "attractiveness as a financial center," and helping to turn Paris into "an indispensable legal marketplace."²⁷⁶

France has had specialized commercial courts since the 16th century, and in many ways they have remained unchanged since that time.²⁷⁷ The 2010 International and European Commercial 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."²⁷⁸ 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.²⁷⁹

In February 2018, the Court of Appeal, the Commercial Court, and the Paris Bar signed agreement protocols to create an appellate body for that chamber, a special international commercial chamber of the Paris Court of Appeal.²⁸⁰ The division opened in March 2018, staffed by English-speaking judges with "English common law capabilities."²⁸¹ Parties, experts, third-party witnesses, and legal counsel (who are not French nationals) may speak in English at hearings.²⁸² However, when a party uses English in appearances before the courts under this provision, the party must arrange simultaneous translation and bear the costs.²⁸³ To save time and money that would otherwise be required to produce sworn translations,²⁸⁴ documentary evidence may be submitted in English.²⁸⁵ Pleadings and filings must be drafted in French.²⁸⁶ Judgements will be delivered in French and accompanied by an official English translation.²⁸⁷

²⁷⁶ MATIGNON PRESS OFFICE, OUR AMBITION FOR PARIS' FINANCIAL CENTRE (July 6, 2017), available at 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.

²⁷⁷ Nicole Stolowy, How France's Commercial Courts Stay Relevant Through the Centuries, 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.").

²⁷⁸ Shearman & Sterling, *supra* note __.

²⁷⁹ Shearman & Sterling, *supra* note __.

²⁸⁰ 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>.

²⁸¹ 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/>.

²⁸² CIRC Protocol, § 2.4; CICAP Protocol, § 2.4.

²⁸³ CIRC Protocol, § 6.3; CICAP Protocol, § 3.3.

²⁸⁴ DEBEVOISE & PLIMPTON, *supra* note 54.

²⁸⁵ CIRC Protocol, § 2.3; CICAP Protocol, § 2.2.

²⁸⁶ CIRC Protocol, § 2.2; CICAP Protocol, § 2.1.

²⁸⁷ CIRC Protocol, § 7; CICAP Protocol, § 7.

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.²⁸⁸

The jurisdiction of both the International Chamber of the Paris Commercial Court (CITC) and the International Chamber of the Court of Appeal of Paris (CICAP) is limited to "transnational commercial disputes" relating to international commercial contracts, transportation, unfair competition, anti-competitive commercial practices, and various kinds of financial transactions.²⁸⁹

The Chamber appears to be considering adopting other common law procedures, such as evidence rules. The rules already allow for slightly broader discovery than was previously permitted.²⁹⁰ Cases before the new chamber will be placed on a "fast-track" schedule that does not permit extension of deadlines.²⁹¹ Court costs will remain minimal.²⁹² In another nod to common law procedure, proceedings before the courts are conducted orally.²⁹³

Overall, the Protocols are touted as providing "highly innovative rules of procedure," where the "parties appearing before those Chambers are given unprecedented flexibility."²⁹⁴ 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.²⁹⁵

²⁸⁸ Ruehl, *supra* note __.

²⁸⁹ 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 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).

²⁹⁰ Debevoise & Plimpton, Client Update, *Paris Commercial Courts Create New International Chambers*, Dec. 1, 2018, https://www.debevoise.com/~media/files/insights/publications/2018/01/2018_0112_paris_commercial_courts_create_new_international_chambers.pdf.

²⁹¹ Debevoise, *supra* note __.

²⁹² Debevoise, *supra* note __.

²⁹³ CITC Protocol, § 2.1; CICAP Protocol, § 6.1 ("[T]he Court will ensure that the Parties' legal Counsel shall, during their oral arguments, have the time to provide all relevant facts and data that they consider to be appropriate to support their requests.").

²⁹⁴ Shearman & Sterling, *supra* note __.

²⁹⁵ Shearman & Sterling, *supra* note __.

Frankfurt. In January 2018, the Frankfurt High Court opened a specialized chamber for international commercial matters.²⁹⁶ It is one of several Germany jurisdictions opening international commercial court chambers.²⁹⁷ The court has jurisdiction over international commercial disputes where the parties have agreed to jurisdiction.²⁹⁸ 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.” The Chamber abides by the German Code of Civil Procedure (Zivilprozessordnung). The proceedings operate in English, but written documents and judgments must be in German.²⁹⁹ The Chamber’s website declares that proceedings are “usually held in public,”³⁰⁰ implying that confidential proceedings may sometimes be available. The Chamber does not require additional fees and generally imposes costs on the non-prevailing party.³⁰¹

The Chamber “encourages settlement at every stage of the proceedings,” and begins with a “conciliation hearing. Similar chambers exist in Hamburg, Dusseldorf, and Munich.³⁰²

Burkhard Hess has proposed a number of suggestions about how Frankfurt could strengthen its position as a potential legal hub for cross-border disputes in Europe. He suggests that Frankfurt should “[borrow] best practices from arbitration,” for example by establishing a secretary/registry to act as case manager, and simultaneously strengthen its hospitality toward arbitration, for

²⁹⁶ *Chamber of International Commercial Disputes*, ORDENTLICHE GERICHTSBARKEIT HESSEN <https://ordentliche-gerichtsbarkeit.hessen.de/ordentliche-gerichte/lgb-frankfurt-am-main/lg-frankfurt-am-main/chamber-international>; Christoph Just, *A New Landmark in International Commercial Litigation? The Frankfurt High Court Installed a Specialized Chamber for International Commercial Matters*, SCHULTE (Jan. 26, 2018), <https://www.schulte-lawyers.com/schulteblog/2882017-6y2e6>.

Similar proposals had been put forth in 2012 and 2016 (see Ruhl n.57), but the proposals gained traction after Brexit. [Cologne has had English language courts since 2010. See Daniel Saam, *Book Review—Herman Hoffmann’s Kammern für international Handessachen: Can Arbitration Serve as a Model for the Law of Civil Procedure?*, 14 GERMAN L.J. 949 (2013). Early German proposals were not focused on creating an international commercial division that would compete with London (they were conceived long before Brexit), but rather on competing with *arbitration*, which offered, among other advantages, the availability of proceedings in English. See “Yes to English court hearings,” https://www.bundestag.de/dokumente/textarchiv/2011/36400205_kw45_pa_recht-206810. In these efforts, Germans saw U.S. state business courts, especially New York’s, as a model. 14 German L.J. at 958.

²⁹⁷ Frankfurt, North Rhine-Westphalia, and Hamburg are all seeking to replace London “as a top legal location.” Ruhl at n.44.

²⁹⁸ Baker McKenzie, *The Chamber for International Commercial Disputes at the District Court Frankfurt/Main*, Oct. 5, 2018, <https://www.lexology.com/library/detail.aspx?g=01f8bd1a-21aa-4529-9476-0d8105d3142c>.

²⁹⁹ Requejo, *supra* note __ at 17.

³⁰⁰ Chamber for International Commercial Disputes, *supra*, note __.

³⁰¹ *Id.*

³⁰² Ruehl, *supra*, note __; Requejo, *supra* note __, at 15.

example by creating a Center for International Dispute Resolution.³⁰³ Critics also note that the German judiciary's technology is woefully inadequate to handle the needs of complex commercial litigation, which may further limit the popularity of these courts.³⁰⁴

In a recent blogpost, a German law firm specializing in arbitration questioned whether these innovations—English language proceedings and specialized commercial courts—could overcome the advantages offered by arbitration, which is also specialized and conducted in English, and furthermore offers potentially greater flexibility, shorter disputes resolution times, and confidentiality.³⁰⁵ German law is already arbitration-friendly and German authorities advertise Germany as a top arbitral forum, growing in popularity.³⁰⁶

Frankfurt has not had any cases since opening in January 1, 2018.³⁰⁷ It has been quite successful in recruiting some of the financial industry displaced by Brexit,³⁰⁸ but the market share of the adjudication business has not come along with that industry—at least not yet.³⁰⁹

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, 2020.³¹⁰ In March 2019, however, fierce opposition blockaded future development of this initiative.³¹¹

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

³⁰³ Matthias Weller, *The Justice Initiative Frankfurt am Main 2017*, CONFLICTS OF LAWS (March 31, 2017) <http://conflictoflaws.net/2017/the-justice-initiative-frankfurt-am-main-2017-law-made-in-frankfurt/>.

³⁰⁴ Requejo, *supra* note __ at 17; *see also* Bookman & Noll, *supra*, note __ (discussing the technological limits of German courts that led to changes in the securities class action laws).

³⁰⁵ Niklas Luft & Philipp Wagner, *Would You Choose German Courts For Commercial Disputes If Proceedings Were Held Before Specialized Chambers In English?*, WAGNER ARBITRATION, <https://wagner-arbitration.com/en/journal/would-you-choose-german-courts-for-commercial-disputes-if-proceedings-were-held-before-specialized-chambers-in-english/> (Nov. 1, 2018).

³⁰⁶ <https://www.lawmadeingermany.de/Law-Made-in-Germany-EN.pdf> at 27.

³⁰⁷ [See Ruhl. Please confirm].

³⁰⁸ See Tsang & Goldstein, *supra*.

³⁰⁹ Germany has been advertising its law since 2008. See <https://www.lawmadeingermany.de/archiv.htm> (linking documents going back to founding of “Law Made in Germany” in 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>.

³¹⁰ *Id.*

³¹¹ Conflictolaws.net post March 27, 2019; <https://gavclaw.com/2018/11/14/the-brussels-international-business-court-council-of-state-continues-to-resist/>; article in Dutch: http://www.standaard.be/cnt/dmf20190321_04272272.

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.³¹²

Reports indicated that the court's focus will be on flexibility and the borrowing from arbitration is not subtle. In addition to the adoption of the UNCITRAL rules, the BIBC's judges will include professional judges as well as international business law specialists. 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.³¹³

The proposed BIBC was most similar to an arbitral tribunal of the courts discussed here. These distinctive features, however, may have prevented the BIBC from seeing the light of day. The BIBC faced political opposition from parties who objected to "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.³¹⁴

D. 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.³¹⁵ 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."³¹⁶ The CICC is intended to "streamline and control" the

³¹² *Id.*

³¹³ <http://arbitrationblog.kluwerarbitration.com/2018/06/25/the-belgian-government-unveils-its-plan-for-the-brussels-international-business-court-bibc/>.

³¹⁴ Conflictoflaws.net; De Standaard, Controversial 'caviar court' by Geens is buried, March 21, 2019.

³¹⁵ A Brief Introduction of China International Commercial Court, <http://cicc.court.gov.cn/html/1/219/193/195/index.html> (June 28, 2018).

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.

³¹⁶ A Brief Introduction of China International Commercial Court, <http://cicc.court.gov.cn/html/1/219/193/195/index.html> (June 28, 2018).

flow of disputes arising out of China's Belt and Road Initiative (BRI).³¹⁷ The CICC's jurisdiction, however, is not limited to BRI disputes.³¹⁸

These courts "mark[] the first time [China] is creating legal institutions for the world."³¹⁹ Notably, although the SPC translates the institution's name as an "international commercial court," Matthew Erie highlights that the institutions are really "'tribunals' (*fating*) as the SPC has authority only to establish tribunals and not courts. The difference is that a decision of a tribunal is effectively a decision of the SPC, and there is no appeal, although parties can apply for a retrial in the SPC's No. 4 Civil Division."³²⁰

The CICC claims to be a "'one stop shop' for international commercial dispute resolution services, including mediation, arbitration, and litigation that are 'organically integrated.'"³²¹ 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."³²² It will not hear investor-state disputes.³²³ It has jurisdiction to hear five categories of disputes: (1) international commercial cases where the amount in dispute is of at least RMB 300 million (approximately \$44 million) and the parties selected the SPC as their forum of choice;³²⁴ (2) first-impression international commercial cases that fall under a High People's Court jurisdiction, that are then moved to the SPC, who suggest a transfer to the CICC; (3) international commercial cases that have a "nationwide significant impact"; (4) applications for preservation

³¹⁷ 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>.

³¹⁸ Matthew S. Erie, *Update on the China International Commercial Court*, OPINIO JURIS, <http://opiniojuris.org/2019/05/13/update-on-the-china-international-commercial-court%E2%BB%BF/> (May 13, 2019).

³¹⁹ Erie, *supra* note __.

³²⁰ Erie, *Opinio Juris*.

³²¹ *Id.* Chinese courts were already very supportive of arbitration, readily enforcing arbitration agreements and awards. [fill in]

³²² "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).

³²³ *Id.* It remains to be seen, however, how the CICC will differentiate between investor-state and commercial disputes. See Stratos Pahis, forthcoming in *Yale J Int'l L* (discussing the sometimes poorly designed distinction between those two kinds of disputes).

³²⁴ *But cf.* Zhou, *supra* note __ (suggesting that the rules are unclear as to whether the value of the contract or the value of the dispute should exceed RMB 300 million).

measures in aid of arbitration, or applications for revocation or enforcement of an arbitral award; and (5) other international commercial cases that the SPC transfers to the CICC.³²⁵ Notably, this is not an entirely consent-based system of jurisdiction.

In some ways, the CICC is designed with an eye toward establishing international expertise and reliability.³²⁶ 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.³²⁷ 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 twelve Chinese and twenty 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.³²⁸

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.³²⁹ The CICC therefore operates under Chinese law, which follows a modified civil/political law system.³³⁰ As *The Economist* recently described the system, "In the law courts of Communist China, power and political control count for more than fairness."³³¹ Accordingly, the CICC judges will likely have less discretion and flexibility than judges in other jurisdictions, and parties will have less control over proceedings than parties would have in the SICC, for example.³³²

³²⁵ *Id.* Art. 2; see also Erie, *supra* note __ (summarizing provisions).

³²⁶ See *The Economist* (noting that the CICC's mission statement is "Fairness, Professionalism, Convenience").

³²⁷ *International Commercial Litigation and Diversified Dispute Resolution*, cicc.court.gov.cn/html/1/219/index.html.

³²⁸ 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>.

³²⁹ 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 __.

³³⁰ 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).

³³¹ *The Economist* June 2019.

³³² See Erie, *supra* note __.

In December 2018, the CICC issued its Rules of Procedure in Chinese³³³ and accepted its first set of cases. The disputes included an unjust enrichment dispute, a product liability dispute, the validity of arbitration clauses, and several related to Red Bull in Thailand.³³⁴ It held its first hearing in May 2019.³³⁵ The event involved a four-hour-long hearing in a case unrelated to the BRL, brought by Thailand's Ruoychai International Group against Red Bull Vitamin Drink, Co., and third party Inter-Biopharm Holding Ltd., disputing the qualifications of Red Bull shareholders.³³⁶ Strikingly, none of the CICC's first set of disputes specifically related to the Belt and Road Initiative.³³⁷

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.³³⁸ The CICC offers translation services at the parties' expense.³³⁹ The rules provide that the CICC will apply foreign law if chosen by the parties to govern their dispute.³⁴⁰ To establish jurisdiction, the plaintiff will have to file a written agreement to submit to the court's jurisdiction.³⁴¹ Like the New York Commercial Division, the CICC encourages pre-trial mediation.³⁴²

To improve the enforceability of CICC judgments (among other reasons), China is involved in negotiations over the Hague Convention on the Recognition and Enforcement of Foreign Judgments.³⁴³ Additionally, China is considering ratifying the Hague Convention on the Choice of Court Agreements (COCA).³⁴⁴ Without signing these treaties, enforcement uncertainty may hinder the development of the CICC: parties will not be able to reliably predict whether

³³³ *International Commercial Litigation and Diversified Dispute Resolution*, CHINA INTERNATIONAL COMMERCIAL COURT, <http://cicc.court.gov.cn/html/1/218/149/192/1122.html>.

³³⁴ Finder, *supra* note __.

³³⁵ A belt-and-road court dreams of rivalling the West's tribunals, *The Economist*, <https://www.economist.com/china/2019/06/06/a-belt-and-road-court-dreams-of-rivalling-the-west-tribunals>.

³³⁶ 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.

³³⁷ Finder, *supra* note __.

³³⁸ CICC Rules, Art. 9.

³³⁹ 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].

³⁴⁰ Art. 7.

³⁴¹ *Id.*, Art. 8.

³⁴² *Id.*, Art. 17.

³⁴³ 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>.

³⁴⁴ *Id.*

a foreign jurisdiction will recognize a CICC judgment.³⁴⁵ Even with these agreements, enforceability may still be less certain than with arbitration awards.

Some experts view the CICC with excitement.³⁴⁶ Matthew Erie notes that “[t]he CICC is potentially most innovative in providing multiple mechanisms for dispute resolution.”³⁴⁷ But he also recognizes the challenges facing the CICC: “uneven enforcement, Chinese language, and authoritarian government.”³⁴⁸ 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.”³⁴⁹ 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.’”³⁵⁰

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.”³⁵¹

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. To date, for example, all of the

³⁴⁵ Zhou, *supra* note 34; see Mark Feldman presentation.

³⁴⁶ 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/>.

³⁴⁷ Erie, *supra* note __; Susan Finder, *Comments on China’s International Commercial Courts*, July 9, 2018, <https://supremepeoplescourtmonitor.com/page/1/> (“The mechanism to link mediation, arbitration and litigation is an important part of the judicial reform 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.”).

³⁴⁸ Erie, Legal Hubs, at 40.

³⁴⁹ Susan Finder, *Comments on China’s International Commercial Courts* (July 9, 2018), <https://supremepeoplescourtmonitor.com/page/1/>.

³⁵⁰ *The Economist*, June 6, 2019.

³⁵¹ *The Economist*, June 6, 2019.

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.³⁵² 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.³⁵³ In the supreme court's president's annual report to the legislature 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."³⁵⁴

III. THE DISRUPTION OF THE NEW INTERNATIONAL COMMERCIAL COURTS

The proliferation of international commercial courts striving to encourage local and regional investment, establish themselves as litigation destinations, and host litigation, arbitration, and hybrid procedures complicates the standard account of the adjudication business in a number of ways. First, this phenomenon calls into question assumptions that positive competitive forces drive the market for international commercial disputes, providing a framework for a "race to the top" in the provision of dispute resolution services. Second, it changes the understanding of what characteristics of arbitration and litigation are fundamental and the public/private divide that they are supposed to represent. Third, it undermines narratives about parties' presumed preferences for private dispute resolution.

A. DISRUPTING THE "RACE TO THE TOP"

The "race to the top" narrative is attractive. Perhaps these jurisdictions are all striving to provide the "best" possible dispute resolution, resulting in innovation that can promote choice, customization, and efficiencies. That is in some ways a satisfying description of the old-school legal hubs, London and New York. It may also work to describe Singapore's efforts to become a coveted destination for dispute resolution.³⁵⁵ European accounts of the new courts there routinely describe them as vying to replace London's prominent position. Even Dubai and Qatar assert that their missions are to compete to offer the best

³⁵² Zhou, *supra* note __.

³⁵³ Zhou, *supra* note __.

³⁵⁴ The Economist, June 6, 2019; *id.* (noting that "China rejects judicial independence, calling it a false Western ideal").

³⁵⁵ See Hwang, *supra* note __.

dispute resolution mechanisms in the world. These states often put out advertising campaigns with these messages.³⁵⁶

This description seems to fit in part because localities like Singapore and New York seem to compete for adjudication business for its own sake. They seem less distracted by trying to attract investment, perhaps because their local courts and legal infrastructure already sufficiently protect local investments.

The investment-minded courts, on the other hand, contend that other forces are at play. Despite their protestations about aspirations of global dominance in this area, these courts originally addressed 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.”³⁵⁷ 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.”³⁵⁸

Whether specialized courts are effective tools for attracting investment as an empirical matter is another story. Little evidence suggests this is true.³⁵⁹ Having courts that will enforce contracts may help promote rule of law, which in turn helps attract investment, but that could be accomplished with generalized courts—which are notably absent from the Dubai model, for example.³⁶⁰ Moreover, London’s attractiveness has long been that it offers a work-around to such rule-of-law obstacles around the globe: parties concerned about protecting their deals with non-state parties can arbitrate (or often litigate) in London.³⁶¹

But that does not mean that promoting investment is not a consideration within the governments that form these courts. Moreover, the investment-minded courts in Dubai and Qatar are not freestanding institutions expected to promote investment by the sheer force of, say, offering the judges’ expertise. Both the DIFC Courts and the QIC are part of a broader legal revolution—the

³⁵⁶ 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).

³⁵⁷ 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/>).

³⁵⁸ Al Owais, *supra* note __, <https://www.difccourts.ae/2018/01/25/global-and-local-challenges-in-commercial-dispute-resolution/>.

³⁵⁹ See Coyle, *Business Courts*, *supra* note __.

³⁶⁰ See Richard Chen, *Bilateral Investment Treaties and Domestic Institutional Reform*, 55 COLUM. J. TRANSNAT’L L., 547, 554 (2017); Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT’L L.J. 67, 76 (2005).

³⁶¹ Thank you to John Coyle for highlighting these points. See, e.g., Nougayrede, *supra* note __.

establishment of the DIFC and the QFC, financial centers that allow foreigners to operate in an English-language common-law jurisdiction instead of being subject to the local Shari'a-based civil-law rules that would otherwise govern their transactions in the country.³⁶²

To the extent that they are truly seeking foreign investment, the “race to the top” analogy doesn’t work.³⁶³ The incentive structures of states seeking to establish investment-minded courts are not to create something new and different and “better,” but rather to replicate mechanisms that give assurances of stability and predictability. The adoption of the common law responds to such incentives. These courts offer and support fairly conventional courts as well as arbitration to give investors the dispute resolution options that they have come to expect elsewhere. The original innovation of investment-minded courts is in the transplanting of English-language common law courts in the Muslim world, rather than particular innovations in the administration of dispute resolution. Once they are established, they can begin to adopt other kinds of innovation, as seems to be happening in Dubai (but not Qatar), but those efforts are no longer (if they ever were) geared toward attracting investment. Rather, they seem geared toward attracting business—i.e., cases—to the courts themselves.

The new international commercial courts in Europe present a different confluence of incentives. These states already have stable legal regimes with functioning courts; they do not need to offer exceptions to local law or alternative local court options to attract investment. Moreover, the arbitration option is, if anything, even more available to parties who wish to opt out of courts.

Instead, the courts on the Continent seem focused on reshaping a post-Brexit Europe. One commentator called these emerging courts the “Brexit Wannabe Profiteers.”³⁶⁴ The standard account is that these states are each trying to elbow each other out in the race to become the next London.³⁶⁵ By this account, each state wants to compete with London to become *the* go-to forum for international litigation—i.e., in ten or twenty years, it will emerge that Amsterdam or Paris or Frankfurt takes over London’s place as the dominant provider of international commercial litigation services. (Paris already beats out London as the most

³⁶² Sharar & Al Kulaifi, *supra* note __.

³⁶³ 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-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.”).

³⁶⁴ Wilske, *supra* note __ at 169.

³⁶⁵ See, e.g., Ruehl, *Towards a European Commercial Court*, *supra* note __; Matic, *supra* note __.

common location for ICC arbitration, for example.³⁶⁶) Under that view, the courts are competing against each other to provide the best possible adjudication services.

Perhaps, however, these states are trying to provide English-language-friendly court options primarily favorable to their own nationals as much as, if not more than, they truly seek to become a player on a global scale. One test is to ask: Would these new courts disadvantage their own nationals in order to gain market share more broadly? Instead of each country making a new international commercial court for itself, Giesela Ruehl has suggested an EU-wide European Commercial Court to compete with London.³⁶⁷ But such a court has not yet materialized. 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. For example, the NCC boasts its efficient Dutch procedures, Paris is slowly incorporating common law procedures, while Brussels would have promised arbitral procedure. But they privilege local lawyers (for example, foreign lawyers may appear but only when accompanied by members of the local Bar) and still render official judgments in the local language (albeit sometimes with certified English translations).

Ruehl doubts 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,” but it is unclear that that would be the only possible marker of success. Perhaps the balkanization of the market is the goal or is desirable in its own right.

When trying to determine why states would “compete” for adjudication business and whether they are driven into a race to the top, it is also useful to examine who stands to benefit from these courts. As John Coyle has pointed out with respect to the proliferation of business courts within U.S. states, the main parties to benefit from specialized business courts are states (through adjudication business revenue) and, prominently, local lawyers.³⁶⁸

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.³⁶⁹ This is doubtless an accurate account of the evolution of the New

³⁶⁶ <https://cdn.iccwbo.org/content/uploads/sites/3/2018/07/2017-icc-dispute-resolution-statistics.pdf> at 12.

³⁶⁷ 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])).

³⁶⁸ Coyle, *supra* note __, at 1930.

³⁶⁹ Jonathan R. Macey & Geoffrey P. Miller, *Origin of the Blue Sky Laws*, 70 TEX. L. REV. 347 (1991).

York Commercial Division.³⁷⁰ 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 lawyers, who may practice before the courts, and foreign judges.³⁷¹ The CICC, of course, relies heavily on Chinese lawyers, judges, and experts, while also permitting foreign lawyers access and declaring that the judges will look to foreign expertise.

Further research may also unearth additional non-competition-based explanations for the rise of these courts. 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.”³⁷² Diffusion theory states that diverse laws spread through various mechanisms such as mimicry and learning in addition to competition.³⁷³ These various theories likely have some salience in the story behind the proliferation of these courts.

The analysis might differ in part from country to country. The Netherlands in some ways seems poised to become the most competitive on a global scale. On its website, the NCC’s marketing pitch is globally oriented. The Netherlands is already recognized as a quasi-English-speaking country with a reputation for being a center of finance and trade as well as an innovator in procedure and efficiency. For example, the Netherlands already has unique procedural offerings for certifying global class action settlements.³⁷⁴ Like Singapore, the Netherlands appears to be trying to position itself as a “neutral” third-party within its region—the “Switzerland” of dispute resolution.³⁷⁵

But skeptics would counter that cases with Dutch ties are more likely to gravitate toward the NCC. Indeed, the court had its first hearing on February 18, 2019,³⁷⁶ in a case between an Irish subsidiary of a Dutch company (which is

³⁷⁰ See *supra* [section discussion NY]; Coyle, *supra* note 222 at 1932 n.61.

³⁷¹ 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).

³⁷² 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).

³⁷³ See Bookman, *Unsung Virtues*, *supra* note __, at 618 (collecting sources).

³⁷⁴ See Bookman & Noll, *supra* note __ (discussing the Dutch WCAM).

³⁷⁵ Switzerland itself may step into the ring shortly. See Matic, *supra* note __.

³⁷⁶ Xandra Kramer, *The Netherlands Commercial Court holds its first hearing!*, Feb. 18, 2019, <http://conflictoflaws.net/2019/the-netherlands-commercial-court-holds-its-first-hearing/>.

itself the subsidiary of a U.S. bank) and a Dutch company that provides sales intelligence data.³⁷⁷

The international commercial divisions of courts in Frankfurt or Paris, meanwhile, may be trying to cater to a local rather than global clientele. It is not entirely clear, however, that German or French 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 thus unclear that these courts are aimed at serving the needs of the business community.

Stefan Vogenauer's work into what parties truly seek with forum clauses in international commercial contracts identifies home-court advantage and familiarity as parties' first priority, then the sophistication of the legal system, both in choice-of-law and choice-of-forum decisions.³⁷⁸ If this is true, then it is possible that the growth of international commercial courts may be an effort to cater to these local preferences and needs. For example, if Volkswagen has enough bargaining power in a particular negotiation, it can insist on a forum-selection clause designating German courts. With slightly less bargaining power, it may be able to have a stronger position pushing for German courts if the Frankfurt High Court's international commercial division seems to offer traits like expertise and English-language proceedings. But that seems to make a difference, if at all, only at the margins.

The more important point is that bargaining power—rather than compromise—may be more likely to drive choice-of-forum designations in contracts.³⁷⁹ That construct further undermines the idea that forum selection in contracts is much different from forum shopping in other contexts.³⁸⁰ 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.³⁸¹ and German courts.³⁸²

There are bigger picture problems with the race-to-the-top analogy. There may be neither a “race” nor a “top.” As noted, there is no race because the courts

³⁷⁷ <https://www.rechtspraak.nl/English/NCC/Pages/hearings.aspx> (listing hearing in Elavon Financial Services DAC vs IPS Holding B.V. and others).

³⁷⁸ Vogenauer, *supra* note __, 44-45, 77; 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).

³⁷⁹ See Albert Choi & George Triantis, *The Effect of Bargaining Power on Contract Design*, 98 VA. L. REV. 1665 (2012); *Economist*, June 2019.

³⁸⁰ *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”).

³⁸¹ See Klerman & Reilly, *supra* note __.

³⁸² Stefan Bechtold, Jens Frankenreiter, & Daniel Klerman, *Forum Selling Abroad*, 92 S. Cal. L. Rev. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3256183.

are driven by internal politics and local economic forces, rather than, or at least in addition to, a desire to compete in a global or even regional market. From the demand side, while international commercial contracts as a whole almost all should designate a forum for dispute resolution,³⁸³ that entire body of contracts is unlikely to be considering all or even most of these options in their choices. Other factors will limit their decisions, and many factors beyond the quest for optimal procedural structures will guide their choices. As noted, these choices may also be driven by power dynamics that favor one contracting party over the other.

Likewise, specialization does not necessarily make courts more efficient.³⁸⁴ It can make courts more prone to compete with each other (and with arbitration),³⁸⁵ and thus more prone to judicial capture.³⁸⁶ In other words, specialized judges and arbitrators are known to be more likely to cater to particular constituencies that regularly appear before them. The dilemma with international arbitrators is particularly complicated because arbitrators are both “agents of contracting parties, and . . . [a]gents of a larger global community.”³⁸⁷ 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.”³⁸⁸ 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.³⁸⁹

It is also difficult to define the “top.” 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 deeply complicated.³⁹⁰ Here, defining the success of courts, especially compared to each other, can be particularly difficult. Using popularity, docket size, or the stakes of the disputes can be a

³⁸³ See Coyle & Drahozal, *supra* note __ (documenting that most, but far from all, international commercial contracts they studied included some kind of forum-selection clause).

³⁸⁴ See Coyle, *Business Courts*, *supra* note __, at 1921.

³⁸⁵ J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631, 636 (2015).

³⁸⁶ 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)).

³⁸⁷ Alec Stone Sweet, *Investor-State Arbitration: Proportionality’s New Frontier*, 4 LAW & ETHICS HUM. RTS. 47, 48 (2010).

³⁸⁸ Anderson, *supra*, note __, at 637.

³⁸⁹ 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 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).

³⁹⁰ See Moon, *Nw. L. Rev.* (summarizing the debate).

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 we have poor metrics for comparing each of these issues and weighing them vis-à-vis each other. It is also difficult to identify the proper baseline for comparison.³⁹¹ Attempts to define quality adjudication can also be elusive, but there is clearly 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, but some of those very same judges are now sitting on the DIFC, SICC, or the AIFC.³⁹² Finally, different parties and different kinds of disputes may lend themselves to different kinds of adjudication. Having a variety of respectable offerings is important so that parties can make meaningful choices.³⁹³

To the extent that "high quality" or "efficient" adjudication can be defined as "the top," it is unclear whether current forces are driving in that direction. That does not seem to be the motivating force behind these courts, and accordingly, that is unlikely to be the metric used to assess their success when states evaluate 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.

Neither of these sets of success metrics 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.³⁹⁴ 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.

The competition between arbitration and specialized courts, for example, could drive tribunals to aggressively expand jurisdiction or to flex their power over non-consenting third parties. There could be simple capture: To the extent these new courts are established to service local shareholders, versus to attract investment, one might expect them to act differently. Specific legal hubs might be susceptible to capture by different industries, for example, the financial sector

³⁹¹ Walker at 20.

³⁹² Compare the Delaware judges as arbitrators example.

³⁹³ See also Walker at 22.

³⁹⁴ Cf. Ad Hoc Procedure.

in New York or Paris, but the construction or energy sector in Kazakhstan.³⁹⁵ Different focus could lead to different pathologies. For example, New York is a hub because it is a financial center; that makes it more liberal about importing and exporting judgments. But London wants to be a commercial center, so it is more conservative about being a “conduit jurisdiction” for ratifying judgments.

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. But their caseloads are paltry in comparison to the London Commercial Court’s. The NCC and the CICC are still at their very beginning stages—their success remains to be seen. Some commentators note that the new European courts do not go far enough in terms of adapting to the needs and desires of potential litigants. Giesela Ruhl, for example, criticizes those efforts as focusing too much on offering English-language options and not enough on mimicking the other desirable features of English courts, such as their reputation, experience, efficiency, and quality of substantive law.³⁹⁶

In short, the corporate law debate about whether competition produced a race to the top turned out to be more complicated than it appeared. That is likely true here as well.

To the extent the market analogy works—and it can be useful—the modern market for dispute resolution appears to be regional, rather than global.³⁹⁷ Most of the courts studied seem to be vying for regional, rather than global, dominance. This was not always the case and the regions are not defined by immutable characteristics. For example, Russian companies have long looked to London to provide their chosen law and forum. One wonders whether, over time, Russians’ gaze will shift eastward, either because of increased perceptions of instability in London, increased stability in Asia, or other factors.

Meanwhile, the Asian scene is worth watching.³⁹⁸ Singapore seems to be trying to exchange a lack of political power for influence in this area. By emphasizing and developing neutrality and expertise, Singapore is setting itself up to be a neutral “Switzerland” of dispute resolution for both litigation and arbitration, even though there may still be questions about neutrality.³⁹⁹

But this is going on amidst broader power dynamics, where China seems to be flexing its muscles most obviously. It will be important to watch whether the

³⁹⁵ See Aaron Simowitz, symposium piece.

³⁹⁶ Ruhl @ fn. 89.

³⁹⁷ 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).

³⁹⁸ See *THE FUTURE IS ASIAN*.

³⁹⁹ See Erie; cross-ref earlier.

CICC emerges as a leader in international commercial dispute innovation or as a cost of doing business with the Belt and Road Initiative.

The recently published CICC rules have been favorably received by many commentators, but 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.⁴⁰⁰ As Matthew Erie reports, "the CICC is not mandatory for BRI deals; rather it is one option amongst an increasingly competitive field of dispute resolution forums in Asia."⁴⁰¹ 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. 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 whether China might one day begin issuing more extraterritorial judgments of its own."⁴⁰²

B. DISRUPTING THE DIFFERENCES BETWEEN LITIGATION AND ARBITRATION

The changing landscape described here also undermines traditional conceptions about the differences between litigation and arbitration and the relationship between them. Studying the rise of international commercial courts yields at least three lessons about the differences between litigation and arbitration. First, this study challenges the conventional U.S. understanding, often articulated in Supreme Court decisions, that litigation and arbitration are opposite forms of dispute resolution that exist in an antagonistic relationship toward each other. Second, litigation and arbitration, which historically have had many distinctive characteristics, appear to be converging in certain ways. Third, this discussion leads to questions about what remains distinctive about litigation and arbitration.

The first point is a contrast between the U.S. federal perspective and these global trends. Whereas the U.S. Supreme Court is widely touted as being hostile to litigation but hospitable to arbitration,⁴⁰³ much of the rest of the world, including New York, recognizes that welcoming multiple variations on dispute

⁴⁰⁰ Zhou, *supra* note __.

⁴⁰¹ Erie, *Opinio Juris*.

⁴⁰² *The Economist*, June 6, 2019.

⁴⁰³ See, e.g., Bookman, *The Arbitration-Litigation Paradox*, *supra* note __.

resolution can increase a locality's attractiveness to business generally and to the adjudication business in particular.

These developments suggest that the Supreme Court's attitude toward arbitration and litigation as opposites 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.⁴⁰⁴ And I argued that 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 doctrine.

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. New York already embraces the use of mediation as an important step in litigation and tries to accommodate arbitration at the same time—but it may wish to go even further in the future in integrating these different dispute resolution mechanisms.

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.⁴⁰⁵ It is already well known that arbitration is increasingly judicialized, looking more and more like international commercial litigation.⁴⁰⁶

The study here demonstrates that international commercial litigation is also becoming more arbitralized. These new 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

⁴⁰⁴ Bookman, *The Arbitration-Litigation Paradox*, *supra* note __ (draft at 3).

⁴⁰⁵ See Hiro N. Aragaki, *The Metaphysics of Arbitration*, 18 NEV. L.J. 541 (2018).

⁴⁰⁶ 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.

English-language proceedings, three judge panels,⁴⁰⁷ 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).⁴⁰⁸

These courts also offer options for confidentiality. Court proceedings are typically open to the public and opinions are typically published.⁴⁰⁹ That is the default status for new international commercial courts, but they offer varying degrees of confidentiality in both proceedings and opinions.

Many of these courts are unabashedly open to private customization of procedure.⁴¹⁰ Parties can opt out of certain standard procedures, such as the rules of evidence or appellate review.⁴¹¹ 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 demonstrates.

Putting aside the problem of determining whether arbitration is public or private law,⁴¹² 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. These distinctions are becoming more elusive. Arbitration's claim to being more efficient and cost effective than litigation is also under attack.⁴¹³

The BIBC would have been the most extreme example, and perhaps that contributed to its being sidelined. It is difficult to pinpoint, for example, what makes the BIBC a court and not an arbitral tribunal. It is a state-created entity, but funded by private fees (not unlike some U.S. state courts and federal agencies). The difference may lie in enforceability: is the result enforceable under the New York Convention? But that seems to put the cart before the horse.

⁴⁰⁷ See *supra* text accompanying nn. 260 (NCC), 327 (CICC).

⁴⁰⁸ See Walker.

⁴⁰⁹ Cf. Merritt McAllister, *Examining Unpublished Decisions* (draft on file with author).

⁴¹⁰ 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.

⁴¹¹ See, e.g., SICC; DIFC Court (following evidence rules from arbitration).

⁴¹² Cf. Ralf Michaels, *International Arbitration as Private or Public Good*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3019557 (calling the question whether arbitration is public or private law "a problematic categorical distinction").

⁴¹³ 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).

The distinction is no longer based on whether jurisdiction is based on party consent rather than pure state power. The design of international commercial courts has the hallmarks of a joint public-private enterprise.

But—and this is the third point—some differences of course remain.⁴¹⁴ 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.

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.⁴¹⁵ This may be less of a problem in civil law traditions, where the law depends less heavily on judicial opinions and precedent. 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.⁴¹⁶

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.⁴¹⁷ They all promise to enforce parties' choice-of-law provisions and they offer procedures to make proving foreign law easier. 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

⁴¹⁴ 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).

⁴¹⁵ [cites from UK judges; Australia].

⁴¹⁶ 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).

⁴¹⁷ See Erie.

in arbitration.⁴¹⁸ Singapore, for example, boasts that one of its objectives is to create “a freestanding body of international commercial law.”⁴¹⁹

Others suggest that these courts may contribute more generally to the “continuum of precedential decisions.”⁴²⁰ As Justice Middleton of the Federal Court of Australia remarked, there is a need for “harmonization” of substantive laws, practices, and ethics in international commerce. Arbitration cannot do this, and it is not supposed to.⁴²¹ 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 value publicity and confidentiality to different degrees. The SICC, for example, permits parties to select confidential proceedings. The CICC, however, notably showcased open proceedings in its first hearings.⁴²² Both the CICC and the NCC plan to make judgments available online.⁴²³ Qatar, the DIFC, the AGDM all have open court proceedings and the DIFC posts videos of its proceedings on its website.⁴²⁴ 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.

In arbitration, meanwhile, there are heated debates about confidentiality as well.⁴²⁵ 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.⁴²⁶ This would further elide distinctions between litigation and arbitration.

Finally, there is a traditional distinction between the basis of legitimacy for arbitration and litigation. Arbitration gains its legitimacy through contract and consent; courts maintain legitimacy through publicity and adherence to *stare decisis*.⁴²⁷ What will happen if courts shift their basis for legitimacy to consent?

⁴¹⁸ See Alec Stone Sweet, *The New Lex Mercatoria and Transnational Governance*, 13 J. EUR. PUB. POL'Y 627 (2006).

⁴¹⁹ SICC Committee Report, Nov. 13, *supra* note __; see also Zhou (opining that the CICC may contribute to positive developments in Chinese law of international commercial transactions).

⁴²⁰ Walker at 18.

⁴²¹ Middleton at para. 15.

⁴²² [cite news reports]

⁴²³ Walker at 19.

⁴²⁴ Walker at 19.

⁴²⁵ See Walker (discussing the controversy).

⁴²⁶ Weidemaier, *Toward a Theory of Precedent in Arbitration*, *supra* note __.

⁴²⁷ Nyarko, *supra* note __, at 26.

C. DISRUPTING ASSUMPTIONS ABOUT PARTY PREFERENCES

Finally, the proliferation of international commercial courts also raises questions about parties' presumed preferences for private dispute resolution, especially arbitration.⁴²⁸ Some empirical studies of contracts have worked toward debunking the assumption that parties to international commercial contracts mostly choose arbitration. The emergence of new international commercial courts may further undermine that understanding.⁴²⁹

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. Some initial thoughts on that process are outlined below in the discussion of how to judge success.⁴³⁰

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.⁴³¹ These courts may test the boundaries of how far such jurisdiction can reach extraterritorially.⁴³²

For example, the CICC is not limited to consent-based jurisdiction. 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 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."⁴³³ It probably needs to offer some quality standards in adjudication, but its 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

⁴²⁸ See *supra* Part I.C.

⁴²⁹ 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).

⁴³⁰ See *infra* Part IV.B.

⁴³¹ 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").

⁴³² 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)

⁴³³ *The Economist*, June 6, 2019.

forum-selection clauses reflect free choice and party agreement—and therefore may require adjusting metrics for judging a particular court’s “popularity.”

IV. THE PATH FORWARD

This Part aims to begin conversations about the normative implications of the proliferation of international commercial courts and how scholars can further study these courts and understand their ramifications. Because the courts are so new, there are more questions than answers.

A. TENTATIVE TAKEAWAYS

Many of these courts have only just begun operations, and so I am cautious not to jump to conclusions about them too quickly. What follows are some tentative thoughts based on what we know now.

From one angle, these courts paint a pretty picture of the triumph of choice, competition, and innovation in dispute resolution. They seem to represent a convergence of norms around best practices in international commercial dispute resolution. Courts and arbitral centers alike recognize the merits 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.⁴³⁴ Such convergence could be understood to represent the fruits of a productive global conversation.⁴³⁵

But there appear to be other, more complicated dynamics that 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. Instead of championing choice, some of these courts may create new environments for flexing disparate bargaining power or exerting state control.

Courts’ convergence with arbitration may be troubling for the same reasons scholars worry about arbitration replacing courts in the United States.⁴³⁶ As Alexi Lahav has explored, the purpose and value of courts is not solely to resolve disputes. Public courts also declare what the law is and provide a forum

⁴³⁴ See Erie.

⁴³⁵ 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).

⁴³⁶ 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).

for public self-governance, when parties bring their grievances before a public forum.⁴³⁷ These courts may become less public or less interested in law declaration. They may subordinate these 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 to cater only to certain parties, leaving other interests of justice to the side.⁴³⁸ One criticism of arbitration is that sometimes it can prize efficiency over fairness;⁴³⁹ international commercial courts should not do so themselves.

It is possible the apparent convergence masks a reassertion of state sovereignty and a rejection of both arbitration and globalization. International arbitration professionals have been advocating for the homogenization of regulations in international dispute settlement for decades.⁴⁴⁰ Today, some arbitration scholars fear that the rising trend of economic nationalism threatens states' support for arbitration.⁴⁴¹ 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.⁴⁴²

Notably, however, 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

⁴³⁷ ALEXANDRA LAHAV, IN PRAISE OF LITIGATION; Alexandra Lahav, *The Role of Litigation in Democracy*, 65 EMORY L.J. (2016).

⁴³⁸ See *supra* [discussion of specialization leading to court capture and "forum selling"].

⁴³⁹ See Aragaki, [NYU], *supra* note __.

⁴⁴⁰ Call For Papers, Center on International Commercial Arbitration Symposium on Salient Issues in International Commercial Arbitration: November 14, 2019: International Arbitration In Times Of Economic Nationalism, <https://www.transnational-dispute-management.com/news/20191114.pdf>.

⁴⁴¹ *Id.*

⁴⁴² 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).

further state control over dispute resolution. But China faces an uphill battle at ensuring integrity and freedom from political corruption and influence.⁴⁴³

B. AREAS FOR RESEARCH

In addition to the need to continue to observe these courts and their impact, as discussed in the previous sections, international commercial courts have implications for a number of other areas of research. Below, I briefly discuss five additional literatures that could provide a lens through which to study these courts. I hope to embark on some of these paths in future research.

First, the field requires more research into the sociological and historical background behind the rise of these courts, and what interests are driving them. Matthew Erie has begun this important work with his seminal para-ethnographic study of the inter-Asian “new legal hubs.”⁴⁴⁴ Similar studies could be conducted in Europe, and his work could be further expanded, especially as the courts develop. One might investigate whether an interest group approach has explanatory power in this area, similar to the interest group theory of Delaware corporate law developed by Jon Macey and Geoffrey Miller.⁴⁴⁵

While excavating the backstory behind these courts, scholars should also investigate the extent to which a judiciary’s investment in an international commercial division diverts resources from other areas of need within the judiciary.⁴⁴⁶ The BIBC proposal fell to criticisms that it would be a “caviar court.”⁴⁴⁷ Future studies should include not only interviews with key legislators and lobbying arms, inquiring about motivating forces behind the courts’ creation, but also investigative studies that seek to trace other perspectives within the justice system and the impact of international commercial courts on other aspects of the system.

Second, there is the question of culture in procedure. In addition to disrupting various standard accounts of the adjudication market, the procedures in some of these international commercial courts in some ways calls into question the usual assumptions that procedure is deeply intertwined with culture.⁴⁴⁸ For those familiar with the strength of French cultural institutions,⁴⁴⁹

⁴⁴³ See Middleton; The Economist.

⁴⁴⁴ Erie, *New Legal Hubs*, *supra* note __.

⁴⁴⁵ See Macey & Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*; see also Moon, at 31-__ (discussing theory as applied to off-short business courts).

⁴⁴⁶ Cf. Brooke Coleman, *One Percent Procedure*, 91 WASH. L. REV. (2016) (highlighting the way that high-stakes complex commercial litigation dominates procedural reform).

⁴⁴⁷ See *supra* note __.

⁴⁴⁸ See, e.g., Oscar G. Chase, *Legal Processes and National Culture*, 5 CARDOZO J. INT’L & COMP. L. 1 (1997); see also source cited in note __ *supra* [discussing comparative procedure and the role of culture in procedure].

⁴⁴⁹ See, e.g., Monica Prasad, *Why Is France So French?*, 111 AM. J. SOCIOLOGY (2005).

for example, it may seem shocking that France would open a court division that operates in English and incorporates any English common-law procedures. On the other hand, the CICC seems to hold tightly to its language and legal culture, which reinforces traditional understandings of how important those are to procedure. Further research should track the lingering effects of culture in these institutions. It would be fascinating to examine how these courts have bucked their own traditions, why, and with what results. It would also be important to watch for the possibility that specializing in international commercial disputes might make courts like the CICC loosen their grip on local culture, or that culture's loosening grip may pave the way for greater harmonization and convergence.

Third, the emergence of these courts provides a new venue in which to observe forum shopping at its finest. Forum shopping describes the "practice of choosing the most favorable jurisdiction or court in which a claim might be heard."⁴⁵⁰ But the term is often used as a derogatory way of referring to forum choices driven by opportunism or illegitimate reasons.⁴⁵¹ Critics' disdain for forum shoppers is usually confined to tort plaintiffs who choose where to sue unilaterally and after a dispute arises. These international commercial courts, if they are successful, would likely give rise to "forum shopping," either by business plaintiffs or in contracts via forum-selection clauses. Further research should contribute to the forum shopping literature by examining what this forum shopping entails, and whether it is a positive or negative force.⁴⁵² Empirical research via surveys of contracting parties might directly study whether forum-selection clauses choosing these courts are more often a result of compromise or an exertion of bargaining power.

Fourth, 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.

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 Brexit, but the chaos that followed Brexit, 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

⁴⁵⁰ *Forum-Shopping*, BLACK'S LAW DICTIONARY 726 (9th ed. 2009).

⁴⁵¹ See *Unsung Virtues*, *supra* note __, at 589.

⁴⁵² See *Unsung Virtues*, *supra* note __ (surveying the forum shopping literature).

ramifications for New York's prominence as an adjudication hub. 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.

Through this lens, China may be the most interesting experiment yet. It will be important to observe, for example, the extent to which the CICC abides by international standards of due process, the extent to which consent to the jurisdiction of that court is truly voluntary (and how to measure voluntariness), and the extent to which the CICC enables China to further expand its influence in the region and throughout the world.

Finally, there are questions about the future of London and New York as traditional legal hubs. New York continues to innovate within the Commercial Division and also to promote itself as a seat for arbitration.⁴⁵³ These efforts will likely continue, with a particular eye toward competing in the global adjudication market, which New York has understood for some time. New York operates, however, under the influence of the Supreme Court's interpretation of the Federal Arbitration Act. That body of law is quite favorable to enforcing arbitration agreements, but it is less focused on establishing law that ensures enforceability of arbitral awards. Moreover, the Supreme Court's general hostility to litigation may be poised to undermine New York's role as a go-to forum for international commercial litigation.⁴⁵⁴ New York courts have applied the Supreme Court's recent personal jurisdiction decisions, for example, to limit their ability to exercise general jurisdiction over foreign defendants, including in enforcement proceedings.⁴⁵⁵ In addition, New York's reputation is tightly bound up in the United States' general reputation for stability. For New York to push to maintain or increase its dominance in the adjudication business, it may have to overcome the obstacles placed on it by federal actors.

⁴⁵³ Stacie Strong has suggested that "one might expect the United States to be at the forefront of the movement regarding international commercial courts so as to ensure robust protection of U.S. parties and interest," "precisely the opposite is true."⁴⁵³ My work has documented how United States has diminished court access for international commercial actors—largely through Supreme Court developments. See, e.g., *Litigation Isolationism*. New York courts do seem to be actively competing in this area—although they are thwarted by federal law developments.

⁴⁵⁴ I have explored these rising barriers to transnational litigation in U.S. courts in other work. See Bookman, *Litigation Isolationism*, *supra* ___; Pamela K. Bookman, *Doubling Down on Litigation Isolationism*, 110 AJIL Unbound 57 (2016); see also David L. Noll, *The New Conflicts Law*, STAN. J. TRANSNAT'L L.; John F. Coyle, *Party Autonomy and the Presumption Against Extraterritoriality*, 55 WILLAMETTE L. REV. (forthcoming 2019) (arguing that Supreme Court's recent reinvigoration of the presumption against extraterritoriality has had the unexpected effect of making it impossible for foreign parties with no connection to the United States to choose U.S. federal law *even if they want to*, which may discourage foreign litigants from litigating their disputes in the United States).

⁴⁵⁵ See, e.g., *Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F.3d 221 (2014); *Kyowa Seni, Co. v. ANA Aircraft Technics Co.*, 2018 BL 240171 (Sup. Ct. July 05, 2018).

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, and the extent to which parties prefer private dispute resolution over public litigation. 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. 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. The first step in this analysis, and the goal of this Article, is recognize the contours of the field to be analyzed.