

# International Business Courts in Europe and Beyond: A Global Competition for Justice?

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## 1 Introduction

Over the past ten to fifteen years, international commercial courts have been established in Europe and in other parts of the world, including the Middle East and Asia,<sup>1</sup> while new initiatives are underway. Commercial courts as specialised courts within the domestic legal system are not a new phenomenon as such, and stem from a desire and a need on the part of a number of countries to offer tailor-made procedures for business-related disputes. For a number of years, they have featured as an asset contributing to a good business climate in the World Bank's Doing Business reports. The 2019 edition stresses that the 'top 10 ranking economies in the ease of doing business ranking share common features of regulatory efficiency and quality, including (...) specialized commercial courts'.<sup>2</sup>

In contrast to older commercial courts, including London's Commercial Court,<sup>3</sup> recently established courts have been created with the specific purpose of adjudicating and attracting international business disputes. In the last few years, international commercial courts and chambers in Europe, which are to a certain extent inspired by London's internationally successful Com-

mercial Court, have been set up in France, the Netherlands and Germany, while in Belgium and Switzerland the creation of such a court is in preparation.<sup>4</sup> Also at the pan-European level the creation of a European commercial court has been proposed,<sup>5</sup> although, understandably, it is unlikely that this initiative will be followed up in the near future. In Eurasia, Asia and the Middle East, such courts are in place, notably in Kazakhstan, Dubai, Qatar, Singapore, China and India. One of the reasons for the mushrooming of international courts around the globe is the intrinsic need and desire to improve and modernise the justice system. However, it is also clear that increased competition in the international litigation market – fuelled in Europe by Brexit – come into play, opening up a new dimension to civil justice and global commercial litigation.<sup>6</sup>

While the establishment of these courts is generally welcomed, as it ties in with the general idea of labour division and specialisation, which are generally expected to result in a more efficient, better quality and perhaps innovative system of justice, it is also criticised. Apart from the uneasiness that open civil justice competition at the international level triggers, the most prominent point of critique from a domestic justice perspective concerns the fear of a two-tiered justice system. This has led the proposal to set up the Belgium International Business Court, as discussed by Lambrecht and Peetermans in the present issue, to be put on hold after it had been submitted to parliament in May 2018. From the outset, the initiative had encountered opposition from the Belgian judiciary and other stakeholders, and the original proposal had to be revised before it was placed before parliament. When at the end of 2018 the biggest Flemish political party withdrew its support, joining the

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- See for a broad overview from the litigation market perspective inter alia E. Themeli, *The Great Race of Courts: Civil Justice System Competition in the European Union* (2018); M. Requejo Isidro, 'International Commercial Courts in the Litigation Market', Max Planck Institute Luxembourg for Procedural Law, Research Paper Series, no 2 (2019); P.K. Bookman, 'The Adjudication Business', *Yale Journal of International Law* (2019, forthcoming), available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3338152](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3338152).
- World Bank, 'Doing Business Report 2019', 2019, at 1, available at: [https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report\\_web-version.pdf](https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf).
- Established in 1895; since 1 October 2018 formally under the umbrella term of the Business and Property Courts. See M. Ahmed, 'A Critical Review of the Business and Property Courts of England & Wales', in X.E. Kramer and J. Sorabji (eds.), *International Business Courts – A European and Global Perspective* (2019, p. 21).

4. See for Switzerland E. Lein, 'International Commercial Courts in Switzerland: The Roadmaps for Geneva and Zurich', in X.E. Kramer and J. Sorabji (eds.), *International Business Courts – A European and Global Perspective* (2019, p. 115).

5. See G. Rühl, 'Building Competence in Commercial Law in the Member States', STUDY European Parliament (2018), available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604980\\_IPOL\\_STU\(2018\)604980\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604980/IPOL_STU(2018)604980_EN.pdf) (last visited 11 June 2019) and T. Evas, 'Expedited Settlement of Commercial Disputes in the European Union', available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2018/627120/EPRS\\_STU\(2018\)627120\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/627120/EPRS_STU(2018)627120_EN.pdf) (last visited 11 June 2019). Criticised by E. Themeli, X.E. Kramer & G. Antonopoulou, 'International Commercial Courts: Should the EU Be Next? – EP Study Building Competence in Commercial Law', 23 September 2018, <http://conflictflaws.net/2018/international-commercial-courts-should-the-eu-be-next-ep-study-building-competence-in-commercial-law/> (last visited 1 August 2019).

6. See further section 3.

earlier critiques in qualifying the court as a ‘caviar court’, the proposal was sidetracked.<sup>7</sup> This idea of a two-tiered justice system, where high-value business disputes – for those parties that can afford the higher court fee – seems to receive better treatment than other disputes, was also brought up critically in other countries. It led to debates in the Dutch Senate, particularly in view of the relatively high court fees, which hampered approval of the proposal,<sup>8</sup> while in France, criticism similar to that in Belgium – unlike in the Netherlands – has been raised with reference to the poor state of the judiciary in general.<sup>9</sup> Although the Belgian proposal has not been formally withdrawn, it now appears that it is highly unlikely that an international business court will be established in Belgium in the near future. Nevertheless, the Belgian proposal continues to be of great interest, specifically its hybridity in combining the public court with aspects of arbitration.

This present issue of *Erasmus Law Review* results in part from the seminar ‘Innovating International Business Courts: a European Outlook’ hosted by the Erasmus School of Law in Rotterdam on 10 July 2018, and co-organised by the Max Planck Institute for Procedural Law in Luxembourg and the Montaigne Centre for Rule of Law and Administration of Justice of Utrecht University. It includes the speaker contributions to that seminar – all but one reworked into an academic peer-reviewed article – complemented by articles resulting from a call for articles focusing on other jurisdictions and horizontal topics. The intense debate between academics, judges, policymakers and lawyers at the seminar not only underlined the topicality of these (new) courts in five European jurisdictions but also revealed divergent views on the desirability of and need for these courts, as well as a certain discomfort – at least for some of the participants – in regard to the competitive elements. Five articles focus on international commercial courts in Europe: England and Wales by Sir Geoffrey Vos (non-peer-reviewed), the Netherlands (Eddy Bauw), France (Alexandre Biard), Germany (Burkhard Hess and Timon Boerner) and Belgium (Philippe Lambrecht and Erik Peetermans). Two articles address horizontal issues from a European perspective: one on forum agreements for the Netherlands and German commercial courts in relation to Brussels *Ibis* (Georgia Antonopoulou) and the other on lawyers’ preferences in relation to international commercial courts (Erlis Themeli). The other articles focus on the international com-

mercial court in Singapore (Man Yip) and the international enforcement of Singaporean judgments (Drossos Stamboulakis and Blake Crook), and on commercial courts in India (Sai Ramani Garimella and M.Z. Ashraf) and Kazakhstan (Nicolás Zambrana-Tévar).

This article frames the discussion on international business courts and provides explanations for the rise of these courts in Europe and beyond, addresses aspects of justice innovation and international competition, and lastly turns to the effect these new courts may have on globalising commercial court litigation.

## 2 International Business Courts in Europe and Beyond

Commercial and business courts are not new. For instance, France has had its commercial courts (*tribunaux de commerce*) since 1563.<sup>10</sup> England and Wales has had a dedicated commercial court since the 1890s.<sup>11</sup> Examples can be multiplied. Yet since the turn of the 21st century there has been a sharp growth in Europe in both discussions concerning the establishment of such courts, and subsequently in their creation. Expansion has not stopped there. It can also be seen in the Middle East, in India and in Singapore. It is unlikely to stop there. Given this, what has fuelled this recent expansion? A number of explanations can be given.

The first potential explanation, and one that is Europe-centric, is Brexit: the United Kingdom’s scheduled withdrawal from the European Union, which is expected to take place on 31 October 2019 following the UK’s June 2016 referendum on the issue. Superficially, this might seem an attractive explanation, as discussions regarding the creation and establishment of new commercial courts in European Union member states accelerated after the UK’s decision to withdraw. That they accelerated demonstrates, however, the flaw in Brexit as a general explanation. As Peetermans and Lambrecht point out, in Belgium the idea of creating such a court was first mooted in 2014.<sup>12</sup> Such considerations in France, Germany and the Netherlands pre-date that.<sup>13</sup> At best, then, Brexit brought into sharper focus for some EU member states a perceived need to move beyond discussion, and, perhaps as Lambrecht and Peetermans suggest, accept Brexit as the basis on which they could secure a ‘windfall’ benefit for their jurisdiction. If, as is assumed by some, Brexit is to have a nega-

7. See G. van Calster, ‘The Brussels International Business Court. A Carrot Sunk by Caviar’, in X.E. Kramer and J. Sorabji (eds.), *International Business Courts – A European and Global Perspective* (2019), p. 107.

8. H. Schelhaas, ‘The Brand New Netherlands Commercial Court: A Positive Development?’, in X.E. Kramer and J. Sorabji (eds.), *International Business Courts – A European and Global Perspective* (2019), p. 45), section 3.5; G. Antonopoulou, E. Themeli & X.E. Kramer, ‘No Fake News: The Netherlands Commercial Court Proposal Approved!’, 11 December 2018, <http://conflictflaws.net/2018/no-fake-news-the-netherlands-commercial-court-proposal-approved/>.

9. E. Jeuland, ‘The International Chambers of Paris: A Gaul Village’, in X.E. Kramer and J. Sorabji (eds.), *International Business Courts – A European and Global Perspective* (2019), p. 65).

10. J.P. Royer, J.P. Jean & B. Durand, *Histoire de la justice en France* (2016), at 717.

11. J. Sorabji, ‘The Commercial Court in England and Wales’, *Tijdschrift voor Civiele Rechtspleging* 140 (2016).

12. P. Lambrecht and E. Peetermans, ‘The Brussels International Business Court: Initial Overview and Analysis’, *Erasmus Law Review* 42, at fn. 24 (2019).

13. See A. Biard, ‘International Commercial Courts in France: Innovation Without Revolution?’, *Erasmus Law Review* 24 (2019); G. Antonopoulou, ‘Requirements Upon Agreements in Favour of the NCC and the German Chambers – Clashing with the Brussels Ibis Regulation?’ *Erasmus Law Review* 56 (2019).

tive impact on the attractiveness of London's Commercial Court as an international dispute resolution centre, then in view of existing competition – for instance, from Singapore – for EU member states to be able to capitalise on it, there is a need for them to have their own international commercial courts operational by the end of 2019 at the earliest. Irrespective of the veracity of claims concerning the effect on London's Commercial Court post-Brexit, and they are specifically doubted in Sir Geoffrey Vos's article,<sup>14</sup> it appears clear that it has played a part in the expansion of competition for that court and jurisdiction within Europe. If Brexit is no more than an accelerant for European expansion, its ultimate rationale must be found elsewhere. That rationale appears to be fundamentally economic. This can be seen both in Europe and in those other jurisdictions around the world where international business and commercial courts are being or have been established. This rationale has a number of facets.

First, it is apparent that for France and Germany there is a desire to improve their national reputations as centres of commercial law and of commerce generally. For France, as Biard suggests, the focus is on increasing its commercial law reputation. The establishment of new commercial courts in Paris thus runs in tandem with the recent reforms to French contract law, with the latter aimed at improving its attractiveness to international commercial and business parties.<sup>15</sup> In Germany, the absence of a strong international commercial or business court is out of kilter with its well-established reputation in the commercial and business sector. Equally, it does not fit with the skills and reputation of its legal sector, including its judiciary. Establishing a number of strong international commercial courts in, for instance, Frankfurt-am-Main, is a means by which Germany could thus enhance its marketability as a commercial and legal hub.<sup>16</sup>

Second, and to a degree linked to the previous point, is the acceptance that developing a strong international commercial and business court provides a substantial benefit to the national economy – a point underscored by Bauw when he notes the concerns that underpinned the Dutch government's desire to create an international commercial court to counteract decreasing numbers of international commercial disputes being litigated in the Netherlands. Developing the reputation of national commercial law, and of courts able to resolve disputes arising from it, has a number of impacts. The more attractive a specific commercial or contract law is in the global market, the more likely it might be that international actors will choose it as the governing law of their contract. And the more likely they are then to choose as the forum of choice the commercial court in the country from which the governing law is taken. If this is correct,

and Themeli's article on focusing on the 'goods' provided by jurisdictions to its potential consumers might suggest that it is likely to be at least an important factor, then the development of such new courts will enhance national economies.

The aim of enhancing national economies by drawing international commercial and business disputes to specific jurisdictions is not limited to Europe. It underpins the growth of international commercial and business courts in Dubai, Qatar, India and Singapore. As Yip puts it in respect of the latter, 'Legal services can be a highly profitable industry'.<sup>17</sup> Of these four, India appears to differ in approach. Garimella and Ashraful's article emphasises that the growth of India's commercial courts has a domestic focus, in that their creation is to a significant degree aimed at improving access to adjudication for domestic commercial disputes.<sup>18</sup> By providing a more efficient and effective forum for litigating such disputes, benefits will flow to domestic businesses, namely through reducing the cost and time of litigation and through providing a stronger 'shadow of the law' effect that would serve to improve contractual compliance and therefore reduce dispute formation and the need for litigation.<sup>19</sup> The establishment of effective domestic commercial courts would thus form, as their article suggests, the first step towards India developing into an international business and commercial dispute hub, thus enabling it at some future time to seek to realise the benefits that such a hub could bring to the Indian economy.

Akin to the approach in India, the development of an international business court in Kazakhstan can also be seen as underpinning the aim of improving its domestic economy, as much as drawing in benefits via developing as an international dispute resolution hub. As Zambrana-Tévar's article argues, the development of the Court of the Astana International Financial Center is one way in which Kazakhstan aims to improve how it is perceived to comply with the rule of law.<sup>20</sup> Increasing both adherence to and a reputation for such adherence to rule of law norms is rightly understood to be central to economic development, a point underscored by the United Nations' sustainable development goals.<sup>21</sup> By promoting the rule of law in a jurisdiction, an international business court can thereby make it a more attractive venue for inward and foreign as well as domestic investment. It can thus play a role in building its national economy as much as it can in building the achievement of wider

14. G. Vos, 'A View from the Business and Property Courts in London', *Erasmus Law Review* 10 (2019).

15. See, for instance, S. Rowan, 'The New French Law of Contract', 66 *International & Comparative Law Quarterly* 805 (2017).

16. B. Hess and T. Boerner, 'Chambers for International Commercial Disputes in Germany', *Erasmus Law Review* 33 (2019).

17. M. Yip, 'The Singapore International Commercial Court: The Future of Litigation?' *Erasmus Law Review* 81, at 82 (2019).

18. S.R. Garimella and M.Z. Ashraful, 'The Emergence of International Commercial Courts in India: A Narrative for Ease of Doing Business', *Erasmus Law Review* 110 (2019).

19. R. Mnookin and L. Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce', 88(5) *The Yale Law Journal* 950 (1979).

20. N. Zambrana-Tévar, 'The Court of the Astana International Financial Center in the Wake of Its Predecessors', *Erasmus Law Review* 121, at 122 (2019).

21. UN General Assembly Resolution 70/1, of 25 September 2015, available at: [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/70/1&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E).



social goals. For Singapore, the focus is at the second stage – that of developing an international court in addition to its domestic courts. Its aim, through integrating its new court with its international arbitral and mediation centres, forms part of a coherent development strategy. That strategy is, as Yip argues, to develop Singapore into ‘a premium dispute resolution hub’.<sup>22</sup> It is therefore aimed at producing a broad benefit for its legal profession and associated banking, commercial and support services, through integrating and thereby enhancing all forms of dispute resolution: namely, Singapore as a one-stop shop.

Where, however, there is an increase in jurisdictions seeking to become the ‘premium dispute resolution hub’, whether regionally or globally, and where the stakes are focused on ultimately improving a country’s GDP, competition is inevitable. The increasing growth of international courts in Europe and beyond is unlikely to be an exception here.

### 3 Competition and Innovation

#### 3.1 Competition between Courts in Commercial Litigation

Competition is well known where international arbitration is concerned. The same has not, historically, been the case where courts are concerned. Courts do not compete with each other. Sir Geoffrey Vos highlights this point in his article right from the outset. As he puts it,

The first point I want to make is that legal systems are not, and should not be, in competition.<sup>23</sup>

That may well have been the case. It is not as clear now whether that remains the position. Competition between courts, and specifically international business and commercial courts as part of a broader trend towards competition between countries, is an increasingly established fact of life. It is one that was, perhaps a little ironically given Sir Geoffrey’s clear view, outlined by a former Lord Chief Justice of England and Wales in 2017. As Lord Thomas put it, jurisdictions across Europe, the Middle East, and Asia were developing their substantive law, reforming their procedure, and developing new and innovative commercial courts in order for their justice systems to play a part in national economic development in a globalising and globalised world.<sup>24</sup>

The greater accuracy of Lord Thomas’ assessment of the reality of current developments, notwithstanding the validity of Sir Geoffrey’s point that national courts ought not to compete with each other or be perceived to be doing so, is readily borne out in the articles in this

volume. From Lambrecht and Peetermans’ article on Belgium’s attempt to develop an international business court to the creation of the Netherlands Commercial Court, discussed by Bauw, and Zambrana-Tévar’s account of Kazakhstan’s decision to create an international business court as part of the Astana International Financial Center the direction of travel is clear. That the latter court was born from similar developments in Qatar and Dubai simply underscores the point that countries are taking notice of the creation of international business courts in other jurisdictions to a degree that is historically novel. That they are choosing to respond by developing their own courts in an attempt to attract the same international business that is being targeted by the other international business courts is equally historically novel. Rather than focusing on the delivery of justice as a public good, as the articles in this volume illustrate, the delivery of justice for international commercial and business disputes is becoming one more aspect of a global service sector.

Questions can and ought to be raised about the attempts of national governments and legislators to position their courts and judicial systems as part of a worldwide market in justice, as goods to be promoted and designed to be ‘bought’ by customers who consider them to provide the best dispute resolution service. Equating the provision of civil justice through a state court with, in effect, international arbitration, as is increasingly likely with the establishment of the Singapore Convention on International Mediation,<sup>25</sup> will undoubtedly play into, and perhaps reinvigorate, debates concerning questions as to whether civil courts provide public goods or no more than private goods.<sup>26</sup> Where jurisdictions such as Singapore have developed their international commercial court on the basis, as is noted in Yip’s article, of ‘a careful marriage between litigation and arbitration’,<sup>27</sup> such debates would seem to become all the more pressing in terms of their continuing contemporary relevance.

For Themeli, the key questions differ in focus from those that look at the role and purpose of civil courts. His analysis focuses on another issue: what factors lead litigants to a specific jurisdiction when they could, in principle, choose from many. The answer to that question, he suggests, is the experience that lawyers, as a form of customer, have of any specific jurisdiction. His analysis poses a problem for the new courts. If customer experience is a leading factor in the choice of court, what can the new international business and commercial courts do to attract business for the first time, and what can established courts do to ensure that their repeat cus-

22. Yip, above n. 17.

23. Vos, above n. 14 at para. 27.

24. Lord Thomas CJ, *Keeping Commercial Law Up-To-Date* (2017), at 8-9, available at: <https://www.judiciary.uk/wp-content/uploads/2017/05/lcj-aston-university-speech-8-march-2017.pdf>.

25. The United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation) 2019, available at: [https://uncitral.un.org/sites/uncitral.un.org/files/singapore\\_convention\\_eng.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf).

26. See, for instance, H. Genn, *Judging Civil Justice* (2014); W. Landes and R. Posner, ‘Adjudication as a Private Good’, 8 *Journal of Legal Studies* 235 (1979); P. Carrington, ‘Adjudication as a Private Good – a Comment’, *Journal of Legal Studies* 303.

27. S. Chong, ‘The Singapore International Commercial Court: A New Opening in a Forked Path’, cited in Yip, above n. 17 at fn. 55.

tomers do not take their business elsewhere? The answer to that question increasingly seems to be innovation. Unique selling points, such as those that are being developed in England via its creation of the Business and Property Court or Singapore through its linking of arbitral and court proceedings, are examples of competition's consequences.

### 3.2 Competition and Innovation in Civil Justice

One of the central areas of innovation that the developing competition between business and commercial courts focuses on is language. Use of the English language has been identified as a key selling point by a number of new courts in Europe and further afield. The argument is that with English as a, or *the*, language of international commerce, courts that want to attract such disputes to their jurisdiction then need to ensure that their proceedings can be conducted in English. The major selling point, it is supposed, that London's Commercial Court has long had, albeit other jurisdictions such as Singapore have long operated with English as a court language, has spurred many jurisdictions to move away from their traditional approach: that litigation must be conducted in their national language. Themeli challenges the assumption that the English language is a significant selling point for any specific jurisdiction. For him, the evidence points to the perceived quality and expertise of a country's judiciary, amongst other things, as being among the selling points that attract international litigants to international business courts.<sup>28</sup> Use of the English language might be a factor, but whether it is a genuinely significant one is questionable.

This raises a broader issue for the future. Competition between the international commercial and business courts may be leading to positive innovation, such as novel procedures in England to provide speedier trials.<sup>29</sup> Might some of those innovations, however, be based on a false premise? If so, they will make little to no positive contribution. Equally, they may pose no problems. New courts offering to conduct proceedings in English as an alternative to, for instance, Dutch or German, may pose no real problems either for the courts or for litigants. If it is not a selling point, it will not be taken up. It will not attract new business. If, however, commercial courts start to introduce innovations that are perceived by their administrators as presenting selling points, but which undermine the court's ability to do justice or, more broadly, to have an adverse effect on the jurisdiction's domestic courts or domestic procedure, things may be different. If, for instance, international commercial courts develop new forms of fast-track appeal process, which prioritise appeals from their decisions in domestic appeal courts, enabling them to be heard before domestic appeals, the pursuit of international business could come at the price of a country providing effective access to justice for its own citizens. Equally, if a focus on

developing such international courts diverts a state's resources from its own domestic courts, a two-tier system of civil justice may well become entrenched, providing a first-class service for international litigants and a poorer class of service for national litigants, to whom in fact the state is under a duty to secure an effective and efficient justice system. That being said, innovation resulting from international competition could lead to domestic courts benefiting from the development of novel procedures at the international level.

A further point from competition-based innovation could affect substantive law. As Themeli notes, one reason that lawyers and litigants choose specific jurisdictions is their substantive law.<sup>30</sup> Historically, one of England's main selling points as a jurisdiction of choice has been its commercial law. Recently, however, there has been some degree of disquiet in England that there may be a weakening of its 'commercial' advantage in this area, as, amongst others, France has reformed its contract law and Singapore has developed its common-law based contract law. While other such countries have taken positive steps to improve the attractiveness of their substantive law, in England there has been a view that it has weakened the attractiveness of its commercial law due to the promotion of arbitration, reducing the number of disputes being resolved by the Commercial Court. This has, it is said, reduced the flow of new precedent, thereby limiting the English common law's ability to develop, to keep pace with commercial developments and thereby to retain its historic attractiveness.<sup>31</sup> Competition between international courts may well prove a spur to common-law jurisdictions such as England, Singapore and those commercial courts in the Middle East that use the common law to do two things. First, it could, as in England, prove a spur to the creation of innovative new processes, such as its Financial Markets test case procedure, to increase the flow of disputes and new precedent. Second, by prompting a competition between common-law jurisdictions, it may lead them to experiment with new developments in substantive law. In either case, it may be that increasing competition at the international level may provide the means for common-law jurisdictions to improve their substantive law at a quicker pace than civil code-based jurisdictions can. In that way, one possible and unintended consequence of increasing competition may be to reinvigorate those common-law courts and jurisdictions. In turn, this may then lead to innovation within civil code-based jurisdictions to innovate at a greater pace in respect of their substantive law, perhaps then remedying some of the issues that Lehmann has argued as being problematic as regards substantive law in Germany, or,

28. See E. Themeli, 'Matchmaking International Commercial Courts and Lawyers' Preferences in Europe', *Erasmus Law Review* 70 (2019); Themeli, above n. 1.

29. CPR PD57AB.

30. Themeli, above n. 28 at its section 2.2.

31. Lord Thomas CJ, *Developing Commercial Law Through the Courts: Rebalancing the Relationship Between the Courts and Arbitration*, available at: <https://www.judiciary.gov.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf>; B. Eder, *Does Arbitration Stifle the Development of the Law?*, available at: <http://arias.org.uk/wp-content/uploads/2016/05/CIArb-EDER-AGM-Keynote-Address-28-April-2016-AMND.pdf>.

as he suggests, the need to reform the German judiciary.<sup>32</sup> The consequences of this both for international and domestic markets remain to be seen. It is, however, a potential consequence that could be far-reaching in terms of its effect on the development of law and a consequence that was perhaps entirely unthought of when the increase in competition began but that seems to follow from Themeli's analysis. Irrespective of how innovation may develop, it appears clear that it will. How it develops and whether it brings benefits or not remains to be seen.

## 4 Globalising Business Litigation

The international commercial courts and chambers that have been established in recent years are available only in international cases or are specifically equipped to deal with these. These courts potentially further access to justice for international business parties and can strengthen the rule of law. Consistent with this aim is the desire expressed in a number of countries to offer business litigants an alternative to commercial arbitration, which has gained a dominant position as a dispute resolution mechanism for commercial disputes. This section turns to the international dimension of the new commercial courts and their position in global litigation.

### 4.1 Enhancing International Litigation: Expertise, Language and Financing

The rules applicable to the recently set up international commercial courts usually contain a specific 'internationality' provision as part of the competence requirements. Among the jurisdictions covered in this issue, an explicit internationality requirement is in place, notably in the Netherlands, France, Germany, Belgium and Singapore.<sup>33</sup> The definition of what an international dispute is differs from country to country. For instance, in the Netherlands, the Netherlands Commercial Court Rules (NCCR) require that the dispute in question is international; the explanatory memorandum defines it as a dispute where (1) at least of one of the parties is resident outside the Netherlands or is a company (or subsidiary thereof) established abroad or incorporated under foreign law; or (b) a treaty or foreign law is applicable to the dispute or the dispute arises from an agreement prepared in a language other than Dutch.<sup>34</sup> This broad definition assures that it covers all civil and com-

mercial disputes having an international element, while at the same time 'legitimising' the establishment of a special court for this type of dispute.<sup>35</sup> The French Protocol requires that it concerns a dispute relating to international contracts, and, in particular, those to which provisions of European law or foreign law apply.<sup>36</sup> The Belgian proposal bases its internationality criterion largely on the UNCITRAL Model Law.<sup>37</sup> London's Commercial Court was not set up specifically with a view to handling international commercial disputes but has gradually developed as the preferred court in international commercial litigation. Around 70% of the cases it deals with are international, and a substantial number of them concern cases where neither of the parties is from the United Kingdom.<sup>38</sup>

The focus on international commercial disputes makes sense in view of the increase in and the inherent complexity of these cases. The international dimension requires not only profound subject-matter expertise but also in-depth knowledge of international business relations, private international law rules, international conventions and foreign law. The required expertise is embodied in the composition of the bench. Without exception, the judges are highly experienced and have considerable expertise in business law, international commerce and litigation. This secures the required knowledge of important international conventions (for instance the CISG) and private international law rules in Europe, in particular the Rome I and Rome II Regulations.<sup>39</sup> It is noteworthy that the United Kingdom has indicated its intention to continue to apply the latter two regulations despite its withdrawal from the EU, in view of their importance in international cases and for the sake of legal certainty. Interestingly, in some countries, in particular Singapore – as Man illustrates in the present issue – judges are selected not only locally but also from a number of other countries.<sup>40</sup> The Singapore International Commercial Court has judges from Australia, Austria, Canada, France, Hong Kong, Japan, the UK and the US and is therefore a truly international court with a strong common-law background and featuring expertise from civil law countries. This not only makes for a more diverse legal culture but also supports

32. M. Lehmann, 'Law Made in Germany' – The Export Engine Stutters', in X.E. Kramer and J. Sorabji (eds.), *International Business Courts – A European and Global Perspective* (2019), p. 83.

33. In India this is not prominent, whereas in Kazakhstan a link to the financial centre is required.

34. Art. 1.3.1. NCCR. E. Bauw, 'Commercial Litigation in Europe in Transformation: The Case of the Netherlands Commercial Court', *Erasmus Law Review* p. 18, at section 4 (2019). See for an in-depth analysis of this requirement G. Antonopoulou, 'Defining International Disputes – Reflections on the Netherlands Commercial Court Proposal', *Nederlands Internationaal Privaatrecht* 740 (2018).

35. See section 1 in this regard, also in relation to the discussion in Belgium.

36. Protocol on Procedural Rules Applicable to the International Chamber of the Paris Commercial Court, 21 February 2018, Preamble with further specifications in Art. 1 on Jurisdiction.

37. Art. 576/1, para. 3 of the proposed amendments to the Belgian Judicial Code. See Lambrecht and Peetermans, above n. 12, at section 5.3 (2019).

38. Judiciary of England and Wales, The Commercial Court Report 2017-2018 (2019), available at: [https://www.judiciary.uk/wp-content/uploads/2019/02/6.5310\\_Commercial-Courts-Annual-Report\\_v3.pdf](https://www.judiciary.uk/wp-content/uploads/2019/02/6.5310_Commercial-Courts-Annual-Report_v3.pdf).

The Portland reports: who uses the commercial courts? indicate an even higher number. Available at: <https://portland-communications.com/publications/who-uses-the-commercial-court-2017>.

39. See in the private international law context X.E. Kramer, 'A Common Discourse in European Private International Law? A View from the Court System', in J. von Hein, E.M. Kieninger & G. Rühl (eds.), *How European Is European Private International Law: Sources, Court Practice, Academic Discourse* (2019) 211, at 226-229.

40. Yip, above n. 17, at section 3.4.



the application of foreign law. In some countries, including Belgium and France, and in some German international commercial courts, lay judges are also appointed to the international commercial chamber, supporting business and trade expertise.<sup>41</sup>

As addressed in the previous section, one of the primary features of these new courts and court chambers is that they offer parties the possibility of litigating in English. This is considered an asset for international business litigants – though perhaps not a key selling point, as Themeli argues in this issue.<sup>42</sup> It goes without saying that this requires the judge to have appropriate language skills. The starting point usually is that the proceedings will be in the local language, but that parties can opt for the proceedings to take place in English. In some countries, there are exceptions to the use of English: for instance, in the Netherlands when the case proceeds to the Supreme Court, and in France for certain procedural acts. In some countries, the use of English in proceedings, particularly in oral hearings or for submitting written evidence, is not entirely new – in the Netherlands the Rotterdam and Amsterdam District court has already offered this possibility for certain cases – but the acceptance of English for the entire proceedings opens the proceedings and case law more easily to international litigants and foreign lawyers.

The question is how these new courts – with their increased expertise and being put forward as highly efficient and technically well equipped – are to be financed. As discussed above, the Belgian proposal, in particular, has been heavily criticised for creating a two-tiered justice system and absorbing financial resources and judicial expertise and experience that are needed elsewhere in the judiciary. This has been a point of discussion in other countries as well, for instance in the Netherlands and France. A logical consequence of the ‘upgrading’ required by these specialised courts and the type of disputes adjudicated by them is that court fees are higher, although this is not the case in all countries that have recently introduced such courts. Both in the Netherlands and Belgium the cost-neutrality of the (proposed) court was principally taken as a starting point.<sup>43</sup> For instance, the Netherlands Commercial Court (NCC) has a flat fee of 10,000 EUR (and in appeal 15,000 EUR), while the proportionate fee system applicable to cases resolved by the ordinary district courts results in substantially lower fees.<sup>44</sup> For claims between 25,000 and 100,000 EUR, this is fivefold. While the increased court fees may be desirable from the perspective of a sustainable justice system securing equality of dispute resolution between high-value business cases and other cases, the downside is that for small and medium-sized enterprises

(SMEs) the access to the NCC may be limited. This has also been criticised by the Dutch Association for the Judiciary (NVvR),<sup>45</sup> and has led to parliamentary debates, as some political parties feared this would give an advantage to certain litigants.<sup>46</sup> In practice, for high-value claims, court fees seem not to be the decisive factor in bringing a case in a particular court, and other costs – in particular lawyer fees – are generally more substantial than the court fees.

## 4.2 International Jurisdiction and Enforcement of Judgments

The subject-matter jurisdiction of the international business courts differs from country to country, but the most important cases are international contract disputes. In Kazakhstan, the Astana International Financial Center, modelled on the Dubai International Financial Center, in particular, has a focus on financial disputes but has a broad jurisdiction over related disputes.<sup>47</sup> Some countries, in particular the Netherlands, also have a monetary threshold for bringing claims in the international commercial court or international chamber, where only claims with a value of 25,000 EUR and above can be brought before its international commercial court. The rules regarding international jurisdiction also differ somewhat among the countries and are interwoven with the special status of the court. The point of departure is that bringing a case before the international commercial court requires a choice of court agreement and the specific consent of the parties. Some countries, in particular Singapore and Kazakhstan, have somewhat complex rules on transfer jurisdiction or require a specific connection with the jurisdiction.<sup>48</sup> While in some countries the ordinary rules on international jurisdiction – in the EU notably the Brussels *Ibis* Regulation – can vest jurisdiction, the explicit consent of the parties to litigate before the international commercial court is important because different procedural rules will apply. Bauw stresses this in relation to the NCC, since adjudication by what is technically the international chamber of the Amsterdam District Court also implies substantially higher court fees.<sup>49</sup> In some countries, the rules regarding choice of court agreements are more strict and diverge slightly from the applicable private international law rules, in particular the Brussels *Ibis* Regulation and the Hague Choice of Court Convention. Antonopoulou addresses the complexities added by the Dutch and German legislatures to choice of court agreements

41. In France and Belgium the inclusion of lay judges is also common in ordinary commercial courts.

42. See section 3.2 above.

43. Bauw, above n. 34, at section 3, para. 3; Lambrecht and Peetermans, above n. 12.

44. In 2019, the court fees for companies for claims with a value between 25,000 and 100,00 EUR is 1,992 EUR and for claims over 100,000 this is 4,030 EUR.

45. Nederlandse Vereniging voor de Rechtspraak, ‘Advies NVvR wetsvoorstel Netherlands Commercial Court’ (Dutch Association for the Judiciary, Advice legislative proposal Netherlands Commercial Court), 23 February 2017, available at: <https://www.rijksoverheid.nl/documenten/rapporten/2017/07/14/tk-advies-nvvv-inzake-netherlands-commercial-court>.

46. Schelhaas, above n. 8, at section 3.5.3; Antonopoulou, Themeli & Kramer, above n. 8.

47. N. Zambrana-Tévar, ‘The Court of the Astana International Financial Center in the Wake of its Predecessors’, *Erasmus Law Review* 121, at 123 (2019).

48. Yip, above n. 17, at section 3.1.3; Zambrana-Tévar, above n. 47, p. 5-10 in word doc.

49. Bauw, above n. 34, section 4.

under the Brussels *Ibis* Regulation.<sup>50</sup> She concludes that these complicate the establishment of jurisdiction. This seems most evident for the NCC. While the stricter requirements, in particular that the agreement be in writing, seem at odds with the formal requirements of Article 25 Brussels *Ibis*, this is inherent in the fact that it is not merely a choice for the Amsterdam District Court but also for its international chamber, the NCC procedural rules, and the substantially higher court fees. These rules may need to be crystallised by the court or the legislature.

Another important aspect of global business litigation, which ties in with jurisdictional issue, is the enforceability of court judgments. This aspect is addressed in some of the articles included in this issue and is central in that of Stamboulakis and Crook.<sup>51</sup> They focus on the approach of the Singapore International Commercial Court to jurisdiction and joinder of non-consenting parties and the enforcement of resulting judgments, which may be troublesome. More generally, the enforcement of judgments from international commercial courts is not likely to be very different from the enforcement of any other court, and it should only be easier considering party autonomy and the high standards of adjudication. Encouraging in this respect is the growing number of ratifications of the Hague Convention on Choice of Court Agreements – among others by Singapore, while China has signed this Convention – and, even more so, the adoption of the Hague Judgments Convention on 2 July 2019.

On a practical note, as illustrated by Themeli in the present issue,<sup>52</sup> surveys among businesses and practitioners consistently show that London's Commercial Court has long been the preferred court for international commercial litigation. Although the establishment of international commercial courts that enable litigation in English along with the persisting insecurity involving Brexit and the relocation of businesses may have some effect, it is unlikely that there will be a big shift. The choice in favour of English courts and English law is firmly rooted in transactional and litigation practice. An indication that there may be some effect as a result of Brexit is given by a 2018 Thomson Reuters report on the impact of Brexit on dispute resolution, which found that 35% of the respondents had changed their approach to choice of law and choice of court clauses.<sup>53</sup> This has to do with the uncertainty regarding the legal framework, and, in particular, the fact that the successful Brussels *Ibis* Regulation will no longer be mutually applicable to jurisdiction, choice of court agreements and the enforcement of judgments. However, apart from other international instruments – notably, the Hague Conventions – being in place, it seems unlikely

that London's Commercial Court will change its practice in regard to issues involved in international litigation or that English judgments will become substantially difficult to enforce in the EU.

### 4.3 Courts versus Arbitration: Turning the Tides of the Vanishing Trial?

Another question pertains to how far the global dispute resolution market will be affected by the emerging international business courts.<sup>54</sup> Over the past few decades, commercial arbitration has taken over a substantial amount of commercial litigation and has become the primary method of dispute resolution in many areas of commercial law, particularly in high-value disputes. The 2018 White & Case and QMUL arbitration survey found that 97% of the respondents prefer international commercial arbitration.<sup>55</sup> Some legislatures have justified the creation of a specialised international commercial court also with a view to providing parties with an alternative to arbitration, by offering high-quality, efficient and affordable procedures. While the international commercial courts have some attractive features and may well be cheaper – in particular because legal counsel in arbitration is more expensive – one may wonder whether these new courts will really be able to turn the tide of what has been called the vanishing trial.<sup>56</sup> Arbitration and court litigation in part fulfil different functions, and they are complementary. Despite catering to business litigants by enabling litigation in English, increased expertise, more procedural freedom, and, in particular in Belgium, the creation of a more hybrid legislative framework that copies arbitration rules, some of the features of arbitration are difficult or impossible to implement. This includes neutrality in the sense of detachment from a particular national and legal environment, the far-reaching freedom to select the applicable rules of procedure and the possibility of selecting specific arbitrators. The Thomson Reuters study on the effects of Brexit mentioned in the previous subsection also indicates that a substantial portion of the litigation that may be withdrawn from the London Commercial Court may move to arbitration (and often to the London

50. Antonopoulou, above n. 13.

51. D. Stamboulakis and B. Crook, 'Joinder of Non-consenting Parties: The Singapore International Commercial Court Approach Meets Transnational Recognition and Enforcement', *Erasmus Law Review* 97 (2019).

52. Themeli, above n. 28.

53. Thomson Reuters, 'The Impact of Brexit on Dispute Resolution Clauses', 23 July 2018.

54. See on the relationship between international commercial courts and arbitration, S. Wilske, 'International Commercial Courts and Arbitration – Alternatives, Substitutes or Trojan Horse', 11 *Contemporary Asia Arbitration Journal* 153 (2018); M. Hwang, 'Commercial Courts and International Arbitration – Competitors or Partners?', 31 *Arbitration International* 193 (2015).

55. White & Case and Queen Mary University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration*, 1, available at: <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration.PDF>.

56. See, e.g., in the US: M. Galanter, 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts', 1 *Journal of Empirical Legal Studies* 459 (2004), and in England & Wales: R. Dingwall and E. Cloatre, 'Vanishing Trials?: An English Perspective', *Journal of Dispute Resolution* 51 (2006). See on concerns about the disappearance of courts, e.g., J. Resnik, 'Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights', 124 *Yale Law Journal* 2804 (2015).



Court of International Arbitration) rather than to similar courts in other countries.<sup>57</sup>

Nevertheless, the emerging international commercial courts may prove to have added value and be a good alternative for certain types of disputes. In any case, the bundling of international business expertise in these courts at the local level, the international cross-fertilisation of rules and practice, and the increased flexibility in procedural rules are of value to international commercial litigation. One of the key advantages of arbitration is the enforceability of arbitral awards on the basis of the New York Convention. The adoption of the Hague Judgment Convention in July 2019, following the 2005 Hague Choice of Court Convention, is certainly to be welcomed. Wide ratification of these conventions in the future would finally create a global enforcement mechanism and give a boost to international court litigation.

role in furthering the rule of law. Although the innovation these courts bring about depends greatly on the local circumstances – and it remains to be seen whether the new courts will be able to attract a substantial number of cases – efforts to boost the public justice system and to facilitate business litigation are to be welcomed.

## 5 Concluding Remarks

The proliferation of international business courts in Europe and beyond has generated considerable discussion at the national political level and has attracted the interest of academics and practitioners alike. The present issue aims to contribute to the debate by presenting and critically analysing the features of these new courts in Europe and in a number of Asian countries. The precise policy aims, institutional design and procedural rules differ among the jurisdictions, but they all centre on facilitating international business dispute resolution by enabling parties to litigate in English and by offering a high level of expertise, more flexible procedural rules and efficient, modern procedures. Some jurisdictions have specifically copied arbitration rules (in particular Belgium), and others aim at creating a more integral dispute resolution system where litigation and arbitration go hand in hand (Singapore and – outside the scope of the present issue – China<sup>58</sup>).

Many discussions evolve around the competition between international commercial courts, fuelled in Europe by Brexit, and between international commercial courts and arbitration. We have doubts as to whether judicial competition is a good reason for a reform of the judicial system, but it is an incentive to modernise the justice system insofar as it concerns business litigation. It has raised an awareness of what is going on in other countries and has resulted in exchanges between policymakers, courts and other stakeholders. This cross-fertilisation is also visible between court litigation and arbitration and may lead to some convergence, while courts can continue to exercise their

57. Thomson Reuters, above n. 53. It concerns 10% of the 35% of the respondents that had indicated their intention to take a different approach to choice of court clauses.

58. See on China, N. Zhao, 'The CICC: An Endeavour towards the Internationalisation and Modernisation of Chinese Courts' in X.E. Kramer and J. Sorabji (eds.), *International Business Courts – A European and Global Perspective* (2019, p. 159).