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**“International Commercial Courts and
the United States:
An Outlier by Choice and by
Constitutional Design?”**

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International Commercial Courts and the United States:
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S.I. Strong

1. Introduction

One of the more unexpected results of globalization has been the diversification and internationalization of commercial legal redress. For decades, arbitration has enjoyed a near-monopoly in the resolution of cross-border business disputes, not only providing parties with procedural norms that are simultaneously innovative and predictable but also offering unparalleled means of enforcing both agreements to arbitrate and final awards via the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).¹ However, recent years have seen a number of challenges to the hegemony of international commercial arbitration, including the rise of specialized international commercial courts lodged within national judicial systems.² This Chapter considers this movement from the perspective of the United States.

The discussion begins in Section 2 by outlining the contemporary motivation for reforming international dispute resolution. Section 3 then describes developments in the United States to determine how competitive the United States is in comparison to those jurisdictions that are actively seeking to attract cross-border commercial litigants to their shores. Although this Chapter will not consider the advantages and disadvantages of ‘forum selling’ as a matter of policy,³ Section 3 does discuss whether

¹ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 UNTS 3.

² Some scholars have also advocated for the creation of an independent international court for commercial disputes, but that proposition has not yet found support among states. M. Steinitz, *The Case for an International Court of Civil Justice* (2018); J.E. Stiglitz, ‘Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World – Balancing Rights and Responsibilities’, 23 *American University International Law Journal* 451, at 556 (2008).

³ ‘Forum selling’ arises when a legal system attempts to attract foreign litigants to its courts. This phenomenon is related to ‘forum shopping’, which arises when parties attempt to locate their disputes in venues that maximize the benefit to themselves. Further reading is available on both points. P.K. Bookman, ‘The Unsung Virtues of Global Forum Selling’, 92 *Notre Dame Law Review* 579 (2016); D. Klerman and G. Reilly, ‘Forum Selling’, 89 *Southern California Law Review* 241 (2016); M. Requejo Isidro, ‘International Commercial Courts in the Litigation Market’, Max Planck Institute Luxembourg for

and to what extent it is possible, as a matter of constitutional and sub-constitutional law, for the United States to increase its competitiveness in the international law market. The Chapter concludes in Section 4 by tying together the various strands of argument and providing some forward-looking ideas.

2. Challenging the Arbitral Hegemony in Cross-Border Commercial Conflicts

In order to understand the US perspective on international commercial courts, it is necessary first to appreciate why various countries have been moving to develop such courts. In many ways, the new mechanisms can best be described as an attempt to cure certain failings associated with the predominant form of dispute resolution – international commercial arbitration – while incorporating arbitral features that are acceptable to states and desirable by users.⁴

Arbitration is seen as offering numerous benefits to international commercial actors, particularly with respect to (1) the ability to choose laws, procedures and decision-makers who are expert in the type of dispute at issue and (2) the ease with which arbitration agreements and final awards can be enforced.⁵

Procedural Law Research Paper Series, No. 2019, at section 3.2, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3327166.

⁴ Requejo Isidro, above n. 3, at section 3.1. Some commentators have argued that these new courts appear to be modelled, at least in part, on the English Commercial Court, which has been very successful in attracting ‘foreign’ litigation. P.K. Bookman, ‘The Adjudication Business’, 45 *Yale Journal of International Law* __, at *nn. 90-112 (forthcoming 2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3338152; Requejo Isidro, above n. 3, at section 2. However, part of the success of the English Commercial Court can and should be attributed to the benefits of English substantive law, which is generally considered to be sophisticated, well-developed and fair to all parties. As a matter of procedural law, parties who choose to have their disputes governed by English law can have their matter heard in English court, even if the parties and the dispute have no other connection to England. *Kaefer Aislamientos SA de CV v. AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10; A. Briggs, *Private International Law in English Courts* (2016), at 10. New York has adopted similar provisions in cases over a certain minimum amount, thus explaining why New York has traditionally been a popular venue for national and international commercial disputes. New York General Obligations Law §§5-1401 to 5-1402; Bookman (2019), above n. 4, at *nn 113-38; T. Eisenberg and G.P. Miller, ‘The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies’ Contracts’, 30 *Cardozo Law Review* 1475, at 1484-85 (2009). However, it is unclear whether and to what extent English and New York courts will continue to thrive given recent political events in both countries.

⁵ G.B. Born, *International Commercial Arbitration* (2014), at 73-93.

However, over the last decade or so, arbitration has been subject to two key criticisms which have resulted in the development of two different types of procedural innovations.

The first criticism comes from users who claim that international commercial arbitration is not as fast and inexpensive as they had initially hoped.⁶ This concern has driven the rise of international commercial mediation (conciliation), which is often touted as resolving cross-border business disputes more quickly and inexpensively than both arbitration and litigation.⁷ States have responded to user concerns by developing the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation), which opened for signature on August 7, 2019.⁸ While it remains to be seen what effect, if any, the Singapore Convention on Mediation will have on cross-border dispute resolution, the initiative fills an important systemic gap in the legal regime supporting international commercial mediation and creates a level playing field between mediation and arbitration by establishing an enforcement mechanism for mediated settlement agreements that is similar to the New York Convention.⁹

The second type of criticism aimed at international commercial arbitration comes from scholars and states who are concerned about the legitimacy and neutrality of private dispute resolution as a general

⁶ S.I. Strong, 'Realizing Rationality: An Empirical Assessment of International Commercial Mediation', 73 *Washington and Lee Law Review* 1973, at 1982-93 (2016).

⁷ This claim has not yet been empirically established in the cross-border commercial realm. *Ibid.* at 2011.

⁸ UNCITRAL, Report of the UN Commission on International Trade Law, Fifty-first session, UN Document A/73/17 (2018) at Annex I.

⁹ T. Schnabel, 'The Singapore Convention on Mediation: A Framework for Cross-Border Recognition and Enforcement of Mediated Settlements', 19 *Pepperdine Dispute Resolution Law Journal* 1, at 1 (2019); S.I. Strong, 'Beyond International Commercial Arbitration? The Promise of International Commercial Mediation', 45 *Washington University Journal of Law and Policy* 11, at 28 (2014).

proposition.¹⁰ Although the debate about legitimacy is not as heated in international commercial arbitration as in investment arbitration, there is a perceptual overlap between the two.¹¹

Some aspects of the discussion about the benefits and propriety of public dispute resolution processes (ie, litigation) as compared to private dispute resolution processes (ie, arbitration and mediation) fly in the face of empirical data and therefore appear to be based on cognitive distortions such as the status quo bias.¹² Nevertheless, advocates for judicial processes have sought to challenge the hegemony of international commercial arbitration through a number of initiatives.

Some of these reforms date back to the mid-twentieth century.¹³ However, the most important global effort¹⁴ to bolster transnational litigation in the modern era began in 1992, when the Hague Conference on Private International Law (Hague Conference) began working on the Judgments Project, which sought to create a New York Convention-style treaty that simultaneously promoted international enforcement of choice of court agreements and court judgments.¹⁵ The project was more contentious than originally contemplated, but did successfully produce the Hague Convention on Choice of Court Agreements (COCA) in 2005.¹⁶ In 2011, the Hague Conference decided to re-open discussion of a treaty

¹⁰ S.I. Strong, 'Truth in a Post-Truth Society: How Sticky Defaults, Status Quo Bias and the Sovereign Prerogative Influence the Perceived Legitimacy of International Arbitration', 2018 *University of Illinois Law Review* 533, at 555-56 (2018). Some scholars have argued that courts are particularly important in protecting certain types of rights, such as those arising from technical or industrial innovation. E. O'Hara O'Connor and C.R. Drahozal, 'The Essential Role of Courts for Supporting Innovation', 92 *Texas Law Review* 2177, at 2181 (2014).

¹¹ Strong (2018a), above n. 10, at 535-36.

¹² *Ibid.* at 537, 539.

¹³ Conventions, Protocols and Principles, Hague Conference on Private International Law (reflecting various international instruments supporting international civil litigation), <https://www.hcch.net/en/instruments/conventions>.

¹⁴ While European Union Member States can rely on various European instruments to facilitate cross-border litigation, those agreements are only regional in nature. Eg, Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), OJ 2012 L 351/1 (re-enacting Council Regulation (EC) 44/2001 of 22 December 2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, OJ 2001 L 12/1 (Brussels I Regulation)).

¹⁵ The Judgments Project, Hague Conference on Private International Law, <https://www.hcch.net/en/projects/legislative-projects/judgments>.

¹⁶ *Ibid.* See also Convention on Choice of Court Agreements, 30 June 2005, 44 ILM 1294.

relating to enforcement of foreign judgments and eventually produced a document that was subject to a final diplomatic session in June 2019.¹⁷

As laudable as these efforts may be, neither seems poised to mount a realistic challenge to arbitral hegemony. Not only has COCA has received relatively few ratifications in the fourteen years since it was signed, but the new judgments convention had not yet been finalized at the time of writing, despite decades of work.¹⁸

The Judgments Project focused on predictability of venues and enforceability of outcomes, which are often seen as two major benefits of the international arbitral regime. However, international commercial arbitration also enjoys a great deal of substantive and procedural flexibility,¹⁹ and states have sought to replicate both those attributes in national litigation. For example, the Hague Conference has sought to increase party autonomy in the area of substantive law through promulgation of the Hague Principles on Choice of Law in International Commercial Contracts, which allows parties to have their contracts governed by non-state law, a feature that was at one time only possible in arbitration.²⁰ As a result, parties in litigation may now choose to have their disputes resolved by several forms of non-state law ranging from the International Institute for the Unification of Private Law (UNIDROIT) Principles of

¹⁷ Hague Conference on Private International Law, Special Commission on the Judgments Project, Draft Convention of May 2018 (24-29 May 2018), available at <https://assets.hcch.net/docs/23b6dac3-7900-49f3-9a94-aa0ffbe0d0dd.pdf>; Hague Conference on Private International Law, Twenty-Second Diplomatic Session, Judgments Convention: Revised Draft Explanatory Report, Preliminary Document No. 1 (18 June-2 July 2019), available at <https://assets.hcch.net/docs/7d2ae3f7-e8c6-4ef3-807c-15f112aa483d.pdf>; Louise Ellen Teitz, ‘Another Hague Judgments Convention? Bucking the Past to Provide For the Future’, 30 *Duke Journal of Comparative and International Law* __ (forthcoming 2019).

¹⁸ COCA has not yet been widely adopted, and its status in the United States is somewhat tenuous, given that it has not yet been ratified and does not appear likely to be ratified in the near future.

¹⁹ Born, above n. 5, at 84-86, 2616.

²⁰ Hague Principles on Choice of Law in International Commercial Contracts, art. 3 (‘The law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise.’), <https://www.hcch.net/en/instruments/conventions/full-text/?cid=135>; G. Saumier, ‘The Hague Principles and the Choice of Non-State “Rules of Law” to Govern an International Commercial Contract’, 40 *Brooklyn Journal of International Law* 1, at 4 (2014).

International Commercial Contracts²¹ to the United Nations Commission on International Trade Law (UNCITRAL) Convention on the International Sale of Goods (CISG)²² to the *lex mercatoria*.²³

Similar innovations have taken place with respect to the procedural law applicable in litigation. For example, in 2006, the American Law Institute (ALI) and UNIDROIT jointly developed various principles and rules of transnational civil procedure that could be used by national courts in cross-border cases.²⁴ Unfortunately, this initiative failed to find widespread support among states, even though the project was critically well-received.²⁵

States' inability to adopt effective means of fostering transnational litigation has occasionally led users to take matters into their own hands. For example, in some jurisdictions, parties can alter standing rules of civil procedure through the adoption of individualized or 'bespoke' rules of procedure.²⁶ While there are limits to what parties may do, this remains an intriguing alternative for international commercial actors who simply want to make minor changes to the procedural rules applicable in a particular state.²⁷

²¹ UNIDROIT, <http://www.unidroit.org/english/principles/contracts/main.htm> (including versions from 1994, 2004 and 2010).

²² United Nations Convention on Contracts for the International Sale of Goods, 11 April 1980, 1489 UNTS 3 (hereinafter CISG).

²³ The term *lex mercatoria* is typically used to refer to various uncodified principles of international commercial law, although there is a wide-ranging debate about the content, scope and existence of *lex mercatoria*. K.P. Berger, *The Creeping Codification of the New Lex Mercatoria* (2010); M.S. Kurkela and S. Turunen, *Due Process in International Commercial Arbitration* (2010), at 6-7 (suggesting the UNIDROIT Principles of International Commercial Contracts constitute a codified version of the *lex mercatoria*).

²⁴ American Law Institute (ALI) and UNIDROIT, *Principles of Transnational Civil Procedure* (2006).

²⁵ The ALI/UNIDROIT Principles of Transnational Civil Procedure have not yet been adopted by any national legal system. ALI and UNIDROIT, above n. 24, at xxix, xxxviii-xxxix (noting effect of the ALI/UNIDROIT Principles in Mexico); S. Dodson and J.M. Klebba, 'Global Civil Procedure Trends in the Twenty-First Century', 34 *Boston College International and Comparative Law Review* 1, at 23 (2011).

²⁶ J. Erickson, 'Bespoke Discovery', 71 *Vanderbilt Law Review* 1873, at 1874-75 (2018); S.I. Strong, 'Limits of Procedural Choice of Law', 39 *Brooklyn Journal of International Law* 1027, at 1033-35 (2014) (surveying scholarly literature).

²⁷ *Ibid.*; S.I. Strong, 'General Principles of Procedural Law and Procedural Jus Cogens', 122 *Penn State Law Review* 347 (2018) (discussing limits).

The most recent innovation in international commercial dispute resolution involves specialized international commercial courts lodged within national judicial systems. However, the development of these courts is somewhat unequally divided around the world, as the following section discusses.

3. International Commercial Courts: Comparing the United States to the Rest of the World

3.1. Key Attributes of International Commercial Courts

As noted in detail elsewhere in this text,²⁸ specialized international courts have become increasingly common in numerous countries around the world, including those located in Europe (Belgium, France, Germany, Ireland and the Netherlands), Asia (Singapore) and the Middle East (Abu Dhabi, Dubai and Qatar).²⁹ Other jurisdictions, most notably Australia, also appear poised to develop courts of this nature.³⁰

In many ways, these new courts appear to have been designed to overcome some of the perceived shortcomings of international commercial arbitration while retaining those aspects of arbitration that are most attractive to parties.³¹ For example, some of the new courts seek to break the arbitral hegemony by allowing parties to conduct proceedings in English, which is the *lingua franca* not only of international business but also of international commercial arbitration, while other courts allow foreign or international judges to sit alongside national judges, thereby mimicking the adjudicative neutrality and expertise typical of arbitration.³² Still other courts permit technological and procedural innovations that are routinely associated with international commercial arbitration.³³

²⁸ See X.E. Kramer & J. Sorabji, 'Conclusion', in X.E. Kramer & J. Sorabji (eds.), *International Business Courts – A European and Global Perspective* (forthcoming 2019).

²⁹ Requejo Isidro, above n. 3, at section 2.

³⁰ *Ibid.*

³¹ F. Tiba, 'The Emergence of Hybrid International Commercial Courts and the Future of Cross-Border Dispute Resolution in Asia', 14 *Loyola University Chicago International Law Review* 31, at 46 (2016).

³² Bookman (2019), above n. 4, at *nn 15-17; Requejo Isidro, above n. 3, at section 3.2.1.2.

³³ Bookman (2019), above n. 4, at *nn 15-17; Requejo Isidro, above n. 3, at sections 3.2.1.2-3.2.1.3.

The one area where new international courts fall flat involves enforceability of choice of court agreements and judgments.³⁴ Those matters can only usefully be addressed through international treaties, which have of course proved problematic in the past.³⁵ However, the rise of international commercial courts may very well trigger increased interest in COCA and the new instrument on the enforcement of foreign judgments.³⁶

3.2. International Commercial Courts in the United States

According to figures from the World Bank and the United Nations Conference on Trade and Development, in 2017, the United States exported goods valued at \$1,545,609 million and imported goods valued at \$2,407,390 million.³⁷ Given these figures, 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 US parties and interests.³⁸ However, precisely the opposite is true: the United States is not only not developing specialist international courts, it is decreasing international commercial actors' access to existing US courts.³⁹

Perhaps the best way to understand this phenomenon is to frame the field of transnational litigation in terms of a competitive market, as is increasingly done.⁴⁰ If a particular country views

³⁴ Requejo Isidro, above n. 3, at sections 3.2.1.2-3.2.1.3. There does not appear to be any requirement that parties subject themselves to a pre-dispute choice of court agreement in order to gain access to international commercial courts, but the failure to do so would diminish the predictability of process so valued by international commercial actors.

³⁵ See above n. 18.

³⁶ *Ibid.*

³⁷ World Integrated Trade Solution, <https://wits.worldbank.org/CountrySnapshot/en/USA/textview>.

³⁸ P.K. Bookman, 'Litigation Isolationism', 67 *Stanford Law Review* 1081, at 1087-88 (2015).

³⁹ G. Berger-Walliser, 'Reconciling Transnational Jurisdiction: A Comparative Approach to Personal Jurisdiction Over Foreign Corporate Defendants in US Courts', 51 *Vanderbilt Journal of Transnational Law* 1243, at 1248 (2018); P.K. Bookman, 'Doubling Down on Litigation Isolationism', 110 *AJIL Unbound* 57, at 57-58 (2016); E. Lein, R. McCorquodale, L. McNamara, H. Kupelyants & J. del Rio, 'Factors Influencing International Litigants' Decisions to Bring Commercial Claims to the London Based Courts', Ministry of Justice Analytical Series-BIICL, London, 2015, section 4.5 ('[I]nternational litigation is increasingly perceived as a competitive market where litigation centres promote themselves through intensive marketing and improved quality and speed of their court services'.).

⁴⁰ Bookman (2016), above n. 3, at 606-07; Strong (2018a), above n. 10, at 563 (citing authorities).

‘litigation business’ in a positive light, then that country will seek to increase the attractiveness of their courts to foreign litigants through ‘forum selling’.⁴¹ However, if a particular country characterizes litigation business in negative terms – often referred to as ‘forum shopping’ – then it will minimize mechanisms that encourage or allow foreign litigants to access national courts.⁴²

Market analysis also provides a second principle, namely that change will be most pronounced in those countries that believe their courts to be lacking in some regard. Jurisdictions that believe themselves to be already capable of competing adequately within the litigation market will not engage in much or any reform but will instead maintain their existing judicial norms.

Closer examination of US policy and practices show two clear trends. First, the United States has traditionally characterized litigation business in pejorative terms, emphasizing the negative effect that international and domestic forum shopping has on individuals and public policy.⁴³ Second, the United States appears to believe that it has no competitive disadvantage when it comes to transnational litigation.⁴⁴ To the contrary, many within the United States believe that US courts, particularly US federal courts, are ‘among the best, if not the best, of any nation in the world’.⁴⁵

⁴¹ Bookman (2019), above n. 4, at *nn 24-43.

⁴² Bookman (2016), above n. 3, at 582.

⁴³ *Ibid.* at 582, 585-87.

⁴⁴ Bookman (2019), above n. 4, at *n.6 (noting New York in particular sees itself as a leader in this field).

⁴⁵ P.M. Koelling, ‘Appellate Practice: The Next 50 Years’, 53 *Judges’ Journal* 15, at 17 (2014). Among other things, this belief in the superiority of the US legal system can be seen in the propensity of US judges to travel to other countries to conduct judicial education programs, but not to attend such programs as students or receive training in the United States from foreign judges, and in US courts’ ongoing attempt to provide unwanted ‘aid’ to foreign and international tribunals in the form of US-style discovery pursuant to 28 USC. §1782, a move that is meant to encourage other countries to provide similar types of assistance, even though most countries view US-style discovery with horror. 28 USC. §1782; S.F. Halabi and N.K. Laughrey, ‘Understanding the Judicial Conference Committee on International Judicial Relations’, 99 *Marquette Law Review* 239, at 242 (2015); J. Kroncke, ‘Law and Development as Anti-Comparative Law’, 45 *Vanderbilt Journal of Transnational Law* 477, at 479 (2012); S.I. Strong, ‘Discovery Under 28 USC. §1782: Distinguishing International Commercial Arbitration and International Investment Arbitration’, 1 *Stanford Journal of Complex Litigation* 295, at 351 (2013).

Interestingly, this view of US courts is not necessarily shared by those in other jurisdictions.⁴⁶ US state courts fare particularly badly as a result of concerns about the quality of judges and a potential lack of neutrality toward foreign litigants.⁴⁷ While some commentators argue that these concerns are overstated, the perception is enough to cause foreign litigants to avoid US state courts if at all possible.⁴⁸

Detailed discussion of the relative merits of the internal and external views of the US judicial system is beyond the scope of the current analysis.⁴⁹ Instead, it is sufficient to note that, because the United States does not perceive its judicial system as lacking in any way and does not view forum-selling in a positive light, it has little to no incentive to change the status quo.

This is not to say that no specialized courts exist in the United States. For example, there are a limited number of specialized trial and appellate courts in the federal system, although none of these bodies currently focus on international business per se.⁵⁰ This approach can be explained by the traditional view among many US judges and commentators that generalist judges are not only capable of

⁴⁶ Eg, R.L. Lerner, 'International Pressure to Harmonize: The US Civil Justice System in an Era of Global Trade', 2001 *Brigham Young University Law Review* 229, 254, 264-65 (2001); C. Sunstein, D. Kahneman & D. Schkade, 'Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)', 107 *Yale Law Journal* 2071, at 2074 (1998).

⁴⁷ Burt Neuborne, 'The Myth of Parity', 90 *Harvard Law Review* 1105, at 1120-21 (1977); Burt Neuborne, 'Parity Revisited: The Uses of a Judicial Forum of Excellence', 44 *DePaul Law Review* 797, at 799 (1995).

⁴⁸ S.P. Jordan, 'Reverse Preemption', 92 *Boston University Law Review* 1771, at 1809-10 (2012); M.E. Solimine, 'The Quiet Revolution in Personal Jurisdiction', 73 *Tulane Law Review* 1, at 15-16 (1998); C.A. Whytock, 'The Evolving Forum Shopping System', 96 *Cornell Law Review* 481, at 530 n.215 (2011).

⁴⁹ Additional reading is available. Eg, J. Wilets and A.A. Imoukhuede, 'A Critique of the Uniquely Adversarial Nature of the US Legal, Economic, and Political System and Its Implications for Reinforcing Existing Power Hierarchies', 20 *University of Pennsylvania Journal of Law and Social Change* 341, at 343-44 (2017).

⁵⁰ For example, the United States Court of International Trade hears matters involving customs law and cross-border trade as a matter of first instance, while the Federal Circuit Court of Appeal maintains specialist jurisdiction over appeals relating to certain types of subject matters, including patents. Customs Court Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (codified as amended at 28 USC. §251) (creating the Court of International Trade); 12 USC. §1295 (creating the Federal Circuit Court of Appeal); E.K. Cheng, 'The Myth of the Generalist Judge', 61 *Stanford Law Review* 519, at 522-23 (2008); J.W. Stempel, 'Two Cheers for Specialization', 61 *Brooklyn Law Review* 67, at 71 (1995).

hearing highly technical disputes but are better than specialist judges in some regards.⁵¹ To the extent that specialized expertise is beneficial, courts can and do engage in specialized opinion writing efforts that are said to reflect the benefits of specialized courts without the negative features associated with such tribunals.⁵²

State courts have not been as hesitant as federal courts to engage in specialization initiatives.⁵³ At this point, twenty-one of the fifty US states have created some type of business court.⁵⁴ Although each of these courts is unique, John Coyle has nevertheless ‘identified three principal rationales for creating these courts’.⁵⁵ These rationales can be usefully compared to those associated with the development of international commercial courts around the world to determine whether and to what extent the United States is in a position to compete for international litigation business.⁵⁶

‘First, [US state business] courts are said to result in a higher quality of decisions in individual cases and to generate more and better-reasoned decisions in the fields of corporate and commercial law’,⁵⁷ a rationale that appears to be equally important to those developing international commercial courts. However, supporters of US business courts appear to correlate quality of decision-making with substantive knowledge that can be obtained through specialist forms of judicial education rather than with

⁵¹ Cheng, above n. 50, at 520-25; J. Rakoff, ‘Are Federal Judges Competent? Dilettantes in an Age of Economic Expertise’, 17 *Fordham Journal of Corporate and Financial Law* 4, at 7-14 (2012).

⁵² Cheng, above n. 50, at 526.

⁵³ J.F. Coyle, ‘Business Courts and Interstate Competition’, 53 *William and Mary Law Review* 1915, at 1918 (2012).

⁵⁴ The jurisdictions include Alabama, Colorado, Delaware, Florida, Georgia, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, and West Virginia. *Ibid.*; R.L. Renck and C.H. Thomas, ‘Recent Developments in Business Commercial Courts in the United States and Abroad’, *Business Law Today* 1, at 1 (May 2014). Notably, the definition of a ‘business court’ varies across jurisdictions. Coyle, above n. 53, at 1922-27.

⁵⁵ Coyle, above n. 53, at 1927.

⁵⁶ It is unclear whether US business courts or international commercial courts achieve any or all of these goals in practice, although that issue is beyond the scope of the current analysis. *Ibid.* at 1927-30, 1975-82 (undertaking that analysis in the context of US business courts).

⁵⁷ *Ibid.* at 1927. See also Requejo Isidro, above n. 3, at section 3.2.

prior expertise, as appears to be the case with international courts.⁵⁸ However, this purported benefit is somewhat illusory, since US state court judges are often not required to undertake any form of judicial education whatsoever, and even those that do are usually not required to undertake training on any particular subject.⁵⁹ Furthermore, judicial education programs in the United States are almost entirely bereft of coursework on international law, particularly international commercial law, which suggests that simply concentrating commercial cases in a particular court will do little by itself to improve the quality of decision-making.⁶⁰

The situation is quite different in many international courts, since a number of those tribunals are seated in civil law jurisdictions that require their judges to undertake significant amounts of judicial education both before and after they join the bench.⁶¹ Some international courts have also addressed this concern by allowing foreign or international judges to sit alongside national judges, thereby deepening and enriching substantive analyses and mirroring procedures used in international commercial arbitration.⁶² Thus, the concept of commercial expertise varies widely between international commercial courts and international commercial arbitration, on the one hand, and business courts in individual US states on the other.

‘Second, [US state business] courts are said to improve the administrative efficiency of a state court system.’⁶³ At first glance, this, too, appears to be a laudable goal shared by international

⁵⁸ Bookman (2019), above n. 4, at 23, 35, 45. For example, business judges from US state courts can receive specialist training from the American College of Business Court Judges and similar organizations. Renck and Thomas, above n. 54, at 3.

⁵⁹ S.I. Strong, ‘Judicial Education and Regulatory Capture: Does the Current System of Educating Judges Promote a Well-Functioning Judiciary and Adequately Serve the Public Interest?’, 2015 *Journal of Dispute Resolution* 1, at 3-4 (2015). US federal judges are also not required to engage in any initial or continuing judicial education. *Ibid.*

⁶⁰ Education for Courts, Federal Judicial Center, <https://www.fjc.gov/education/education-programs>; 2019 Course Calendar, National Judicial College, <https://www.judges.org/2019courses/>.

⁶¹ Strong (2015), above n. 59, at 2 (noting judges in the US do not engage in any judicial education prior to joining the bench).

⁶² Bookman (2019), above n. 4, at *n.159, 293.

⁶³ Coyle, above n. 53, at 1927.

commercial courts.⁶⁴ However, certain problems exist with respect to the US approach. For example, the US focus is limited to decreasing the time to final disposition, even though the concept of efficiency in international commercial arbitration and in many new international commercial courts includes procedural innovation and flexibility as well as speed.⁶⁵ Because US state commercial courts do not appear to have adopted any technical or procedural innovations other than those that are otherwise available in the US judicial system, these courts appear unlikely to be able to compete with international commercial courts or with international commercial arbitration.

‘Finally, [US state] business courts are said to facilitate the diversion of economic resources from one jurisdiction to another as part of a broader process of interjurisdictional competition.’⁶⁶ This rationale is equally important to those developing international commercial courts, but the concept of ‘interjurisdictional competition’ is of course commensurately broader in international matters. Thus, it is not surprising that US state business courts ignore a number of issues that are important to international commercial actors, such as matters relating to potential bias against foreign litigants. This type of concern has been addressed by a number of international commercial courts by allowing international or foreign judges to sit alongside national judges and in international arbitration by limiting the ability of an arbitrator from the same state as one of the parties to hear the matter in question.⁶⁷

3.3. Looking Forward: Is Change in the United States Likely?

The preceding subsection suggests that the United States is currently not well-situated to compete with new international commercial courts arising around the world. Federal courts appear disinclined to change, either because of a deep-seated aversion to forum shopping and forum selling or because of a belief in the superiority of the US federal system. Although a significant number of US state courts have

⁶⁴ Bookman (2019), above n. 4, at *n.329; Requejo Isidro, above n. 3, at section 3.2.

⁶⁵ Born, above n. 5, at 73-93.

⁶⁶ Coyle, above n. 53, at 1927.

⁶⁷ See above n. 32.

sought to attract litigation business by creating specialized commercial courts, the focus there is on interstate rather than international matters.

The question therefore arises whether the United States is likely to adopt the types of reforms that are necessary to make it more competitive on the world legal market. This analysis involves two different types of issues: those that are constitutional and those that are sub-constitutional.

3.3.1. Constitutional concerns

Constitutional concerns involving the creation of specialist international commercial courts in the United States primarily relate to the US federal system rather than to individual state judiciaries, although there is occasional overlap.⁶⁸ This discussion focuses on two particular issues, one relating to jurisdiction and the other relating to the right to a civil trial by jury.

Jurisdictional concerns

As a federalized nation, the United States has two different judicial systems: state and federal. Courts of the individual US states enjoy ‘general jurisdiction’, meaning that are competent to hear a wide variety of matters, including those involving international disputes.⁶⁹ Federal courts, on the other hand, enjoy only ‘limited jurisdiction’,⁷⁰ meaning that they may only hear matters when the court has jurisdiction over the person or property in question (‘personal jurisdiction’) and over the substance of the dispute (‘subject matter jurisdiction’).⁷¹ Although it is more difficult to establish jurisdiction in US federal courts, foreign litigants typically prefer to have their matters heard in federal court for a variety of reasons, not the least

⁶⁸ Stempel, above n. 50, at 71-72 (noting the possibility of some analogous issues arising as a matter of state law).

⁶⁹ *Nevada v. Hicks*, 533 US 353, 366 (2001); *Boston Stock Exchange v. State Tax Commission*, 429 US 318, 320 n.3 (1977).

⁷⁰ US Constitution, art. III, §2, cl. 1; *Marbury v. Madison*, 5 US (1 Cranch) 137, 173-80 (1803); G.B. Born and P.B. Rutledge, *International Civil Litigation in US Courts* (2011), at 1-229.

⁷¹ Born and Rutledge, above n. 70, at 1-229.

of which is because federal judges are perceived as being less prone to bias based on nationality.⁷² As a result, those seeking to develop an internationally-competitive international commercial court in the United States would likely want to establish that court in the federal system so as to comply with the expectations and desires of potential users.

The first issue that dispute system designers would have to address involves subject matter jurisdiction.⁷³ According to the US Constitution,⁷⁴ federal courts may only exercise jurisdiction over a certain subset of cases, such as those that arise under the US Constitution, federal law or so-called ‘diversity’ jurisdiction.⁷⁵ However, diversity jurisdiction does not exist in cases arising entirely between

⁷² Jordan, above n. 48, at 1809-10 (2012); Solimine, above n. 48, at 15-16; Whytock, above n. 48, at 530 n.215.

⁷³ The term ‘dispute system designers’ is related to a new field of academic and practical interest: dispute system design (DSD), which “‘is not a dispute resolution methodology itself’ but instead reflects ‘the intentional and systematic creation of an effective, efficient, and fair dispute resolution process based upon the unique needs of a particular system’”. S.I. Strong, ‘The Role of Empirical Research and Dispute System Design in Developing International Treaties: A Case Study of the Singapore Convention on Mediation’, 20 *Cardozo Journal of Conflict Resolution* __ (forthcoming 2019) (citation omitted). Application of DSD theory to development of international commercial courts in the United States or elsewhere increases the chance of creating mechanisms that are both successful and procedurally fair. *Ibid.* (noting that DSD provides a time-tested, multi-step framework for development of new dispute system processes). For more on DSD, see N.H. Rogers, R.C. Bordone, F.E.A. Sander & C.A. McEwen, *Designing Systems and Processes for Managing Disputes* (2d ed. 2018); S. Smith and J. Martinez, ‘An Analytic Framework for Dispute System Design’, 14 *Harvard Negotiation Law Review* 123 (2009); A. Spain, ‘Integration Matters: Rethinking the Architecture of International Dispute Resolution’, 32 *University of Pennsylvania Journal of International Law* 1 (2010).

⁷⁴ US Constitution, art. III, §2, cl. 1.

⁷⁵ Diversity jurisdiction arises in

all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

non-US parties.⁷⁶ Although federal courts may nevertheless hear a dispute if another type of subject matter jurisdiction (such as that based on a question of constitutional or federal law) exists, the US constitutional structure nevertheless creates significant problems should US courts wish to compete with other jurisdictions for litigation business involving international commercial disputes.⁷⁷

As problematic as this may seem, the US Constitution provides the federal legislature (Congress) with some options. For example, Congress could create a new Article III court with subject-matter jurisdiction over international disputes, although that body would be subject to all of the restrictions and protections set forth in Article III of the US Constitution.⁷⁸ Alternatively, Congress could create a new Article I court, which would not be subject to the criteria described in Article III.⁷⁹ At this point, the US federal system is home to a number of specialized Article I courts, most notably the US Bankruptcy Courts,⁸⁰ and one specialized Article III first-instance court, the US Court of International Trade.⁸¹ Although Congress has traditionally been loath to create specialist tribunals in the US federal system,⁸²

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

28 USC. §1332(a). See also US Constitution, art. III, §2, cl. 1; C.A. Wright and A.R. Miller, *Federal Practice and Procedure 3d* (2012), at §§3602.1, 3604. Although some courts and commentators refer to matters involving ‘citizens of a State and citizens or subjects of a foreign state’ as constituting ‘alienage’ jurisdiction, most authorities combine those situations with suits between ‘citizens of different States’ under the single heading of ‘diversity’ jurisdiction.

⁷⁶ US Constitution, art. III, §2, cl. 1; *Mossman v. Higginson*, 4 US (4 Dall.) 12, 14 (1800); *Gall v. Topcall Int’l, A.G.*, No. Civ. A. 04-CV-432, 2005 WL 664502, at *4-5 (E.D. Pa. 2005); Wright and Miller, above n. 75, at §3604.

⁷⁷ This may be becoming increasingly difficult to do. *Kiobel v. Royal Dutch Petroleum Co.*, 569 US 108, 113-15 (2013) (discussing the Alien Tort Statute); *Morrison v. National Australia Bank Ltd.*, 561 US 247, 273 (2010) (declining jurisdiction over ‘foreign cubed’ action); *ibid.* at 283 n.11 (Stevens, J., concurring) (defining ‘foreign cubed’ or ‘f-cubed’ actions).

⁷⁸ Article III courts currently include the US Supreme Court, the US Circuit Courts of Appeal, the US District Courts, and the US Court of International Trade. Courts: A Brief Overview, Federal Judicial Center, <https://www.fjc.gov/history/courts/courts-brief-overview>.

⁷⁹ *Ibid.*

⁸⁰ Article I courts include various agency tribunals, bankruptcy courts and the like. *Ibid.*

⁸¹ Customs Court Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (codified as amended at 28 USC. §251).

⁸² See above nn. 51-52.

commentators who support such courts have suggested that such tribunals be created under Article I and subject to review by Article III judges.⁸³

Even if Congress were willing to create a new federal court with specialized subject matter jurisdiction,⁸⁴ problems would still exist with respect to personal jurisdiction. Personal jurisdiction is typically considered pursuant to the ‘minimum contacts’ test described by the US Supreme Court in a series of opinions beginning with the 1945 decision in *International Shoe Co. v. Washington*.⁸⁵ This test establishes the limits of a court’s extraterritorial (‘long-arm’) jurisdiction as a matter of US constitutional law and can apply in state as well as federal court, since some states extend their jurisdictional reach to the full extent permitted by the US Constitution.⁸⁶

In this case, the obstacle would be judicial rather than legislative. Over the last few years, the US Supreme Court has repeatedly restricted the circumstances in which personal jurisdiction can be exercised over foreign parties, particularly corporate parties.⁸⁷ Although some aspects of personal jurisdiction might be overcome through party consent (waiver),⁸⁸ the only way to exercise mandatory jurisdiction over an unwilling litigant that does not meet existing requirements of the minimum contacts test would be

⁸³ Stempel, above n. 50, at 71. Parties may waive their right to have a matter heard by an Article III judge. *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1943 (2015).

⁸⁴ In addition to creating a new court, Congress would also need to create one or more substantive federal laws on which subject matter jurisdiction could be based. US Constitution, art. III, §2, cl. 1.

⁸⁵ *J. McIntyre Machinery v. Nicastro*, 564 US 873, 877-78 (2011); *Asahi Metal Indus. Co. v. Superior Court*, 480 US 102, 108-12 (1987) (O’Connor, J.); *Burger King Corp. v. Rudzewicz*, 471 US 462, 478-79 (1985); *Helicopteros Nacionales de Colombia, SA v. Hall*, 466 US 408, 414-15 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 US 286, 295 (1980); *International Shoe Co. v. Washington*, 326 US 310, 316 (1945). See also U.S. Federal Rules of Civil Procedure, R. 4(k)(2). The minimum contacts test is used in cases involving jurisdiction over both people and property, since the United States recognizes actions that are both *in rem* and quasi-*in rem*. *Shaffer v. Heitner*, 433 US 186, 199 (1977).

⁸⁶ California Civil Procedure Code §410.10 (extending jurisdiction to the full extent of state and federal constitutional limits); Utah Code Annotated §78B-3-201 (extending jurisdiction to the full extent of the federal constitution). Other states assert extraterritorial jurisdiction only in certain enumerated circumstances. New York Civil Practice Law and Rules §302.

⁸⁷ Berger-Walliser, above n. 39, at 1248.

⁸⁸ Although questions relating to personal jurisdiction are only considered pursuant to a motion by the parties, since such matters are waivable, federal courts may (and indeed must) raise questions regarding subject matter jurisdiction *sua sponte*. *Gonzalez v. Thaler*, 565 US 134, 141 (2012) (noting subject matter jurisdiction is not waivable); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 US 694, 703 (1982) (noting personal jurisdiction may be waived).

to overcome the judicially created minimum standards test through a constitutional amendment. That approach is of course very difficult to achieve, even assuming sufficient political will existed.⁸⁹

The constitutional right to a jury

The second constitutional concern relating to the creation of international commercial courts in the United States involves the right to a civil trial by jury.⁹⁰ While the right to a jury may be waived by litigants, many US parties consider juries to be fundamental to the judicial process and are therefore disinclined to agree to a bench trial.⁹¹ Furthermore, parties often have different interests when it comes to juries, which can make it difficult to come to agreement. For example, some international litigants (ie, plaintiffs) may be drawn to US courts in the hope of benefitting from the large monetary awards traditionally associated with jury determinations,⁹² while other international actors (ie, defendants) view the US jury system in a negative light and seek to avoid it at all costs.⁹³

Although the right to a jury is constitutional in nature, the provision in question (the Seventh Amendment) only applies to matters heard in Article III courts.⁹⁴ At this point, the Seventh Amendment does not appear to apply to Article I courts, which suggests that those seeking to create international commercial courts in the United States could avoid problems with juries by establishing an Article I

⁸⁹ US Constitution, art. V (identifying means of amending the US Constitution).

⁹⁰ *Ibid.* amend. VII ('In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.').

⁹¹ P.D. Carrington, 'The Civil Jury and American Democracy', 13 *Duke Journal of Comparative and International Law* 79, at 87 (2003). See also 28 USC. §§1861-74; U.S. Federal Rules of Civil Procedure, R. 38.

⁹² Bookman (2015), above n. 38, at 1090-91, 1110-11. This presumption may not in fact be true. K.M. Clermont and T. Eisenberg, 'Trial by Jury or Judge: Transcending Empiricism', 77 *Cornell Law Review* 1124, 1173-74 (1992) (providing evidence undermining assumptions that juries are more friendly to plaintiffs than judges). Interestingly, other jurisdictions are now offering more robust damages awards, which has decreased the attractiveness of US courts to many plaintiffs. Bookman (2015), above n. 38, at 1110-11.

⁹³ Carrington, above n. 91, at 88, 93.

⁹⁴ Z.D. Clopton, 'Justiciability, Federalism, and the Administrative State', 103 *Cornell Law Review* 1431, at 1453 (2018).

tribunal.⁹⁵ Notably, dispute system designers cannot avoid the problem of juries simply by locating international commercial courts in state court systems, for although the Seventh Amendment does not apply to proceedings in individual state courts, virtually all state constitutions contain provisions relating to the right to a jury trial in civil matters.⁹⁶

3.3.2. Sub-constitutional concerns

Development of international commercial courts in the United States is also made challenging as a result of a number of sub-constitutional concerns. Two issues that are of particular interest to international litigants involve discovery and punitive damages. In the past, the availability of contingent fee structures in the United States might have also been a factor, but the rise of third-party litigation funding around the world has lessened the distinctiveness of the United States in this regard.⁹⁷

Discovery

Discovery – meaning the pre-trial exchange of oral, documentary and written information – is one of the more exceptional aspects of US judicial procedure.⁹⁸ In the United States, discovery is regulated by Rule 26 of the Federal Rules of Civil Procedure in federal court and by analogous provisions in individual state courts.

While limited exchanges of information (often referred to as ‘disclosure’ rather than ‘discovery’) are also available in other common law countries as well as in international commercial arbitration, the processes are quite different from those used in the United States. Outside the United States, documents must be requested with a relatively high degree of specificity, thereby reducing time and costs and

⁹⁵ *Ibid.*

⁹⁶ E.J. Hamilton, Note, ‘Federalism and the State Civil Jury Rights’, 65 *Stanford Law Review* 851, at 852 (2013).

⁹⁷ Bookman (2015), above n. 38, at 1112.

⁹⁸ Harvard Law Review Association, ‘Developments in the Law – Discovery’, 74 *Harvard Law Review* 940 (1961) (providing historical view on the need for and purpose of discovery in the US legal system).

eliminating controversial ‘fishing expeditions’ for information.⁹⁹ Furthermore, other jurisdictions tend not to permit parties to engage in oral methods of information-gathering (ie, depositions) during the pre-trial phase.

The extensive and expensive nature of discovery in the United States has led international litigants to view the process with ‘horror’.¹⁰⁰ Domestic concerns about the cost and time associated with discovery have occasionally led to reform efforts, but these initiatives seldom have a significant or lasting impact on actual practice.¹⁰¹ Indeed, many parties in the United States seem to view discovery as a quasi-fundamental procedural right.

There is no real distinction between the scope and availability of discovery in state and federal courts, so there is no benefit to international litigants to proceeding in one system or the other. While some aspects of discovery can be controlled through pre- or post-dispute agreements between the parties, US parties are often loath to exercise this option, based on the belief that discovery will produce the magical ‘smoking gun document’ that will win their case.¹⁰²

There is, however, one possible means of overcoming this issue. Procedural law and substantive law are much more closely aligned than most people realize,¹⁰³ and the need for US-style discovery is closely tied to the legal standards associated with US substantive law. For example, fraud claims typically cannot be established as a matter of US law without extensive discovery, since most of the

⁹⁹ Compare U.S. Federal Rules of Civil Procedure, R. 26 (involving US discovery) with England Civil Procedure Rules, Part 31 (involving disclosure and inspection of documents in England) and International Bar Association Rules on the Taking of Evidence in International Arbitration (2010), https://www.ibanet.org/ENews_Archive/IBA_30June_2010_Enews_Taking_of_Evidence_new_rules.aspx.

¹⁰⁰ Strong (2013), above n. 45, at 351.

¹⁰¹ U.S. Federal Rules of Civil Procedure, R. 26 (committee notes on rules amendments from 1937 to 2015). Because discovery is often arranged privately between the parties, with judges only becoming involved if the parties cannot come to an agreement, parties can and often do engage in practices that violate the technical rules on discovery.

¹⁰² Erickson, above n. 26, at 1874-75 (noting parties seldom enter into an agreement regarding discovery *ex ante*).

¹⁰³ T.M. Main, ‘The Procedural Foundation of Substantive Law’, 87 *Washington Law Review* 801, at 822-23 (2010).

evidence of wrongdoing is in the hands of the defendant.¹⁰⁴ However, civil law jurisdictions allow fraud and related claims to be proven through other procedural mechanisms, such as shifting of the burden of proof or negative inferences.¹⁰⁵ International commercial arbitration also makes use of negative inferences to offset the limited ability to require production of evidence.¹⁰⁶

If innovators are made aware of the connection between US substantive law and US procedural norms, it might be possible to demonstrate a diminished need for US-style discovery if claims in a US-based international commercial court are governed by something other than US law. For example, claims governed by foreign law or by non-state law (such as the CISG) might not need full-blown US discovery.¹⁰⁷ However, excluding or limiting the applicability of US substantive law to matters heard in an international commercial court based in the United States would appear somewhat illogical, since one of the primary benefits of having a matter heard in the United States would be to take advantage of the substantive expertise of US-trained judges.

Punitive damages

The second sub-constitutional norm that makes the United States an unlikely candidate for international litigation involves punitive damages, meaning damages that are not merely compensatory or exemplary but are instead deterrent in nature. In many ways, punitive damages can be analysed in the same way as discovery. For example, not only can punitive damages in many cases be waived by the parties through pre- or post-dispute agreements (although post-dispute agreements are unlikely as a tactical matter and pre-dispute agreements may be impossible due the unanticipated nature of the suit),¹⁰⁸ but punitive

¹⁰⁴ L.S. Hoffman, 'Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery', 40 *University of Michigan Journal of Law Reform* 217, at 263-64 (2007).

¹⁰⁵ Strong (2018b), above n. 27, at 402.

¹⁰⁶ Born, above n. 5, at 2312.

¹⁰⁷ CISG, above n. 22.

¹⁰⁸ This approach is adopted with some frequency in international commercial arbitration, although there are some limits to the technique. *Stark v. Sandberg, Phoenix & von Gontard, P.C.*, 381 F.3d 793, 800 (8th Cir. 2004) (disallowing punitive damages waiver in arbitration when to do so would violate mandatory state law).

damages are also considered by many US parties to be a fundamental part of the US legal system. Indeed, US laws and lawmakers often view punitive damages as a necessary incentive to lawyers and/or parties to act as ‘private attorneys general’ and bring certain types of cases in the public interest.¹⁰⁹

If the United States wanted to increase the likelihood of the United States becoming a forum for international commercial disputes, it could limit or preclude the use of punitive damages. Again, this outcome might be more likely if the new forum limited the applicability of US substantive law. However, that outcome appears politically unlikely given the role that punitive damages play in the US legal system and also appears undesirable as a matter of dispute system design, since one of the major reasons to locate an international commercial court in the United States would be to facilitate claims asserted under US law.

4. Conclusion

As more jurisdictions around the world seek to compete with international commercial arbitration by developing international commercial courts, questions arise as to whether other countries can or should follow suit. This Chapter has focused on the United States, which appears to be somewhat exceptional not for what it has done but for what it has not done. Despite its role as a leader in cross-border commerce, the United States has demonstrated a marked disinclination to create specialized courts to deal with disputes arising out of transnational business relationships, instead preferring to allow those matters to be heard in existing state and federal tribunals.

This approach might be understandable if US courts were capable of competing on the world stage, but that does not appear to be the case. Instead, the problematic nature of certain aspects of US procedural and substantive law, combined with concerns about the neutrality and accessibility of US courts, suggests that the United States will be losing international litigation business in the coming years. Over time, this phenomenon will likely reduce the US influence on cross-border business concerns.

¹⁰⁹ *Ibid.* (noting some types of punitive damages cannot be waived).

Of course, change is always possible. Although the United States would have to overcome a number of challenges involving both constitutional and sub-constitutional norms, there does not appear to be an absolute bar to the development of international commercial courts in US state or federal judiciaries. Indeed, other countries, most notably Dubai and Singapore, have had to amend their constitutions to create their new courts, suggesting that even the most significant barriers can be overcome should the political will exist.¹¹⁰ The only question that remains is whether the United States will seek to increase its engagement with the rest of the world or adopt a more isolationist approach. To that, only time will tell.

¹¹⁰ Bookman (2019), above n. 4, at n.*258.