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The ‘Arbitralization’ of Courts: The Role of International Commercial Arbitration in the Establishment and the Procedural Design of International Commercial Courts

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ABSTRACT

International commercial arbitration is the most preferred dispute resolution method in cross-border commercial disputes. It has been, however, claimed that arbitration has lost its flexibility by becoming increasingly formal and by incorporating litigation practices. In academic literature, this trend has been termed the ‘judicialization’ of international commercial arbitration. This article argues that while arbitration is becoming progressively judicialized, international commercial courts evidence an opposite, less studied trend; namely, the ‘arbitralization’ of courts. Through a comparative analysis of different international commercial courts, the article explores how the competition with arbitration has prompted the establishment of these courts, and how arbitration has served as the inspiration for some of their most innovative features. The article concludes that while the incorporation of arbitration features could improve court proceedings, some of international commercial courts’ arbitration features undermine procedural justice and the role of courts as public institutions and therefore hit the limits of arbitralization.

I. INTRODUCTION

In the opening pages of the academic literature on international commercial arbitration, the standard account is that in international commercial disputes most parties prefer arbitration.¹

¹ E Gaillard and J Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 1; JDM Lew, LA Mistelis and S Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 5; G Born, *International Commercial Arbitration: Law and Practice* (3rd edn, Kluwer Law International 2021) cxxvii; N Blackaby, C Partasides and A Redfern, *Redfern and Hunter on International Arbitration* (7th edn, OUP 2022) 1.

Surveys indeed confirm that arbitration is by far the preferred dispute resolution method.² Although devised as a method to resolve disputes in an informal and flexible manner, it has been claimed that arbitration over time has lost its flexibility by becoming increasingly formal, and by incorporating litigation practices that extend the length of proceedings and raise costs. This increasing court-like formality has been termed the ‘judicialization’ of international commercial arbitration.³

However, while international commercial arbitration is becoming progressively judicialized, international commercial courts evidence an opposite trend; namely, the ‘arbitralization’ of public courts and justice.⁴ In order to attract parties with a preference for arbitration, some international commercial courts have adopted some of arbitration’s most valued features. Although in the case of some courts their arbitration features are limited in scope and therefore are simply ‘buzz’ words aimed at sending signals of quality and familiarity to prospective litigants,⁵ international commercial arbitration has considerably influenced the institutional design and the procedural rules of some international commercial courts. While a growing body of academic literature has studied the worldwide proliferation of international commercial courts and their innovative features,⁶ literature has not rigorously examined the role of international commercial arbitration as one of the main drivers behind the establishment of international commercial courts.⁷ A detailed examination of which specific arbitration rules and practices have served as the blueprint for international commercial courts’ rules and practices is similarly missing.

Drawing from the study of policy documents, international commercial courts’ rules and case law as well as academic literature, this article presents a comparative analysis of how different international commercial courts emulate international commercial arbitration. It is argued that whether ‘competitors or partners’⁸ international commercial arbitration and its increasing popularity in cross-border commercial disputes have prompted the establishment of international commercial courts and have served as an inspiration for some of the courts’ most innovative features. Although different international commercial courts opt for different arbitration features, international commercial courts resemble arbitration by infusing greater flexibility into their proceedings, appointing foreign nationality judges, permitting foreign lawyers to appear before them, allowing parties to agree on private and confidential proceedings and expanding the enforceability of their judgments by turning court judgments into

² White & Case and Queen Mary University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration*, Charts 1 & 2, <<https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-19.pdf>>; Singapore Management University, School of Law, Singapore International Dispute Resolution Academy (SIDRA), *SIDRA International Dispute Resolution Survey: 2020 Final Report*, Exhibit 4.1. <<https://sidra.smu.edu.sg/sidra-international-dispute-resolution-survey-final-report-2020>> all accessed 1 November 2022.

³ C Brower, ‘W(h)ither International Commercial Arbitration?’ (2008) 27 *Arbit Int* 181; T Stipanowich, ‘Arbitration: The New “Litigation”’ [2010] *Univ Ill Law Rev* 1; L Trakman and H Montgomery, ‘The “Judicialization” of International Commercial Arbitration: Pitfall or Virtue?’ (2017) 30 *Leiden J Int Law* 405.

⁴ See also M Hwang, ‘Commercial Courts and International Arbitration – Competitors or Partners?’ (2015) 31 *Arbit Int* 193, 201 referring to the Singapore International Commercial Court (SICC) as a hybrid court; P Bookman, ‘The Arbitration-Litigation Paradox’ (2019) 72 *Vanderbilt Law Rev* 1119; P Bookman, ‘The Adjudication Business’ (2020) 45 *Yale J Int Law* 227; P Bookman, ‘Arbitral Courts’ (2021) 61 *Virginia J Int Law* 161.

⁵ T Schultz and C Bachmann, ‘International Commercial Courts: Possible Problematic Social Externalities of a Dispute Resolution Product with Good Market Potential’ in S Brekoulakis and G Dimitropoulos (eds), *International Commercial Courts: The Future of Transnational Adjudication* (CUP 2022) 52, 56; G Antonopoulou, ‘Procedure before International Commercial Courts and Ordinary Courts: A Comparative Perspective’ in S Brekoulakis and G Dimitropoulos (eds), *International Commercial Courts: The Future of Transnational Adjudication* (CUP 2022) 421, 439.

⁶ X Kramer and J Sorabji (eds), *International Business Courts: A European and Global Perspective* (Eleven International Publishing 2019); M Requeho Isidro, ‘International Commercial Courts in the Litigation Market’ (2019) 9 *Int J Proced Law* 4; Bookman, ‘The Adjudication Business’ (n 4) 227; M Erie, ‘The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution’ (2020) 60 *Virginia J Int Law* 225; S Brekoulakis and G Dimitropoulos (eds), *International Commercial Courts: The Future of Transnational Adjudication* (CUP 2022).

⁷ However, see Bookman, ‘Arbitral Courts’ (n 4).

⁸ Hwang (n 4).

parties for alternative dispute resolution methods, as well as the resulting decrease in the caseload of federal and state courts in the United States.¹⁰

Starting with the NCC, the Council for the Judiciary's plan for establishing the court, the NCC Plan, stressed that high-value and complex international commercial disputes are increasingly resolved by foreign courts, such as the London Commercial Court, or by arbitration.¹¹ As a result of the outflow of cases to English courts or arbitration, national courts deal less and less with commercial disputes having an international element, and this has a negative impact on their expertise and their ability to produce and shape the law.¹² According to the NCC Plan, the phenomenon of the 'vanishing trial' has a self-reinforcing effect, as Dutch lawyers opt more and more often for foreign courts or arbitration.¹³ In addition, the NCC Plan delved into the economic gains that the establishment of the NCC would bring with it. As well as creating a business-friendly environment, the NCC could create business for the local bar and other service providers. The plan mentions the high legal fees charged in arbitration proceedings for high-value disputes as an indication of the court's high turnover potential.¹⁴ As such, the increasing popularity of arbitration was a central consideration in establishing the NCC. Like-minded considerations underlie the successive legislative proposals for establishing Chambers for International Commercial Disputes and Commercial Courts in Germany. The German proposals stress that despite the international recognition of the German justice system, parties prefer foreign courts or arbitration.¹⁵ It is expected that the use of English would make German courts more accessible to foreign litigants, draw significant international commercial disputes and boost the attractiveness of the German justice system as a whole.¹⁶

The NCC Plan and the proposals for the establishment of Chambers for International Commercial Disputes and Commercial Courts in Germany reveal the outflow of cases to arbitration and the 'vanishing trial' as one of the reasons behind the creation of the courts. However, the fact that international commercial arbitration and its prominence in cross-border commercial disputes were central considerations in the establishment of international commercial courts in Europe, does not mean that these courts and their host jurisdictions are not arbitration friendly. European countries, such as the Netherlands or Germany, have modern arbitration rules and a developed arbitration market. In addition, some European international commercial courts are additionally vested with jurisdiction over procedures related to international arbitration, and thereby support arbitration next to competing with it. For instance, in addition to ruling on appeals against NCC judgments, the Netherlands Commercial Court of Appeal (NCCA) has jurisdiction over arbitration-related procedures under the condition that the dispute is an international one, the place of arbitration is in the district of Amsterdam and the parties have made an explicit choice in favour of the NCCA.¹⁷

zur Einführung von Kammern für internationale Handelssachen) Drucksache 19/1717 (18 April 2018) 1, <<http://dipbt.bundes.de/dip21/btd/19/017/1901717.pdf>> (German Chambers Legislative Proposal 2018) all accessed 1 November 2022.

¹⁰ M Galanter, 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts' (2004) 1 J Empir Leg Stud 459; T Stipanowich, 'ADR and the "Vanishing Trial"' (2004) 1 J Empir Leg Stud 843.

¹¹ NCC Plan 2015, 3. See also The Boston Consulting Group, *Market Survey Netherlands Commercial Court (Marktverkenning Netherlands Commercial Court)*, 1, 9, <<https://docplayer.nl/111900001-Raad-voor-de-rechtspraak-marktverkenning-netherlands-commercial-court.html>> accessed 1 November 2022.

¹² *ibid.* See also Frits Bakker, 'Speech' (11 September 2014), <<https://www.taxlive.nl/media/1647/speech-frits-bakker-dag-van-de-rechtspraak-11-9-2014.pdf>> accessed 1 November 2022.

¹³ *ibid.* 5.

¹⁴ *ibid.* 8.

¹⁵ Federal Council (*Bundesrat*), Drucksache 219/21, *Draft Proposal submitted by the Federal States of North Rhine-Westphalia and Hamburg (Gesetzesantrag der Länder Nordrhein-Westfalen und Hamburg), Legislative Proposal for Strengthening the Courts in Commercial Disputes (Entwurf eines Gesetzes zur Stärkung der Gerichte in Wirtschaftsstreitigkeiten)* (17 March 2021), Begründung (Explanatory Statement), 11 (German Chambers Legislative Proposal 2021). See also German Chambers Legislative Proposal 2018, 1.

¹⁶ *ibid.* 1–2.

¹⁷ art 1.3.3(c) NCC Rules.

Although the practical relevance of this provision is limited given that arbitration proceedings are commonly seated in the Hague, the provision nevertheless aims at boosting the attractiveness of the Netherlands as an arbitration destination by offering parties arbitrating their disputes in Amsterdam English language court proceedings before a specialized court.¹⁸ Similar provisions can be also found in the rules of other international commercial courts.¹⁹ All this suggests that the competition with arbitration was mainly targeted at foreign arbitral seats and institutions and their increasing popularity among domestic parties. By establishing specialized courts attractive to parties undertaking international business activities, the Netherlands and Germany made explicit their aim of modernizing the public court system, attracting disputes frequently escaping their borders and ultimately, wiping the dust off state court case law.

B. Asian perspectives: international commercial courts as a partner of arbitration

Whereas the reasons behind the establishment of international commercial courts in Asia vary, the Asian courts show a different relationship to arbitration. They present themselves as a complementary dispute resolution method that aims to attract disputes better suited for public court proceedings.

In 2005, the Emirate of Dubai established the DIFC Courts with the aim of offering prospective investors a reliable dispute resolution venue.²⁰ The aim of attracting foreign direct investment similarly prompted the subsequent establishment of the QIC, the ADGM Courts and the AIFC Court.²¹ In 2015, Singapore established the SICC with the intention of further promoting Singapore as an Asian dispute resolution hub.²² China followed in 2019, and established the CICC.²³ According to commentators, the CICC, being a division of the Supreme People's Court,²⁴ is intended to concentrate high-value commercial disputes at China's highest court, and thereby facilitate state control over high-stake disputes involving Chinese companies and a state interest.²⁵ Although the reasons behind the establishment of these courts are widely different, these jurisdictions share the aim of attracting dispute resolution in its various forms; namely, litigation, arbitration or mediation. In particular, Singapore hosts the Singapore International Arbitration Centre (SIAC) with its rapidly developing case-load, and promotes mediation through the Singapore Mediation Centre (SMC).²⁶ Similarly, the CICC hosts Chinese arbitration institutions under its roof, providing parties with a 'one-stop' dispute resolution platform,²⁷ and has assigned its Expert Committee the additional

¹⁸ P Ortolani and B van Zelst, 'International Commercial Courts and EU Law: Easing the Tension' (2023) *JInt Disput Sett* 1, 13.

¹⁹ SICC Rules, Order 2, rule 1(2)(d). See also G Dimitropoulos, 'International Commercial Courts in the "Modern Law of Nature": Adjudicatory Unilateralism in Special Economic Zones' (2021) 24 *J Int Econ Law* 361, 369.

²⁰ J Krishnan and P Purohit, 'A Common Law Court in an Uncommon Environment: The DIFC Judiciary and Global Commercial Dispute Resolution' (2014) 25 *Am Rev Int Arbit* 497, 499; Z Al Abdin Sharar and M Al Khulaifi, 'The Courts in Qatar Financial Centre and Dubai International Financial Centre: A Comparative Analysis' (2016) 46 *Hong Kong Law J* 529, 539.

²¹ Bookman, 'The Adjudication Business' (n 4) 240.

²² SICC Committee, *Report* (November 2013), para 4 (a), <<https://www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/-report-of-the-singapore-international-commercial-court-committee-90a41701-a5fc-4a2e-82db-cc33db8b6603-1.pdf>> accessed 1 November 2022 (SICC Committee Report 2013).

²³ Supreme People's Court, *Provisions on Several Issues Regarding the Establishment of the International Commercial Court*, <<http://www.chinalawtranslate.com/Siyi-Lin-Translation-China-International-Commercial-Court.pdf>> accessed 1 November 2022 (CICC Provisions).

²⁴ *ibid* art 1.

²⁵ Z Huo and M Yip, 'Comparing the International Commercial Courts of China with the Singapore International Commercial Court' (2019) 68 *Int Comp Law Quart* 903, 922. See also W Gu, 'China's Law and Development: A Case Study of the China International Commercial Courts' (2021) 62 *Harv Int Law J* 67, 98.

²⁶ SIAC Official Website, <<https://www.siac.org.sg/>>; SMC Official Website, <<https://www.mediation.com.sg/>> all accessed 1 November 2022.

²⁷ Supreme People's Court, *Notice on Inclusion of the First Group of International Commercial Arbitration and Mediation Institutions in the 'One-stop' Diversified International Commercial Dispute Resolution Mechanism* (5 December 2018), <<http://cicc.court.gov.cn/html/1/219/208/210/1144.html>> accessed 1 November 2022.

task of mediating disputes.²⁸ By establishing international commercial courts as one of many options in a diversified dispute resolution portfolio, these countries promote, respectively, the broader goals of investment attraction, the creation of a dispute resolution market or enhanced state control.

This might explain why the SICC invoked the shortcomings of arbitration in order to justify its establishment, and to present itself as being simply complementary to arbitration. A glance at the official website of the SICC reveals how the court targets arbitration's weak spots. According to the website, although parties may be able to pursue their claims in international commercial arbitration, they may nevertheless wish to resolve their dispute in the SICC in order to avoid some of the problems encountered in arbitration.²⁹ These are the over-formalization of arbitration, also known as the 'judicialization' of international commercial arbitration,³⁰ legitimacy and ethical issues,³¹ the lack of an appellate review mechanism³² and the inability to join third parties who have not consented to arbitration proceedings.³³

The above illustrate how the SICC distinguishes itself from arbitration in order to underline its advantages as a public court and, consequently, its unique features. Although the SICC targets arbitration's shortcomings, various stakeholders underline that the court does not intend to detract from arbitration's caseload. Instead, the SICC aims at attracting disputes that would have bypassed Singapore, and thereby expand its dispute resolution market.³⁴ Sundaresh Menon, Chief Justice of Singapore, pointed out that just as the London Commercial Court exists alongside a vibrant arbitration market, the SICC would coexist in harmony with Singapore's growing arbitration market.³⁵

While the SICC is the only international commercial court that explains in detail how it complements arbitration, most Asian international commercial courts similarly position themselves as being partners of arbitration rather than as competitors.³⁶ However, defining the relationship between international commercial courts and international commercial arbitration in competitive or complementary terms is simply a rhetorical dilemma, which actually reflects varying policy objectives and regional particularities. Despite differences in rhetoric, international commercial arbitration has played an important role in the establishment of international commercial courts both in Europe and in Asia.

²⁸ Supreme People's Court, *Decision on the Establishment of International Commercial Expert Committee* (24 August 2018) <<http://cicc.court.gov.cn/html/1/219/235/243/index.html>> accessed 1 November 2022.

²⁹ 'About the SICC' (SICC), <<https://www.sicc.gov.sg/about-the-sicc>> accessed 1 November 2022. See also Hwang (n 4) 196–97; S Menon, 'International Commercial Courts: Towards a Transnational System of Dispute Resolution' (Opening Lecture for the DIFC Courts Lecture Series, 2015) paras 40–55; L Reed, 'International Dispute Resolution Courts: Retreat or Advance?' (John E. C. Brierley Memorial Lecture, 11 September 2017) 4.

³⁰ See also Menon (n 29) paras 45–49; S Menon, 'The Rule of Law and the SICC' (Singapore International Chamber of Commerce Distinguished Speaker Series, 10 January 2018) para 26, <https://www.sicc.gov.sg/docs/default-source/document/news-and-article/b_58692c78-fc83-48e0-8da9-258928974ffc.pdf> accessed 1 November 2022. For a similar discussion in the context of the NCC, see Parliamentary Papers II 2016/17 (*Kamerstukken II*), 34 761, no 3, *Amendments to the Code of Civil Procedure and the Civil Court Fees Act With Regard to the Introduction of English-language Case Law at the International Commercial Chambers of the Amsterdam District Court and the Amsterdam Court of Appeal* (*Wijziging van het Wetboek van Burgerlijke Rechtsvordering en de Wet griffierechten burgerlijke zaken in verband met het mogelijk maken van Engelstalige rechtspraak bij de internationale handelskamers van de rechtbank Amsterdam en het gerechtshof Amsterdam*), Explanatory Statement (*Memorie van Toelichting*), 2 (NCC Law).

³¹ See also Menon (n 29) para 51. For the regulation of arbitrators, see J Ilhão Moreira, 'Arbitrators vis-à-vis Other Professions: A Sociology of Professions Account of International Commercial Arbitrators' (2022) 49 *J Law & Soc* 48.

³² See also Menon (n 30) para 28(c).

³³ Menon (n 29) para 42; Menon (n 30) para 28(a); S Menon, 'International Commercial Courts in the Post-Pandemic Era' (SICC 2021, 10 March 2021) para 8, <<https://file.go.gov.sg/opening-address-cj-sicc-symposium.pdf>> accessed 1 November 2022.

³⁴ I Rajah, Senior Minister of State for Law, 'Speech' (Litigation Conference, 16 March 2015) para 25, <<https://www.mlaw.gov.sg/news/speeches/speech-by-senior-minister-of-state-for-law-indraneerajah-at-t>> accessed 1 November 2022; Hwang (n 4) 200.

³⁵ Menon (n 29) para 10.

³⁶ Hwang (n 4).

III. THE ARBITRATION FEATURES OF INTERNATIONAL COMMERCIAL COURTS

In order to attract parties with a preference for arbitration, international commercial courts emulate international commercial arbitration, which serves to inspire some of the courts' most innovative institutional and procedural features. Yet, not all international commercial courts are to the same degree arbitration-inspired. While the SICC or the DIFC Courts borrow multiple features from international commercial arbitration, the European international commercial courts borrow less. This could be attributed to factors such as the courts' international outlook, the fact that some international commercial courts are deeply embedded in national justice systems, as well as to constitutional or other legal provisions that allow some courts to be more arbitration-inspired than others.

This section focuses on these features of international commercial courts that are explicitly modelled after arbitration rules and practices. It illustrates how specific international commercial courts resemble arbitration by infusing greater flexibility into their proceedings, appointing foreign nationality judges, permitting foreign lawyers to appear before the court, allowing parties to agree on private and confidential proceedings and expanding the enforceability of their judgments by turning court judgments into arbitral awards.

A. Procedural flexibility in international commercial courts

International commercial arbitration is frequently described as a 'creature of contract'.³⁷ It is the will of the parties, expressed in an arbitration agreement, that submits disputes to arbitration and excludes the jurisdiction of national courts.³⁸ Arbitration agreements are therefore referred to as the 'foundation stone' of international commercial arbitration.³⁹ In addition, it is the parties' agreement that regulates and shapes the conduct of proceedings. The light-touch approach of arbitration statutes, the minimal intervention of public courts in the arbitration proceedings and the freedom of the parties to design proceedings facilitate party autonomy and lend international commercial arbitration flexibility,⁴⁰ which is one of its most valued features.⁴¹

Some international commercial courts base their jurisdiction on choice of court agreements. It is therefore claimed—similar in a way to arbitration—that the parties' agreement is the cornerstone of international commercial courts.⁴² In addition, similar to arbitration, some international commercial courts allow parties to have a greater say in the design of proceedings by, for instance, allowing parties to opt out of national rules of evidence or the right to appeal. This Part focuses on party autonomy in international commercial courts, exploring whether and to what extent party autonomy and the agreement of the parties permeates proceedings before an international commercial court. How far do international commercial courts go in reconciling freedom with law?⁴³

³⁷ See also Born (n 1) 331.

³⁸ art II Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed on 10 June 1958, effective 7 June 1959, 330 UNTS 3; Art 8 United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006 (Model Law).

³⁹ Blackaby, Partasides and Redfern (n 1) 49.

⁴⁰ Born (n 1) 22–23; Blackaby, Partasides and Redfern (n 1) 32.

⁴¹ 2018 International Arbitration Survey (n 2) Chart 3; SIDRA International Dispute Resolution Survey 2020 (n 2) Exhibit 6.1.1.

⁴² A Chong and M Yip, 'Singapore as a Centre for International Commercial Litigation: Party Autonomy to the Fore' (2019) 15 J Priv Int Law 97, 102, 106; Ortolani and van Zelst (n 18) 4.

⁴³ J Paulsson, *The Idea of Arbitration* (OUP 2013) 1.

1. *The agreement of the parties on jurisdiction*

Except for the international commercial courts established in the Middle East and Kazakhstan, the rest of the courts base their jurisdiction primarily on choice of court agreements, and therefore lack mandatory jurisdiction.⁴⁴ The fact that international commercial courts predominantly require the parties' agreement to establish jurisdiction brings them closer to arbitration and its consensual character.

The parties' agreement not only establishes the international jurisdiction of international commercial courts but also shapes subject matter jurisdiction. International commercial courts deal with international disputes: namely, those that have a cross-border element.⁴⁵ In addition, a dispute has to be of a commercial nature in order to fall within the courts' jurisdictional scope.⁴⁶ Although the definition of an international dispute varies significantly among different international commercial courts, criteria such as the parties' place of business abroad or the place of the performance of the contract abroad may lead to the dispute the required cross-border character.⁴⁷

More interesting for present purposes is that the SICCC Rules allow parties to turn a domestic dispute into an international simply by their agreement.⁴⁸ The definition of an international dispute in the SICCC Rules is modelled after Article 5(2) International Arbitration Act⁴⁹ (IAA), which in turn incorporates Article 1(3) Model Law. In a similar vein, the definition of a commercial dispute under the SICCC Rules was modelled after Article 1(1) IAA, which incorporates Article 1(1) Model Law. In 2016, the rules were amended so as to include that a claim is commercial in nature if, *inter alia*, the parties have expressly agreed that the subject matter of the claim is commercial in nature.⁵⁰ The SICCC's rules on the international and commercial character of a dispute show that the court lays increased emphasis on the parties' agreement. It allows parties to agree on its subject matter jurisdiction, and to turn a domestic dispute into an international one, and likewise to turn a non-commercial dispute into a commercial one simply by way of their agreement.

2. *The agreement of the parties on evidence proceedings*

International commercial courts give parties a greater say than the ordinary courts in the design of proceedings and, more specifically, with regard to evidence proceedings. The Supreme Court of Judicature Act, the primary legislation setting out the constitution and powers of the SICCC, provides that the SICCC may apply rules of evidence found under any foreign law or otherwise.⁵¹ According to SICCC Rules, parties may agree on the rules of

⁴⁴ Supreme Court of Judicature Act (Chapter 322), SICCC Rules 2021, Order 2, rule 1(1)(b); art 30r(1) Dutch Code of Civil Procedure [DCCP]; art 1.3.1.(d) Rules of Procedure for the International Commercial Chambers of the Amsterdam District Court (NCC District Court) and the Amsterdam Court of Appeal (NCC Court of Appeal) (December 2020) [NCC Rules]; art 2(1) CICC Provisions; German Chambers Legislative Proposal 2018, Draft art 114b Courts Constitution Act.

⁴⁵ art 30r(1) DCCP; art 1.3.1.(b) NCC Rules; German Chambers Legislative Proposal 2018, Draft art 114b Courts Constitution Act; art 1.1. Protocol on Procedural Rules Applicable to the International Chamber of the Paris Commercial Court (Protocol—Paris Commercial Court); SICCC Rules, Order 2, rule 1(1)(a); art 3 CICC Provisions.

⁴⁶ art 5(A)(1) and (2) Law No (16) of 2011 Amending Certain Provisions of Law No (12) of 2004 concerning DIFC Courts; art 8(3)(c) QFC Law, Law No (7) of 2005; art 13(6) Law No (4) of 2013 Concerning ADGM; SICCC Rules, Order 2, rule 1(1)(a); art 26 AIFC Court Regulations; art 1.2. Protocol—Paris Commercial Court; art 1.3.1.(a) NCC Rules; Explanatory Notes to art 1.3.1.(a) NCC Rules; art 95 German Courts Constitution Act. The CICC Provisions omit a definition of 'commercial'. However, see Decision on China Joining the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Court Issuance No 5 of 1987).

⁴⁷ Explanatory Notes to art 1.3.1.(b) NCC Rules; German Chambers Legislative Proposal 2018, Explanatory Statement, 14.

⁴⁸ SICCC Rules, Order 2, rule 1(3)(a)(ii).

⁴⁹ International Arbitration Act (Chapter 143A, Revised Edition 2002).

⁵⁰ SICCC Rules, Order 2, rule 1(3)(b)(iii).

⁵¹ Supreme Court of Judicature Act section 18K; SICCC Rules, Order 13, rule 15(1).

evidence that shall not apply and on the rules of evidence that shall apply instead, and submit the relevant application to the court.⁵²

The ability of the parties to disapply by agreement national rules of evidence and to apply foreign rules instead upsets a basic tenet in civil procedure, mandating that the law of the forum governs proceedings.⁵³ The SICC Rules set aside the axiom *lex fori regit processum* to give way to the parties' agreement. Furthermore, the rules provide that parties may opt out of national rules and instead opt in not only to foreign rules but also to non-state, soft law instruments.⁵⁴ According to the SICC User Guides, the parties may agree on applying the International Bar Association Rules on the Taking of Evidence in International Arbitration.⁵⁵

Turning to the discovery of documents, the SICC does not apply the general discovery regime.⁵⁶ In SICC proceedings, the discovery of documents is limited to those on which the parties rely.⁵⁷ Just like other provisions modelled after arbitration, the SICC discovery regime has its origins in the IBA Rules on the Taking of Evidence.⁵⁸

Taken together, the SICC Rules allow parties to disapply by agreement national rules of evidence, and to agree instead on the application of foreign or arbitration rules. Moreover, although the SICC applies a more limited discovery regime based on the IBA Rules, the parties may agree and completely do away with the discovery of documents. Consequently, the parties' agreement plays a central role in the design of proceedings at the SICC, and lends the court greater procedural flexibility.⁵⁹ This procedural flexibility was modelled explicitly after arbitration rules and practices.

The NCC Rules also offer parties greater flexibility. They provide that parties may enter into an agreement to depart from statutory rules of evidence, and shall submit their agreement with the first written submissions.⁶⁰ However, it is unclear whether the NCC Rules allow parties to choose non-state law, such as the IBA Rules, to govern evidence proceedings.⁶¹ Similarly, the latest proposal for the establishment of Chambers for International Commercial Disputes and Commercial Courts in Germany explicitly permits parties to reach agreements with regard to evidence proceedings.⁶² Finally, on the model of common law courts and arbitration, the Paris International Chambers permit extended evidence proceedings, are more lenient regarding the discovery of documents and allow for the cross-examination of witnesses.⁶³

⁵² SICC Rules, Order 13, rule 15(2). See also J Landbrecht, 'The Singapore International Commercial Court (SICC) – an Alternative to International Arbitration?' [2016] ASA Bull 112, 120; L Teh, 'The Singapore International Commercial Court' (2017) 11 Disput Res Int 143, 146; M Yip, 'The Singapore International Commercial Court: The Future of Litigation?' (2019) 12 Erasmus Law Rev 88, 89.

⁵³ See also DR Demeter and KM Smith, 'The Implications of International Commercial Courts on Arbitration' (2016) 33 J Int Arbit 441, 446.

⁵⁴ For the exclusion of such a possibility in European regulations with regard to the choice of law applicable to the substance of the dispute, see P Mankowski, 'Article 3: Freedom of Choice' in U Magnus and P Mankowski (eds), *European Commentaries on Private International Law – Rome I Regulation Commentary* (Verlag Dr. Otto Schmidt 2017) paras 248–57.

⁵⁵ International Bar Association Rules on the Taking of Evidence in International Arbitration, adopted by a resolution of the International Bar Association Council, 29 May 2010. SICC User Guides (Applicable to Proceedings Governed by the SICC Rules 2021), Note 4—Disapplication of Singapore Evidence Law.

⁵⁶ SICC Rules, Order 12.

⁵⁷ SICC Rules, Order 12, rule 1.

⁵⁸ Menon (n 29) para 34(c); T Hwee Hwee, J Yeo and C Seow, 'The Singapore International Commercial Court in Action – Illustrations from the First Case' (2016) 28 Singapore Acad Law J 692, 701. See also *B2C2 Ltd v Quoine Pte Ltd* [2018] SGHC(1) 04, [2018] 4 SLR 67, paras 22–31.

⁵⁹ Teh (n 52) 146; Chong and Yip (n 42) 101.

⁶⁰ art 8.3 NCC Rules.

⁶¹ E Bauw, 'Commercial Litigation in Europe in Transformation: The Case of the Netherlands Commercial Court' (2019) 12 Erasmus Law Rev 15, 18–20.

⁶² German Chambers Legislative Proposal 2021, art 2—Amending the Code of Civil Procedure, Draft art 284 (3).

⁶³ arts 4.3, 5.1 and 5.4.4 Protocol—Paris Commercial Court; arts 3 and 4 Protocol—Paris Court of Appeal. See also A Biard, 'International Commercial Courts in France: Innovation without Revolution?' (2019) 12 Erasmus Law Rev 24, 29; E Jeuland, 'The International Chambers of Paris: A Gaul Village' in X Kramer and J Sorabji (eds), *International Business Courts* (Eleven International Publishing 2019) 65, 77.

3. Proof of foreign law

International commercial courts' evidentiary flexibility becomes additionally evident with regard to the proof of foreign law. In common law jurisdictions, such as Singapore or the DIFC, foreign law is regarded as an issue of fact, whereas in civil law jurisdictions foreign law is regarded as an issue of law. In jurisdictions that consider foreign law an issue of fact, the proof of foreign law is frequently conducted on the basis of expert evidence. In order to avoid the related costs and time expenditure, foreign law at the SICC may be determined on the basis of direct submissions, whether oral, written or both.⁶⁴

Once again, arbitration practices were the source of inspiration.⁶⁵ The SICC Committee Report aspired that the possibility of proving foreign law on the basis of submissions would encourage foreign counsel, accustomed to the treatment of foreign law as a finding of law, to resolve their disputes before the SICC, and would align the SICC procedure with international arbitration practices that involve foreign counsel.⁶⁶

The DIFC Courts have a similar approach. With regard to the evidence rules applicable to questions of foreign law, the DIFC Court of Appeal ruled that the courts should accept legal submissions, as is usually done in international arbitration.⁶⁷ Former Chief Justice Michael Hwang, delivering the judgment on behalf of the court, stated that the composition of the DIFC Courts' bench differs from that of the ordinary courts by having international judges hailing from various jurisdictions, and who therefore possess expertise involving various national laws. The justification for expert evidence, namely, the lack of relevant expertise on the part of a judge, does not apply when the foreign law applicable to the claims belongs to a jurisdiction in which one of the international judges hearing the case is qualified.⁶⁸ As an example, Justice Hwang used international arbitration, where the arbitral tribunal may well be qualified in the applicable substantive law, and the SICC, where foreign law may also be determined on the basis of submissions.⁶⁹

Despite being common law courts, the SICC and the DIFC Courts take a different evidentiary approach with regard to the proof of foreign law. Influenced by international commercial arbitration, these courts take full advantage of the foreign judges sitting on their bench, and of the foreign lawyers given permission to represent parties before them, and allow parties to prove the applicable foreign law on the basis of submissions. In this manner, the SICC and the DIFC Courts forego the rigid common law approach, instil greater flexibility in their proceedings and aspire to minimize the delays and costs that the evidence of foreign law may entail.

4. Appeal

As noted above, international commercial courts underline the absence of appeals as one of arbitration's drawbacks. Because arbitration awards are not subject to appeal, parties in international commercial arbitration lack the means to rectify any mistakes in law or in facts. The absence of appeals lends arbitration awards instant finality, and saves time and costs.⁷⁰ Still, international commercial courts observe that despite the unavailability of appellate review, international commercial arbitration is not necessarily faster and therefore cheaper than court litigation. Since arbitration is a 'one shot' procedure, parties tend to protract proceedings by

⁶⁴ Supreme Court of Judicature Act section 18L; SICC Rules, Order 16, rule 8. See also Hwee Hwee, Yeo and Seow (n 58) 702–10.

⁶⁵ SICC Committee Report 2013 (n 22) para 34. See also Yip (n 52) 89.

⁶⁶ SICC Committee Report 2013 (n 22) para 34; Menon (n 29) para 34 (b).

⁶⁷ *Fidel v Felecia and Faraz* [2015] DIFC CA 002, para 49.

⁶⁸ *ibid* paras 56–57.

⁶⁹ *ibid* paras 67–70.

⁷⁰ Born (1) 22.

leaving 'no stone unturned'.⁷¹ This ongoing debate, which has also been thoroughly hashed out in the context of investment arbitration,⁷² reveals that the 'appeal' of the appeal mechanism is an unsettled matter of perspective.⁷³

International commercial courts offer parties the right to appeal. In particular, parties may appeal against judgments of the DIFC Court of First Instance to the DIFC Court of Appeal, SICC judgments to the Singapore Court of Appeal, NCC judgments to the NCCA, judgments of the International Chamber of the Paris Commercial Court to the International Chamber of the Paris Court of Appeal and judgments of the Frankfurt and Hamburg Chambers for International Commercial Disputes to the Higher Regional Court of the States of Hessen and Hamburg.⁷⁴ Being a division of the Supreme People's Court, the highest adjudicative body in China, the CICC is an international commercial court that deprives parties of the right to appeal.⁷⁵ In a similar vein, the proposed German 'Commercial Courts' lack an appellate review mechanism.⁷⁶

Although the right to appeal is the default rule, some international commercial courts allow parties to waive or limit their right to appeal. Parties before the SICC may agree in writing to waive or limit their right to appeal.⁷⁷ The SICC Committee Report, which preceded the establishment of the SICC, clarified that when limiting their right to appeal, parties could restrict review to grounds modelled after international arbitration, such as breaches of natural justice or defects of the validity, and the scope of the SICC jurisdiction agreement based on Article 24 IAA or Article 34 Model Law.⁷⁸ Although not regulated explicitly in the rules of European international commercial courts, in civil law jurisdictions, such as the Netherlands or Germany, parties may similarly waive or restrict their right to appeal.⁷⁹

B. The judges at international commercial courts

On the basis of studies that have explored arbitration's most valuable features, it would appear that parties value the ability to participate in the selection of arbitrators.⁸⁰ This ability also allows parties to appoint third-country nationals, and thereby enhances the neutrality of the arbitration, which is another valuable feature.⁸¹ However, the ability to select arbitrators may give rise to biases and conflicts of interest.⁸² The European Union's proposal for a Multilateral Investment Court in the place of investment arbitration became the impetus for a revival of the debate on arbitrators' independence and impartiality and conflicts of interest.

⁷¹ Menon (n 29) paras 48–49.

⁷² European Commission, Commission Staff Working Document, Report, *Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)* (13 January 2015) SWD(2015) 3 final; European Commission, *Recommendation for a Council Decision Authorising the Opening of Negotiations for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes* (13 September 2017) COM(2017) 493 final; Possible Reform of Investor-State Dispute Settlement (ISDS) Appellate Mechanism and Enforcement Issues, Annotated Comments from the European Union and its Member States to the UNCITRAL Secretariat (19 October 2020).

⁷³ See also 2018 International Arbitration Survey (n 2) Charts 3 and 4.

⁷⁴ Supreme Court of Judicature Act section 29C(2) in combination with Sixth Schedule, 1(f); 1.3.3.(a) NCC Rules; art 1.3. Protocol—Court of Appeal of Paris; art 119(1) German Courts Constitution Act.

⁷⁵ art 1 CICC Provisions.

⁷⁶ German Chambers Legislative Proposal 2021, Special Part, on Draft art 119(4) German Constitutions Act.

⁷⁷ For proceedings before 1 April 2022, see SICC Practice Directions, No 139(3).

⁷⁸ SICC Committee Report 2013 (n 22) para 35.

⁷⁹ art 515 German Code of Civil Procedure. See also M Kuijpers, *The Netherlands Commercial Court* (Ars Aequi Libri 2019)

⁸⁰ 2018 International Arbitration Survey (n 2) Chart 3; SIDRA International Dispute Resolution Survey 2020 (n 2) Exhibit 6.1.1.

⁸¹ *ibid.*

⁸² R Drahozal, 'Empirical Findings on International Arbitration: An Overview' in T Schultz and F Ortino (eds), *The Oxford Handbook of International Arbitration* (OUP 2020) 663–64; W Park, 'Arbitrator Integrity', in M Waibel, A Kausal, KL Chung and C Balchin (eds), *The Backlash Against Investment Arbitration* (Kluwer 2010) 189; J Paulsson, 'Moral Hazard in International Dispute Resolution' (2010) 25 ICSID Rev Foreign Invest Law J 339; S Brekoulakis, 'Systemic Bias and the Institution of International Arbitration' (2013) 4 J Int Disput Settle 553.

The proposal aims to safeguard the independence and impartiality of its adjudicators, and to tackle biases and conflicts of interest, by proposing a permanent investment court that has strong rules on ethics and conflicts of interest, and adjudicators who are appointed for a fixed, non-renewable term, and who enjoy the security of tenure.⁸³

Parties choosing an international commercial court lack the ability to select the judge or judges that will decide their case. Party participation in case assignment, also referred to as 'judge shopping', would jeopardize judicial independence and impartiality. In civil law jurisdictions, judge shopping would in addition contravene constitutional norms such as the principle of the lawful judge, whereby the judge hearing a case must be determined in advance for each case, according to abstract rules and principles.⁸⁴ Because they are integrated within national judicial structures, international commercial courts in addition lack the neutrality desired by foreign parties who fear that national courts may favour their own nationals.

International commercial courts offset the inability of the parties to participate in the selection of judges by raising the predictability of case assignments, on the basis of criteria such as the nature of the dispute or the foreign law applicable to it. First, most international commercial courts provide ample information on the judges sitting on their bench. The courts list the judges on their websites, offer information on their nationality and provide a brief description of their professional background and expertise in specific fields of law.⁸⁵ Although European international commercial courts share less information online, the small number of judges appointed in combination with case law, publications or public appearances makes it easy for interested parties to identify the judges and their field of specialization. The availability of information about the judges increases transparency and raises the predictability of case assignments. According to the 2020 Final Report of the SIDRA Dispute Resolution Survey, 59% of respondents indicated that the availability of information about judges is an 'absolutely crucial' or 'important' factor in choosing an international commercial court.⁸⁶ Lastly, in international commercial courts with international judges on their bench, the foreign law applicable may give a hint as to the judge who may eventually be assigned to the case, owing to their knowledge of the specific law.⁸⁷ Therefore, although parties do not select the judges at an international commercial court, parties in some instances may predict the judge or judges that will decide their case.

Turning to neutrality, as observed, international commercial courts are national courts, and therefore lack the neutrality that international commercial arbitration enjoys. The appointment of judges of a foreign nationality instils some degree of neutrality in the bench of international commercial courts, and may counter the perception of them being national courts, staffed with national judges who are favourably disposed towards their own nationals.

Although no party-appointed judges sit in international commercial courts, and the courts may be perceived as being less neutral than arbitration, parties are reminded that, unlike arbitrators, judges in international commercial courts enjoy a high degree of independence and impartiality, and are free of the conflicts of interest that plague arbitration.⁸⁸

⁸³ Council of the European Union, *Negotiating Directives for a Convention Establishing a Multilateral Investment Court for the Settlement of Investment Disputes* (20 March 2018).

⁸⁴ art 101(2) Basic Law for the Federal Republic of Germany; art 17 the Constitution of the Kingdom of the Netherlands 2008.

⁸⁵ 'Judges' (DIFC), <<https://www.difccourts.ae/about/court-structure/judges>>; 'Judges' (SICC); 'The Court' (QICDRC), <<https://www.qicdrc.gov.qa/courts/court>>; 'Justices' (AIFC Court), <<https://court.aifc.kz/who-we-are/justices/>>; 'Judges' (CICC) <<http://cicc.court.gov.cn/html/1/219/193/196/index.html>> all accessed 1 November 2022.

⁸⁶ SIDRA International Dispute Resolution Survey 2020 (n 2) Exhibit 8.2.1.

⁸⁷ Chong and Yip (n 42) 101.

⁸⁸ Menon (n 29) para 51; Menon (n 30) para 27f; S Menon, 'International Commercial Courts in the Post-Pandemic Era' (SICC Symposium 2021, 10 March 2021) para 8.

Indeed, international commercial court judges are not selected by the parties, and therefore any related biases and conflicts of interest are absent. However, the claim that these judges enjoy a high degree of independence and impartiality disregards the particularities of the international judges sitting at the DIFC Courts, the SICCC, the QIC, the ADGM Courts and the AIFC Court. These judges are the courts' strong suit. They bring with them expertise in specific fields of law, as well as international reputation, and enhance the neutrality of the courts' bench. However, as Section IV illustrates, the appointment and remuneration conditions of international judges might under circumstances challenge their independence and impartiality.

C. Foreign lawyers before international commercial courts

The jurisdictional focus on international disputes and the appointment of foreign judges is not the only foreign element in international commercial courts. The DIFC Courts, the SICCC, the QIC, the ADGM Courts and the AIFC Court allow foreign lawyers to appear in court. The inspiration for the possibility of representation by foreign lawyers was once again arbitration. In Singapore, the former Senior Minister of State for Law stressed that representation by foreign lawyers was aimed at incentivizing foreign parties to bring their disputes before the SICCC. In the same manner that the number of international commercial arbitration cases boomed once Singapore amended its laws and allowed foreign lawyers to appear in arbitration proceedings, representation by foreign lawyers before the SICCC would give the court and its caseload a significant boost.⁸⁹

A party to a case in the SICCC or to an appeal from the SICCC may be represented by a foreign lawyer, who is registered in accordance with the Legal Profession Act.⁹⁰ This Act distinguishes between two types of registration: full and restricted. Lawyers granted full registration may appear and plead in the SICCC and appellate court proceedings as well as give advice, prepare documents and provide any other assistance in relation to the proceedings.⁹¹ Lawyers granted restricted registration may appear in SICCC and appellate court proceedings, as well as give advice and prepare documents only for the purpose of making submissions on foreign law.⁹² The SICCC User Guides clarify that the main category of cases in which full registration lawyers may represent parties is 'offshore cases'.⁹³ An offshore case is an action that has no substantial connection to Singapore.⁹⁴

The limitations on representation by foreign lawyers before the SICCC are a balancing act.⁹⁵ On the one hand, the rules incentivize foreign counsel to choose the SICCC by allowing them to appear before the court in offshore disputes. On the other hand, they preserve the workload of Singapore practitioners by excluding representation by foreign lawyers in disputes with local ties. In addition, the SICCC awards the costs of solicitors instructing Singapore counsel, even if the first did not appear before the court after being granted full or restricted registration.⁹⁶ By allowing foreign lawyers to appear before the SICCC, or to recover fees even if they did not appear before the court, the SICCC acknowledges the important role of lawyers as the real decision makers in choosing venues and steering disputes.

⁸⁹ Rajah (n 34).

⁹⁰ Supreme Court of Judicature Act section 18M.

⁹¹ Legal Profession Act, S. 36P(1).

⁹² Legal Profession Act, S. 36P(2).

⁹³ SICCC User Guides, Note 3, para 3.

⁹⁴ SICCC Rules, Order 3, rule 3. See also *Teras Offshore Pte Ltd v Teras Cargo Transport (America) LLC* [2016] 4 SLR 75, para 8; *BNP Paribas SA v Jacob Agam* [2018] SGHC(1) 03; *Perry v Esculier* [2020] SGHC(1) 22.

⁹⁵ Landbrecht (n 52) 123; Yip (n 52) 89.

⁹⁶ *Sheila Kazzav v Standard Chartered Bank* [2020] SGHC(1) 19, paras 9–12.

Foreign lawyers may represent clients in legal proceedings before European international commercial courts in conjunction with locally qualified lawyers.⁹⁷ As such, however, legal representation exclusively by foreign lawyers before these courts is not yet possible. Nevertheless, even in international commercial courts that allow representation by foreign lawyers, such as the SICCC, it is unlikely that parties will appear in court without also hiring a local lawyer familiar with national court proceedings.

D. Privacy and confidentiality in international commercial courts

In addition to the flexibility of its proceedings, and the ability to select arbitrators, parties hold the privacy and confidentiality of arbitration in high regard.⁹⁸ The privacy and confidentiality of international commercial arbitration does not only speak to parties' preferences. It also reveals a conceptual difference between arbitration and litigation.⁹⁹ Empowered by private agreement and funded by the parties, arbitration proceedings are governed by the parties' choice and preferences. Despite divergences, especially with regard to the parties' duty of confidentiality in the absence of an express legal or contractual basis and the publication of awards,¹⁰⁰ privacy and confidentiality is considered an inherent, almost axiomatic, feature of arbitration.¹⁰¹ However, the expansion of arbitration to disputes that involve public interests or weaker parties has gradually eroded the axiom that arbitration proceedings are private and confidential. While privacy and confidentiality features strongly in international commercial arbitration, developments in the adjacent fields of investment and sports arbitration have opened the doors of arbitration proceedings to the public so as to increase transparency, and to safeguard public interests and the right to a fair trial of athletes, respectively.¹⁰²

Public courts and the publicity of trials and judgments are at opposite ends of the spectrum of international commercial arbitration and the privacy and confidentiality of its proceedings and awards. Just as privacy and confidentiality is an inherent feature of arbitration, publicity is a hallmark of litigation. It is *'the very soul of justice'*.¹⁰³ The right to a public trial and the public pronouncement of judgments is protected in national constitutions, and is enshrined in the right to a fair trial in international treaties, such as the United Nations Covenant on Civil and Political Rights and the European Convention on Human Rights.¹⁰⁴ Apart from contributing to a fair hearing for the involved parties, the publicity of court trials has a broader public function. The access of the public to courts enables public scrutiny of the judiciary and stimulates debate about legal rules. Nevertheless, mounting pressure to improve the efficiency of court proceedings has led to an increase in written court proceedings

⁹⁷ art 3.1.2. NCC Rules. See also Council Directive 77/249/EEC of 22 March 1977 to Facilitate the Effective Exercise by Lawyers of Freedom to Provide Services; Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to Facilitate Practice of the Profession of Lawyer on a Permanent Basis in a Member State Other Than That in Which the Qualification Was Obtained.

⁹⁸ 2018 International Arbitration Survey (n 2) Chart 3; SIDRA International Dispute Resolution Survey 2020 (n 2) Exhibit 6.1.1.

⁹⁹ E Reymond-Eniaeva, *Towards a Uniform Approach to Confidentiality of International Commercial Arbitration* (Springer 2019) 133.

¹⁰⁰ *ibid* 7.

¹⁰¹ *ibid* 7; DR Hensler and D Khatam, 'Re-Inventing Arbitration: How Expanding the Scope of Arbitration is Reshaping its Form and Blurring the Line Between Private and Public Adjudication' (2018) 18 Nevada Law J 381, 388, 407; HN Aragaki, 'The Metaphysics of Arbitration: A Reply to Hensler and Khatam' (2018) 18 Nevada Law J 541, 558.

¹⁰² United Nations Convention on Transparency in Treaty-based Investor State-Arbitration (the 'Mauritius Convention on Transparency') (10 December 2014), <<https://uncitral.un.org/en/texts/arbitration/conventions/transparency>> accessed 1 November 2022; European Court of Human Rights, *Mutu and Pechstein v Switzerland* (Applications nos 40575/10 and 67474/10), 2 October 2018.

¹⁰³ J Bentham, 'Bentham's Draught for the Organization of Judicial Establishments, Compared with That of the National Assembly, with a Commentary on the Same' in J Bowring (ed), *The Works of Jeremy Bentham*, vol 4 (William Tait 1843) 316.

¹⁰⁴ art 14(1) 1966 United Nations Covenant on Civil and Political Rights; art 6 European Convention on Human Rights.

or court settlements and therefore gives substance to the claim that just as privacy and confidentiality in arbitration is gradually fading, publicity in court is declining.¹⁰⁵

International commercial courts underline the merits of open justice, and translate these into an advantage *vis-à-vis* arbitration. Open court proceedings and the publication of judgments create a body of jurisprudence and predictability for interested parties.¹⁰⁶ However, the SICC has a unique feature. It is the only international commercial court that offers parties the option to exclude publicity under specific conditions. According to the SICC Rules, there are three kinds of confidentiality orders: parties may apply for an order that the case be heard in camera; an order that no person may reveal or publish any information or document relating to the case; and an order that the court file be sealed.¹⁰⁷ While ruling on such an order, the court will take into consideration whether the case is an 'offshore case' and whether both parties agree.¹⁰⁸

It is asserted that in 'offshore cases'—namely cases lacking a substantial connection to Singapore—the public interest in maintaining open court proceedings is less critical than in other cases bearing stronger connections to Singapore.¹⁰⁹ 'Offshore cases' and their weak link to the forum weaken in turn the potential of a clash with national public policy, and therefore justify a departure from the principle of open justice. Section IV explores the soundness of these arguments and the limits of private and confidential court proceedings.

Although the SICC is the only international commercial court that allows for private and confidential proceedings in offshore disputes, the most recent proposal for the establishment of Chambers for International Commercial Disputes in Germany has similarly responded to parties' preference for private and confidential proceedings, and expands the parties' right to request confidentiality orders.¹¹⁰ Interestingly, the proposal notes that the need to attract cases, currently resolved in arbitration, back to state courts and to develop the law overrides the right to public trials.¹¹¹ Consequently, international commercial courts are gradually opening the door to private and confidential court proceedings.

E. Converting judgments into arbitral awards

The most valuable characteristic of international commercial arbitration is the enforceability of arbitral awards.¹¹² Despite variations in its interpretation by national courts, the New York Convention has acquired more than 150 contracting states to date, and arbitral awards as a result enjoy almost worldwide recognition and enforcement.¹¹³

Unlike arbitral awards, court judgments lack an equally territorially extensive international treaty that would lend them nearly worldwide recognition and enforcement. The Hague Choice of Court Convention regulates the recognition and enforcement of exclusive choice of court agreements and the resulting court judgments, and has up until now attracted a

¹⁰⁵ See J Resnik, 'Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights' (2015) 124 Yale Law J 2804.

¹⁰⁶ Rajah (n 34) para 40; Yip (n 52) 89; Gu (n 25) 70.

¹⁰⁷ SICC Rules, Order 16, rule 9(1).

¹⁰⁸ SICC Rules, Order 16, rule 9(2); SICC User Guides, Note 3, para 8.

¹⁰⁹ M Yip, 'Singapore International Commercial Court: A New Model for Transnational Commercial Litigation' in Ying-jeou Ma (ed), *Chinese (Taiwan) Yearbook of International Law and Affairs* (Martinus Nijhoff 2014) 155, 160.

¹¹⁰ German Chambers Legislative Proposal 2021, art 2—Amending the Code of Civil Procedure (*Änderung der Zivilprozessordnung*), Draft Article 510(S) and (6).

¹¹¹ German Chambers Legislative Proposal 2021, Explanatory Statement (*Begründung*), 31.

¹¹² 2018 International Arbitration Survey (n 2) Chart 3; SIDRA International Dispute Resolution Survey 2020 (n 2) Exhibit 6.1.1.

¹¹³ New York Convention, Contracting States, <<https://www.newyorkconvention.org/list-of-contracting-states>> accessed 1 November 2022.

significant number of contracting states.¹¹⁴ At the time of writing, the Hague Judgments Convention has not yet entered in force.¹¹⁵

Although the Hague Choice of Court Convention and the Hague Judgments Convention have promising potential, at present they are lagging far behind the New York Convention. Despite the lack of a multilateral treaty ensuring wide-reaching enforceability, various regional instruments facilitate the recognition and enforcement of foreign court judgments. In Europe, the Brussels Ibis Regulation or the Lugano Convention¹¹⁶ have narrowed the grounds for refusing recognition and enforcement, and have simplified procedures. In contrast, the enforceability of Asian court judgments appears more challenging, due to the lack of a multilateral treaty and the small number of bilateral treaties. Yet, various regional initiatives aim at loosening the criteria for recognizing and enforcing foreign court judgments and fostering greater judicial cooperation.¹¹⁷ In the absence of treaties, some international commercial courts have had to search for alternatives in order to improve the recognition and enforcement prospects of their judgments.

In this regard, the DIFC Courts came up with an innovative experiment to enhance the enforceability of their judgments. Just like those of the Dubai Courts, DIFC Court judgments may be enforced outside the United Arab Emirates (UAE). In particular, the UAE have entered into treaties with foreign jurisdictions providing for the reciprocal recognition and enforcement of court judgments.¹¹⁸

Nevertheless, in order to enhance the enforceability of DIFC Courts judgments, especially in offshore disputes, the DIFC Courts experimented in 2015 with the ‘conversion’ of their judgments into arbitral awards. According to Practice Direction No. 2, parties could agree that any dispute arising out of or in connection with the non-payment of any money judgment given by the DIFC Courts could, at the option of the judgment creditor, be referred to arbitration under the Arbitration Rules of the DIFC-LCIA Arbitration Centre.¹¹⁹ In this way, the DIFC Courts aimed to profit from the extensive territorial reach of the New York Convention, and lend to their judgments nearly worldwide enforceability. The Practice Direction further clarified that such an arbitration agreement provides the creditor with an additional option to enforce the judgment, and does not preclude their right to seek execution before any national court. Accordingly, the judgment debtor may not invoke this arbitration agreement against execution before a national court.¹²⁰

Enforcement through arbitration was presented as the last resort for a creditor seeking enforcement of a judgment.¹²¹ Although there was no reported case of parties applying for the conversion of a DIFC Courts judgment into an arbitral award and although, as former Chief Justice Michael Hwang has explained, it was more of a ‘marketing’ tool,¹²² this possibility was nevertheless a very innovative feature. However, doubts have been expressed as to

¹¹⁴ Convention of 30 June 2005 on Choice of Court Agreements, Status Table, <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>> accessed 1 November 2022.

¹¹⁵ Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgements in Civil or Commercial Matters, Status Table, <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=137>> accessed 1 November 2022.

¹¹⁶ Convention on Recognition and Enforcement of Judgements in Civil and Commercial Matters, 21 December 2007 OJ L339/3.

¹¹⁷ A Chong, ‘Moving Towards Harmonization in the Recognition and Enforcement of Foreign Judgement Rules in Asia’ (2020) 16 *J Priv Int Law* 31, 55; A Reyes and K Tan, ‘Recognition and Enforcement of International Commercial Court Judgments’ in L Chen and A Janssen (eds), *Dispute Resolution in China, Europe and World, Ius Gentium: Comparative Perspectives on Law and Justice* (Springer 2020) 37, 44.

¹¹⁸ These treaties are the Gulf Cooperation Council Convention (1996); the Riyadh Convention (1983); and bilateral treaties with Tunisia (1975), France (1992), India (2000), Egypt (2000), China (2004) and Kazakhstan (2009).

¹¹⁹ Amended DIFC Courts Practice Direction No 2 of 2015—Referral of Judgment Payment Disputes to Arbitration.

¹²⁰ DIFC Courts, *Enforcement Guide* 2018, 14.

¹²¹ Amended DIFC Courts Practice Direction No 2 of 2015.

¹²² Hague Conference of Private International Law, ‘HCCH a|Bridged: Innovation in Transnational Litigation’ (Conference, 1 December 2021).

whose appointment, renewal and remuneration conditions, and parallel practice as arbitrators or lawyers may call into question their independence and impartiality and give rise to conflicts of interest. But even if international judges in some countries are subject to a similar regime as the rest of the judges, one should be aware of the institutional context and the overall independence of the judiciary in each country that has an international commercial court.¹³⁸ The appointment of international judges therefore might give rise to independence and impartiality concerns and is the second limit with respect to ‘arbitralization’.

C. Private and confidential court proceedings

As mentioned previously, the SICC is the only international commercial court that allows for private and confidential proceedings in offshore disputes. However, privacy and confidentiality is not unprecedented in the history of commercial litigation. The first recorded experiment involving private and confidential court proceedings was the Delaware Arbitration Programme. In 2009, a new state law gave the Delaware Court of Chancery the power to arbitrate business disputes if the parties request a member of the Court of Chancery to arbitrate a dispute. The most notable feature of the Delaware Arbitration Programme was its confidentiality. Proceedings were confidential and not of public record unless appealed.¹³⁹ The rationale of the Delaware Arbitration Programme was to preserve Delaware’s pre-eminence in offering cost-effective options for resolving disputes, particularly those involving commercial, corporate and technology matters.¹⁴⁰

Almost 2 years after enactment, the Delaware Coalition for Open Government, a non-profit corporation with the stated aim of promoting and defending the people’s right to transparency and accountability in government, brought the Delaware Court of Chancery Judges, the court itself and the state of Delaware to court.¹⁴¹ By depriving the public of access to trials, the Delaware Arbitration Programme violated the constitution, in particular the First Amendment.¹⁴²

The United States Court of Appeals for the Third Circuit struck down the Delaware Arbitration Programme for violating the public’s right to access the court. According to the court, allowing public access would give stockholders and the public a better understanding of how Delaware resolves major business disputes. Opening the proceedings would also allay the public’s concerns about a process only accessible to litigants in business disputes. In addition, public access would subject litigants, lawyers and the Chancery Court judges alike to scrutiny from peers and the press. Finally, public access would discourage perjury, and ensure that companies could not misrepresent their activities to competitors and the public.¹⁴³

Various SICC Rules allow parties to shape proceedings by way of their agreement, and therefore resemble arbitration. Just as parties may enhance confidentiality in arbitration proceedings by entering into agreements for confidentiality, the SICC introduces a form of court-supervised confidentiality agreements. As noted by Bookman, the exclusion of publicity upon the parties’ agreement reaches the limits of ‘arbitralization’, because it undermines the

¹³⁸ See also L Clover Alcolea, ‘The Rise of the International Commercial Court: Threat to the Rule of Law?’ (2022) 13 *J Int Disput Settl* 413, 433.

¹³⁹ The Delaware Code, Title 10, § 347 (b). See also T Stipanowich, ‘In Quest of the Arbitration Trifecta, or Closed Door Litigation: The Delaware Arbitration Programme’ (2013) *J Bus Entrepreneurship Law* 349, 368–69.

¹⁴⁰ Stipanowich (n 139) 350. See also M Steele and others, ‘Delaware’s Closed-Door Arbitration: What the Future Holds for Large Business Disputes and How it Will Affect M&A Deals’ (2013) 6 *J Bus Entrepreneurship Law* 375, 376.

¹⁴¹ *Delaware Coalition for Open Government, Inc v The Honorable Leo E. Strine, Jr* No CIV.A. 1:11–1015, 2012 WL 3744718.

¹⁴² *ibid* paras 19–20.

¹⁴³ United States Court of Appeals for the Third Circuit, No 12-3859 *Delaware Coalition for Open Government, Inc v The Honorable Leo E Strine*. See also J Kharatian, ‘Secret Arbitration or Civil Litigation?: An Analysis of the Delaware Arbitration Program’ (2013) 6 *J Bus Entrepreneurship Law* 411, 415.

important is that some of the arbitration features of international commercial courts may undermine procedural justice, and therefore reach the limits of 'arbitralization'. The article identifies three such features: the joinder of third parties against their will; the appointment and remuneration regime regarding some international judges; and the conduct of private and confidential proceedings. Safeguarding third parties' right to a fair trial, ensuring the independence and impartiality of the judiciary and preserving the public character of court proceedings are an indispensable part of a transnational public policy on procedural justice that should be exempted from the 'arbitralization' trend. Therefore, although the competition with international commercial arbitration encourages international commercial courts to borrow some of arbitration's most valued features, and may improve public court proceedings, some of these features undermine procedural justice and the role of courts as public institutions.

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