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International Commercial Courts: A Global Disputes Practitioner's Perspective—Part III

Markus Burianski and Lisa Fleckenstein[1]

In this multipart article, the authors provide a perspective on international commercial courts. In the first part, published in the May-June 2025 issue of *Dispute Resolution Journal*, the authors set out a brief overview of five prominent international commercial courts with a description of their salient features. In the second part, which was published in the July-August 2025 issue of *Dispute Resolution Journal*, the authors discussed five characteristics of a high-quality dispute resolution process and made recommendations as to whether its emphasis is better reflected in arbitration or commercial court proceedings. The authors conclude their article here, providing guidance to the choice between the various international commercial courts, based on the substantive and procedural law applicable to them with a focus on the determination method for foreign law issues as well as the legal basis for the cross-border enforcement of commercial court judgments.

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Once the previously discussed aspects have been applied and it has been concluded that an international commercial court is the more appropriate forum, the next step is to decide which of the courts offers the best procedural and substantive legal framework for the proceeding in question. To facilitate this decision and to systematise the process, the following three questions should be asked.

First, the international commercial courts discussed here place different requirements on the parties' choice of court agreements to establish jurisdiction. Contrary to what one might be used to from arbitration practice, it is by no means true that the parties' intention alone to agree on the jurisdiction is sufficient for the court to consider itself competent with certainty. This is because the international commercial courts' rules contain objective hurdles and, in some cases, retain the final authority to decide on their jurisdiction. In order to avoid unpleasant surprises, the most important requirements are set out in the first section, categorized by commercial court.

Second, the parties of commercial court proceedings can decide which substantive law shall govern their dispute. Depending on whether a common law or civil law system is chosen, there may be significant differences in the outcome of the case. If the parties select a legal system other than that of the seat of the commercial court (the home jurisdiction), they must be aware of how issues of "foreign" law will be dealt with in the courtroom. In this context, it is also important to know the mechanism by which the rules of private international law determine which court has international jurisdiction in the absence of a choice of court agreement or if such agreement is challenged as invalid.

Third, the parties may consider how they want to arrange the proceedings because, unlike the relatively rigid domestic procedural rules, the rules of the commercial courts grant the parties some discretion to tailor the proceedings to their individual needs. Key issues the parties can decide autonomously, albeit by consensus, are the rules of evidence in general and the procedure for document production in particular.

The Choice of Court Agreement

The choice of an international commercial court as a dispute resolution forum should ideally be made during the contract negotiations. However, even if that is not the case (for example, if the parties' relationship is non-contractual or a claim is made in tort), parties may, even after the dispute has arisen, agree on the jurisdiction of the international commercial court at any other time.

All of the commercial courts discussed in this article can derive their jurisdiction through the parties' choice of court agreement. Because of their international nature, it is not necessary for the parties or the dispute to have any connection to the country in which the commercial court is located. The only connection required is the parties' choice of court agreement and a commercial business element to the dispute. The Singapore International Commercial Court (SICC) and International Commercial Chambers of the Paris Commercial Court (ICPC), however, retain their discretion to decline jurisdiction.

Regarding the ICPC, only the Paris Court d'Appel can be declared competent or incompetent to rule on a dispute.[2] For a case to be assigned to the International Chamber at the Paris Court d'Appel, the parties have to notify the registry of their request and to justify their reasons. The court's placement Chamber (chambre de placement) will then allocate the dispute to the International Chamber if it is of an economic and commercial nature with an international dimension, and, in particular, when provisions of European law or of a foreign law (meaning not French law) apply or may apply.[3]

For the Netherlands Commercial Court (NCC) to hear a case, the procedure is simpler: Parties need to agree to a clause referring the case to the NCC and also ensure to incorporate English as the language of the proceedings. The same applies to future

[2] Information published on the website of the Chambre internationale, www.tribunal-de-commerce-de-paris.fr/en/chambre-internationale.

[3] Article 1 of the ICPC Rules.

commercial courts in Germany, although the amount in dispute must be attained, as otherwise the proceedings will be referred to the commercial chamber at the Regional Courts. Jurisdiction can also be established by the counterparty entering an appearance without objecting.

As the Hague Choice of Court Convention is the most comprehensive international treaty on the cross-border enforcement of court judgments to date, it is also recommended to include an "exclusivity clause" in the agreement, because the regulation only applies in case of an exclusive choice of court agreement.

Another noteworthy detail must be considered with regard to the limits on the amount in dispute which is required in German commercial courts; for example, as the choice of court agreement is usually concluded at the time the contract is signed, the parties cannot foresee with certainty whether the dispute will ultimately reach the amount in dispute required by the commercial courts. If the amount remains below the required threshold, the desired and agreed commercial court at the Higher Regional Court will not have jurisdiction for the dispute and instead one of possibly many Commercial Chambers. If this result is to be avoided, an alternative choice of court agreement should be included in the event that the dispute does not reach the mandatory monetary threshold. To enhance legal certainty, it would be beneficial for the German legislator to adopt a similar approach to the NCC and Dubai International Financial Centre Courts (DIFC Courts)[4] by publishing exemplary choice of court agreements for German commercial courts.

The model clauses on the websites of the commercial courts certainly offer a good initial suggestion for drafting of a robust choice of court agreement. However, as has been shown, they still need to be adapted to the circumstances of the specific individual case.

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[4] Rules of Procedure for the International Commercial Chambers of the Amsterdam District Court, 3d ed., 2023, www.rechtspraak.nl/SiteCollectionDocuments/NCC-Rules-third-edition.pdf, Art. 1.3.1(b), p. 34.; DIFC Courts model clause available at https://www.difccourts.ae/application/files/1515/9774/9107/DIFC-Courts-Opt-In-Clause.pdf; SICC model clause available at www.sicc.gov.sg/model-clauses; AIFC Court model clause online available at https://court.aifc.kz/en/model-clauses.

Applicable Substantive Law

In many cases, the geographical location or seat of the dispute resolution forum is already inspired by the choice of substantive law. The same pattern can be seen in international arbitration, where an important reason to select a particular seat of arbitration is often its location within the jurisdiction of the applicable substantive law. However, there are also reasons (possibly the characteristics mentioned below) that encourage parties to choose a particular commercial court, irrespective or despite of its local law.

The legislators have clearly recognised this interest because commercial courts allow the parties to choose which law applies to the merits of the dispute, whether in advance, upon conclusion of the contract, or even after the legal dispute has commenced. They can choose between the home jurisdiction of the commercial court and foreign law. Unlike in international arbitration, the parties are not free to designate any non-state law as their governing law, regardless if this is classified as a legal system or not under the Rome Convention or other conflict of law rules.[5]

Applicable Law Under Private International Law

If the case entails international elements, and in the absence of a valid agreement, the applicable substantive law is determined by the rules of private international law of the state in which the case is first submitted.

Private International Law (referred to as conflict-of-law rules in common law) describes the body of law surrounding which law governs when there is a conflict between citizens of different countries. This is where the continental European and civil law courts differ from the common law commercial courts in Dubai, Kazakhstan, and Singapore, at least in terms of the legal basis. In both legal systems, however, the baseline is that

[5] Ilias Bantekas, The Rise of Transnational Commercial Courts: The Astana International Financial Centre Court, Pace International Law Review, Issue 1, 33, 2020, p. 29.

the applicable law depends on the legal ground for the claim. A claim based on contract may be governed by a different law than a claim founded on tort.

The main sources of private international law rules on applicable law in Europe are the EU regulations no. 593/2008 (Rome I) and no. 864/2007 (Rome II). The Rome I Regulation provides for specific rules, depending on the type of contract, but if these rules are not conclusive, the law of the habitual residence of the characteristic performer will generally apply. For non-contractual obligations, the Rome II Regulation will apply in most cases.

In May 2024, the Dubai International Financial Centre Authority issued Consultation Paper No. 1 of 2024 on proposed amendments to the Application Law. The proposed amendments were introduced to clarify the source and content of DIFC law, and provide guidance on the interpretation of DIFC legislation. While the previous version of Article 8(2)(e) of the DIFC Law No. 3 provided for the law of England and Wales to be applied, this has now been replaced by Article 8(2)(e) of the Amended Application Law, which provides that "DIFC Law" shall be applied.

The Amended Application Law not only defines "DIFC Law" as the law of the DIFC as established by DIFC Statute and the decisions of the DIFC Courts; but also explains the meaning of DIFC Law in the second significant amendment, i.e., Article 8A of the Amended Application Law, titled "Content of DIFC Law"

Under common law, the governing law of a relationship between parties across borders is generally defined as "the law chosen, expressly or impliedly, by the parties, or if no law had been chosen, the law with which the contract had its closest and most real connection." It may also vary by the type of contract: there are different conflict of law rules for consumer contracts and commercial contracts, and special rules for certain types of contracts, such as employment and insurance contracts.

The SICC Court Rules do not contain any rules on the applicable substantive law in the absence of a choice of law by the parties. In Singapore, however, as a former Commonwealth state, common law is applied, including to the question of "conflict of laws." The standards for applying the choice of law rules are not

fixed but are determined by case law. The choice of law rules to be applied depend on the nature of the dispute and the claim. The main categories of common law are contracts, torts, restitution, property, succession, and family, which are in turn divided into numerous subcategories.

For example, in a dispute over the existence of a contract, the SICC applied a three-step "putative proper law test": (1) The court will look for what parties have expressly chosen as the law governing their disputed relationship; (2) where (1) is unavailable, the court searches for what the parties' intention as to the governing law of the contract may be by inferring from the facts available in the surrounding circumstances. Where (1) and (2) prove inconclusive, the court will put its mind to discerning which law has the closest and most real connection with the disputed relationship.[6]

Where it is impossible factually to identify objectively what law parties would have chosen, and if the connecting factors do not assist the court in any way, the court may apply the lex fori (the courts' local law) as a measure of last resort.[7]

The common law conflict of laws rules also apply to the AIFC (Astana International Financial Centre) Court, if the parties do not determine the law applicable to a contract. This follows from the fact that the AIFC Court Rules do not contain their own conflict of laws rules, according to which the contract is then governed by the law of the AIFC. As an SEZ court, the conflict of laws rules of the host country Kazakhstan cannot be applied, as is the case with the DIFC courts. The law of the AIFC "is based on the Constitution of the Republic of Kazakhstan and …, the principles, legislation and precedents of the law of England and Wales."[8]

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[6] Shou Yu Chong, Choice of Law Governing a Contract Where Its Existence Is In Dispute: Clarifications from the Singapore International Commercial Court in Lew, Solomon v. Kaikhushru Shiavax Nargolwala, Singapore Academy of Law Journal, 33, 2021, p. 667.

[7] Id. at p. 669.

[8] Art. 4 no. 1, Art. 13 no. 5 Constitutional Statute of the Republic of Kazakhstan on the Astana International Financial Centre; Ilias Bantekas, The

Suitability of Substantive Law for a Commercial Dispute

Parties may choose a certain jurisdiction because they or their business is located in that particular state, meaning they are familiar with its commercial laws. Confidence in one's home jurisdiction is a valid reason for a particular choice of law.

In many cases, however, the parties have already analysed which jurisdiction can best accommodate their concerns and interests in the event of a conflict before concluding a contract. Predictability of law, on the one hand, and its suitability for commercial law conflicts, on the other hand, are both crucial factors in this decision-making process.

In a global context, companies have developed distinct preferences as to which law they usually base their contracts on. This is because some jurisdictions are better suited to reflect the peculiarities and customs of commercial practices than other jurisdictions.

The most popular choice of applicable law in international commercial contracts is currently English law. This is partly because negotiation and contract language are often already in English. But even more important is the general perception that English contract law emphasizes the concept of freedom of contract. This concept provides for judges to assess disputes based on the terms of the written contract between the parties and not enforce a general duty of good faith unlike judges in many other jurisdictions. Not to mention that corporations can rely on sophisticated case law to forecast the most likely outcome of their dispute.

Continental European law, especially Dutch and German civil law, is sometimes purported to be dominated by the more nebulous concept of good faith (reasonableness and fairness) and to offer lesser certainty because of it.[9] The starting point for

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Rise of Transnational Commercial Courts: The Astana International Financial Centre Court, Pace International Law Review, Vol. 33, Issue 1, 2020, p. 27.

[9] R.A. Dudok van Heel & R.P.J.L. Tjittes, The Netherlands Commercial Court and Business Certainty in Dutch and English Commercial Contract Law, 2018, www.rechtspraak.nl/SiteCollectionDocuments/ncc-business-dutch-english-commercial-contract-law.pdf, p. 3.

contract interpretation by the courts is the often-theorised parties' intentions rather than the literal wording as in common law jurisdictions. German courts regularly declare terms and conditions that have been intensively negotiated between companies or clauses that are common in international business transactions invalid on the grounds of customer-protection provisions. In these jurisdictions, the prospects of legal action are difficult to predict, which is particularly unsettling for foreign litigants.

Depending on the specific facts of the case, other aspects of substantive law may also be relevant. An example of this is the allocation of the burden of proof within the jurisdictions. Very few claims contain explicit rules on the burden of proof so that the general rule in the jurisdiction usually applies. The NCC Commercial Court's Rules, for example, give "primacy" to substantive law, as stated in Article 8.2: "The court or tribunal shall assign the burden of proving certain facts or rights to the party who relies on a legal basis supported by those facts or rights for a claim or defence, unless the law—including the applicable substantive law—or requirements of reasonableness and fairness provide otherwise." The DIFC Courts, the AIFC Court, and the SICC, on the other hand, apply a common law standard of proof based on the balance of probabilities. The court may increase this burden, depending on the nature of the dispute. Civil fraud claims, for example, have a higher burden of proof than contractual disputes.

A particularly thorough analysis of the applicable laws is recommended with regard to the international commercial courts located in the SEZs, as their laws are different from their host countries' local laws in the United Arab Emirates and Kazakhstan. Both the DIFC Courts and the AIFC Court are unique in the sense that they are legal enclaves of the common law in civil law host countries. Based on constitutional amendments, these commercial courts have been authorised to develop their own legislation for the resolution of commercial disputes.

The DIFC laws are developed by the DIFC Authority and the Dubai Financial Services Authority. Unless the parties explicitly agree that another law governs their dispute, the DIFC Courts will apply the DIFC's laws and regulations. It is often stated that DIFC laws are "largely based on English law," which may create the misunderstanding that it is sufficient for parties to know

English law in order to conduct proceedings governed by DIFC rules. Unfortunately, this is not entirely true. To begin with, there are no English law statutes that have been directly incorporated by reference into DIFC law, nor are there common law principles that DIFC law expressly stipulates. Rather, Article 8, para. 1 of the DIFC Law No. 3 of 2004 (the DIFC Application Law) clarifies that only DIFC law applies. In addition, the DIFC Court of Appeal held in 2022[10] that legal principles from other jurisdictions cannot be imported into DIFC law in the absence of a statutory provision to that effect. According to the Court of Appeal, decisions from other jurisdictions can be used only to interpret DIFC laws, but since law in the DIFC is statutory, there is no room for judges to create their own case law in order to mitigate gaps within the statutes.

The situation is somewhat different with regard to the AIFC Court where Article 13, para. 5 of the AIFC Constitutional Statute[11] states that "[t]he activities of the AIFC Court are governed by the resolution of the Council On the Court of Astana International Financial Centre, which is based on the principles and legislation of the law of England and Wales and the standards of leading global financial centres." Unlike the DIFC Courts, Kazakhstan's constitutional law provides the necessary common law link for the AIFC Court to apply judgments from other common law jurisdictions. However, the scope of this reference is also not immediately clear from this provision, which is why it is sometimes criticised for creating legal uncertainties for potential parties as to the applicable law.[12]

[10] DIFC Court of Appeal, decision from 20 September 2022, The Industrial Group v. El Fadil Hamid, docket no. CA 005/006.

[11] AIFC Constitutional Statute, https://aifc.kz/files/legals/7/file/constitutional-statute-on-the-aifc-with-amendments-as-of-30-december-2022.pdf.

[12] Nicolás Álvaro Zambrana-Tévar, The Court of the Astana International Financial Center in the Wake of Its Predecessors, Erasmus Law Review, 1, 2019, p. 132.

The Commercial Courts' Approach to Determining Foreign Law

Once the question of which foreign law can be applied to the merits of the case has been raised, the next question is "how" to determine foreign law issues in the proceedings of an international commercial court.

There are two basic models for dealing with foreign law issues: In the common law system, foreign law is regarded as an issue of fact and therefore must be proven (mostly by expert evidence), whereas in civil law jurisdictions, foreign law is regarded as an issue of law. Civil law jurisdictions and arbitration allow for foreign law to be presented as law by way of submission argued by the counsel. The advantage of the civil law approach is that it saves time and expense in the proceedings by avoiding costly expert evidence[13] in cases where the parties are usually already being advised by foreign lawyers.

In proceedings before the NCC, ICPC, and German commercial courts, as civil law courts, questions of foreign law are dealt with as an issue of law. In Germany, for example, according to Section 293 of the Code of Civil Procedure (ZPO), the court must independently determine the foreign legal norm and can only, among other things, call upon the assistance of the parties. Consequently, if the applicable legal rule cannot be determined by the court, the claim is not dismissed because the plaintiff has failed to provide evidence. Rather, a "substitute law" is applied, be it the lex fori or general principles of law.[14] It is noteworthy that regarding the NCC, the court may be informed on foreign law aspects through submissions of a foreign counsel as well as through expert briefs.[15] The court may also request both parties

[13] Hannah Eckhoff, Leane Meyer & Paul Schiering, Die Attraktivität Deutschlands als Forum internationaler Streitbeilegung, RIW, 2023, 804, p. 809.

[14] Rolf A. Schütze, Ausgewählte Probleme des internationalen Zivilprozessrechts, 17. Ausländisches Recht als beweisbedürftige Tatsache, Berlin 2006, p. 220.

[15] Marieke Witkamp, Internationalizing Domestic Courts in Europe: A Comparative Analysis on Procedure, Function, Organization, International

to produce a legal opinion or the court may also appoint its own expert. The costs for this expert are paid by the court, as it is the court that needs to establish the substance of the foreign law, and not the parties in difference to common law countries.

More intriguing, however, is the approach of the common law commercial courts in this matter. According to Article 110 of the SICC Rules, the court may, upon an application of a party, order that any question of foreign law arising in any cause or matter in the court be determined on the basis of submissions instead of proof.

The same applies for the DIFC Court, which is free to apply such rules of evidence as it considers appropriate.[16] Moreover, the DIFC Court of Appeal held that the courts should accept legal submissions, as is customary in international arbitration. The court stated that the composition of the DIFC Courts' benches consist of international judges from various jurisdictions, and therefore have expertise in different national laws.[17]

Procedural Law

In the context of international commercial court proceedings, the choice of the court will, along with any rules or other agreement between the parties, provide the procedural law for the dispute. International commercial courts have developed their own procedural rules, which give parties significantly more flexibility to shape the process through their own agreements and decisions than was previously the case with national procedural statutes. This applies specifically with regard to the taking of evidence.

This procedural flexibility is beneficial when parties have very different backgrounds because they can jointly agree on the framework conditions of their lawsuit, and thus the impression

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Commercial Courts: The Future of Transnational Adjudication, 2022, Cambridge, p. 9.

[16] Art. 50 (c) of the DIFC Courts Rules.

[17] Georgia Antonopoulou, The "Arbitralization" of Courts: The Role of International Commercial Arbitration in the Establishment and the Procedural Design of International Commercial Courts, Journal of International Dispute Settlement, 14, 2023, p. 337.

is less likely to arise that a party is having a foreign procedural law imposed on them.

Document Production

In many common law jurisdictions, extensive document production and disclosure rules prevail, to which parties will often be under an obligation to search for and produce a wide range of documents that are relevant to the case, including those that are disadvantageous to their own position. By contrast, the requirements for document production in civil law systems are generally more limited, with the parties to litigation only producing those documents that they intend to rely on in the dispute and that are favorable to their own positions.

The disadvantage of document production is that it takes up time and costs, which are valuable resources in civil proceedings and, above all, are not always equally distributed. Particularly savvy and financially capable parties can therefore try to use the document production process as a mechanism to drive up costs and delays; for instance, to position themselves favorably in light of a potential settlement. If you want your case to be resolved quickly, it is best to refrain from extensive document production.

As a general approach, all commercial court rules provide that each party shall submit to the other party all documents on which it relies, including public and generally accessible documents, with the exception of documents already submitted by another party and documents that it is required to submit by law.

Unsurprisingly, the common law commercial courts contain provisions according to which the parties can make a reasoned request for the production of documents. However, the special feature here is that, unlike in common law state courts, document production is not compulsory, but instead must be initiated by one of the parties.[18] This approach serves the purpose of individualised solutions.

[18] For DIFC Courts, see Art. 28.20-Art. 28.25 of DIFC Rules; for AIFC Courts, see AIFC Court Rules Sect. 17.9 and following; for SICC, see SICC Order 110, Rule 17 of the Rules of Court.

For the European commercial courts, whose host states are based on the tradition of civil law, the option to produce documents is also available, but with considerable restrictions. Under German law, there is no general duty to disclose any documents except for those relied on to support a party's allegations. But beyond that, it is only where a party has a legitimate interest that the counterparty may be required to disclose specific documents pertaining to a legal relationship involving that counterparty. The duty to disclose information is narrower than in common law countries such as the United Kingdom and the United States.

In proceedings before the NCC, pursuant to Article 8.4.6 of the NCC Court Rules, a party may make a request to produce certain documents if it has a legitimate interest. However, the significant restriction applies that only "certain documents relating to a legal relationship in which that party or its predecessors in title are involved" may be requested. The order may be granted to a person or entity having custody or control of the documents; however, that person or entity is not required to comply with the order if compelling reasons justify it or if the court determines that it is reasonable to assume that the proper administration of justice can be ensured without the production of the documents. The requesting party bears the costs of production.

At the ICPC, the judge may, at the request of the other party,[19] order the party who holds evidence to produce it. The judge may, even at the request of one of the parties, request the production of any document held by third parties if there is no legitimate impediment. Such a request may relate to the production of precisely identified documents or "categories" of precisely identified documents.

What all procedural rules have in common, however, is that they contain mechanisms to protect business secrets or highly personal information. If the document production contains documents with such content, it can be stipulated, for example, that these documents may only be viewed by the lawyers or the court.

[19] Art. 4.1. ICPC Rules.

Rules of Evidence

International commercial courts refer to their host states' rules of civil procedure in addition to their own rules' scope of application, which, at first glance, may appear daunting for parties unfamiliar with them. Particularly in complex proceedings, factual issues are a greater point of controversy than their legal assessment, meaning that the taking of evidence is a key aspect of the entire litigation process. At second glance, the perception that the rules of evidence are beyond the parties' influence is mitigated by the fact that evidence is only in part a procedural matter, first and foremost including the taking of evidence. More significant matters such as the burden of proof and presumptions of law are areas of evidence that are determined by the law applicable to the merits of the case.

In addition, the procedural rules of the commercial courts presented here allow parties (albeit in different forms) to disapply national rules of taking of evidence and instead apply internationally more recognised standards and methods.

The parties have the widest discretion in proceedings before the SICC. The Supreme Court of Judicature Act, which governs the powers of the SICC, provides that the court may apply rules of evidence derived from foreign or other law. Most notably, however, the rules provide that parties may deviate from domestic procedural statutes and instead choose not only foreign statutes but also non-state rules. According to the SICC User Guide, parties may even agree to apply the International Bar Association Rules on the Taking of Evidence in International Arbitration.[20] The legislature's decision is a clear indication of Singapore's commitment to becoming a viable alternative to arbitration for international parties.

The NCC Rules also offer parties some flexibility, although to a much lesser extent than the SICC does. The NCC Court

[20] Georgia Antonopoulou, The "Arbitralization" of Courts, The Role of International Commercial Arbitration in the Establishment and the Procedural Design of International Commercial Courts, Journal of International Dispute Settlement, 14, 2023, p. 336.

Rules[21] provide that the parties may enter into an "evidentiary agreement" to deviate from the statutory rules of evidence. However, there are limits to their autonomy—Article 8.3 NCC states: "within the scope of the parties' freedom of choice"—and specifically where the interests of third parties are to be protected or the standards of reasonableness and fairness are undermined. The court will also disregard an evidentiary agreement if it concerns the proof of facts to which the law attaches consequences that are outside the parties' autonomy.

The ICPC as well has developed its own procedural rules, which are more adaptable in their scope of application than the otherwise applicable French Code of Civil Procedure. According to the "ICPC Practical Guide,"[22] proceedings are organised "in close cooperation with the parties." During a preliminary hearing, for example, the parties may submit to the judge requests concerning the conduct of the proceedings, such as requests to hear witnesses or experts or requests for the compulsory production of documents. A real novelty introduced by the ICPC Rules are the hearing of witnesses and experts by the judge and by cross-examination, which is uncommon in France. Yet, as in arbitration, witnesses and experts are required to give written testimony beforehand.

The DIFC Courts' Rules, on the other hand, leave the parties with little leeway for input, but instead provide precise guidelines for each type of evidence (including witnesses, expert evidence, affidavits, hearsay evidence). The most important category of evidence is witnesses evidence. Witnesses give their evidence by way of a written witness statement[23] and may be cross-examined on their statement.[24] In a similar approach, appointed experts usually give their evidence in advance by way of a written report and may then be cross-examined by both parties.

The AIFC Court as well places a great focus on the testimony of witnesses. Any party may apply to the Court for permission to

[21] Article 8.3 NCC Rules.

[22] ICPC Practical Guide to Proceedings Before the ICPC and the Paris Court of Appeal, p. 123.

[23] DIFC Rules No. 29.2.

[24] DIFC Rules No. 29.49.

cross-examine the person giving the evidence.[25] Moreover, the AIFC Court may generally circumvent non-mandatory procedural rules according to the "overriding objective of enabling the Court to deal with cases justly" set out in Section 1.6 of the AIFC Court Rules. Section 1.8 of the Court Rules even allows the court to "waive any procedural requirement if it is satisfied that it is in accordance with the overriding objective to do so." Although such a decision will ultimately be made by the court, the parties may offer their suggestions.[26]

"Mind the Gap"

As appealing as the choices with regard to substantive law and the applicable procedural law may appear, it should be acknowledged that the combination of civil law rules with common law rules can also cause friction when the parties chosen law for the merits is different from the applicable procedural law. This jurisdictional discrepancy often leads to overlooked "gaps."

For example, certain legal circumstances can be either categorised as substantive or procedural matters, depending on which jurisdiction applies. This dualism is particularly evident concerning the limitation of claims, which has been a long-standing problem within arbitration practice.

As a general proposition, common law jurisdictions consider limitation laws to be a matter of procedural law, barring the remedy as opposed to extinguishing the right.

The common law traditionally considered statutes of limitation as procedural, as contrasted with the position in most civil law countries where it has traditionally been regarded as substantive. The limitation laws may differ not only in terms of their respective periods of limitation but also in the nature of their limitation provisions. For example, issues such as when a limitation period commences and whether there is discretionary

[25] Section 18.25 of the AIFC Court Regulation.

[26] Ilias Bantekas, The Rise of Transnational Commercial Courts: The Astana International Financial Centre Court, Pace International Law Review, Vol. 33, Issue 1, 2020, p. 31.

power to extend the period will depend on which limitation law the court applies.[27]

To date, there is no rule governing the statute of limitation in the event of a conflict between the two legal systems, either in arbitration proceedings or in proceedings before the international commercial courts. At least for arbitration proceedings, there is case law that deals with this problem and has developed solutions that may also be applicable to commercial courts. In the past, several decisions by the International Chamber of Commerce have held that a limitation period should be subject to the "lex arbitri," meaning the law of the place of arbitration. Over time, however, doctrine and arbitral jurisprudence have consolidated and established that in international arbitration proceedings, the limitation period is governed by the law applicable to the subject matter of the dispute (lex causae or lex contract), irrespective of the mandatory provisions of the lex arbitri.[28]

Applied to the international commercial courts, this means that parties must be aware of the limitation rules of both the substantive and procedural jurisdictions. Furthermore, any future judgments of the international commercial courts on this topic will need to be reviewed. However, a certain degree of legal uncertainty will remain until this issue has been conclusively clarified.

Enforcement

One final important aspect in which the international commercial courts differ greatly from one another should be addressed—namely, the question of the countries and regions

[27] Brian Millar, Applicable Laws for Limitation Periods: Blurring Substantive and Procedural Lines in International Commercial Arbitration? (Part One), Kluwer Arbitration Blog, October 7, 2023, https://arbitrationblog.kluwerarbitration.com/2023/10/07/applicable-laws-for-limitation-periods-blurring-substantive-and-procedural-lines-in-international-commercial-arbitration-part-one/.

[28] Thiago Marinho Nunes, Statute of Limitations and International Arbitration, Comitê Brasileiro de Arbitragem (CBAr) Blog, https://cbar.org.br/site/statute-of-limitations-and-international-arbitration/.

in which the judgments of international commercial courts are effectively enforceable.

Since there is no reciprocal enforcement agreement comparable to the New York Convention for state courts, parties must identify which international treaties or regulations apply to the respective commercial court and which regions they cover for enforcement.

Between EU member states, the Regulation (EU) No. 1215/2012 on the Recognition and Enforcement of Judgments applies, meaning that court judgments from one member state are relatively straightforward to enforce in another EU member state. Under the 2007 Lugano Convention, a similar regime exists between the EU and Norway, Iceland, and Switzerland. EU member states are also party to the Hague Judgments Convention from 2019.

Asian and Middle Eastern commercial courts are, of course, not included in any EU Regulations. Instead, the Supreme Court of Singapore has entered into "Memoranda of Guidance" with seven courts in other jurisdictions (Bermuda, China, Myanmar, Rwanda, Qatar, Abu Dhabi, and Dubai) to facilitate the enforcement of money judgments and to set out the "mutual understanding."[29] Singapore has also ratified the Hague Choice of Court Convention from 2005, which recognizes but also requires an exclusive choice of court agreement between parties in the field of civil law. To ease the admittedly inconsistent and unpredictable enforcement mechanisms that SICC judgments face, the court recommends in its User Guide that the parties agree on a model SICC dispute resolution clause, including a waiver of "their right to defend against an action based on an SICC judgment in any jurisdiction."[30]

Kazakhstan, as the host state of the AIFC, has neither signed the Hague Choice of Court Convention nor the Hague Judgments

[29] SICC User Guide Note 7 Enforcement No. 12, Version May 2023, https://www.sicc.gov.sg/docs/default-source/legislation-rules-pd/2023-05-19-sicc-user-guides-(sicc-rules-2021)(irda-moratorium)(clean).pdf.

[30] SICC User Guide Note 7 Enforcement No. 14, Version May 2023, https://www.sicc.gov.sg/docs/default-source/legislation-rules-pd/2023-05-19-sicc-user-guides-(sicc-rules-2021)(irda-moratorium)(clean).pdf.

Convention. According to the AIFC Court website, the AIFC Court has "enforcement capabilities" under the Minsk and Kiev Conventions and other treaties entered into by Kazakhstan with Azerbaijan, China, Georgia, India, Kyrgyzstan, Uzbekistan, Lithuania, North Korea, Pakistan, Turkey, Turkmenistan, and the United Arab Emirates. The problem is, however, that Kazakhstan has expressly declared that the AIFC Courts are not part of the domestic judicial system of this country. This may mean that parties to AIFC Court proceedings cannot rely on the recognition treaties mentioned above because they are designated for Kazakh courts and the AIFC Court is not listed as a contracting party.[31] The AIFC website in fact also refers to agreements with "several other countries on a court-to-court reciprocity basis" but does not specify which courts or countries are involved. There is also no publicly available information on any proposed amendments to the existing international treaties or laws of Kazakhstan to address this issue.

The United Arab Emirates as the host state of the DIFC, is also neither part of the Hague Choice of Court Convention nor the Hague Judgments Convention. As opposed to the AIFC Court, however, mutual recognition is ensured through a range of bilateral agreements.[32] In this sense, the 1996 Gulf Co-operation Council Convention allows for reciprocal enforcement of judgments throughout Bahrain, Saudi Arabia, Oman, Qatar, Kuwait, and the United Arab Emirates. The 1983 Riyadh Arab Agreement for Judicial Cooperation adds 14 states to the list of countries providing mutual recognition to the DIFC Courts' judgments and allowing for enforcement if certain conditions are met. The United Arab Emirates is also a party to bilateral treaties; for example, the 1992 Convention on Judicial Assistance, Recognition and Enforcement of Judgments in Civil and Commercial matters with France. Enforcement difficulties out-

[31] Nicolás Álvaro Zambrana-Tévar, The Court of the Astana International Financial Center in the Wake of Its Predecessors, Erasmus Law Review, 1, 2019, p. 13.

[32] DIFC Courts Enforcement Guide, Edition 4, https://www.difccourts.ae/wp-content/uploads/2018/01/ENFORCEMENT-GUIDE-2016-AW.pdf, p. 6 et seq.

side the Middle East region have been further mitigated to some extent by memoranda signed with the competent courts of other countries (e.g., with the UK Commercial Court, the U.S. District Court for the Southern District of New York, the Supreme Court of Singapore, and the Australia Federal Court).

This creates the overall impression that judgments of the international commercial courts can primarily be enforced in their geopolitical region. Recognition and enforcement of judgments beyond this cannot be unconditionally guaranteed. With regard to selecting the right commercial court, it is therefore recommended to carefully consider the region across which an enforcement measure can be carried out if necessary before entering into proceedings or even before the legal disputes arises.

Conclusion

This article has set out specific criteria to help parties in an international commercial dispute decide whether arbitration or commercial litigation is more appropriate to resolve their dispute. Both resolution methods provide different solutions for different aspects of a commercial dispute. It is therefore not useful to ask which of the two methods is the "best."

The second finding—albeit unsurprisingly—is that there is no "one size fits all" solution in the sense that there is a definitive criterion for deciding which type of dispute resolution is suitable for a legal dispute. In fact, there are many criteria that co-determine the decision and this paper has identified some of these criteria and analysed them with regard to their characteristics in arbitration law, on the one hand, and the commercial courts, on the other.

However, the balancing of these criteria must remain the responsibility of the parties, as such assessment cannot be carried out in theory, but must take into account the specific interests and risks of each case. Counsels have a particularly important role to play in this, as it is their task, to determine together with their clients what interests are at stake in order to then analyse which dispute resolution method best serves these interests. For example, if parties place a greater emphasis on the ability

to enforce a decision in as many jurisdictions as possible, they will be attracted by the potential for universal enforcement offered by the New York Convention and are most likely going to choose arbitration as their dispute resolution method. However, enforcement—while of obvious importance—is not the sole factor dictating the choice of forum. For example, if the parties prioritise the possibility of having access to the appellate courts, an international commercial court would probably be the better option for them.

In terms of the differences between the international commercial courts addressed here, the fundamental choice will likely be between a common law commercial court and a civil law court. There is no definitive ranking of commercial courts that this article could offer as a result. Rather, it will depend primarily on the substantive law applicable to the dispute and the ability or experience of the court to apply it.

In addition, the individual commercial court rules contain a number of procedural options for the parties, particularly in relation to evidence, of which they should be aware. Of particular importance is whether the commercial courts offer promising enforcement opportunities abroad. It has been found that, with a few exceptions, commercial court judgments are most successfully enforced in their own region.

It is no news that deciding on the right method of dispute resolution requires a high degree of foresight, experience, and awareness on the part of the advising lawyers as to the nature and type of dispute that may arise after the contract has been concluded. This is certainly not an easy task, but one to which this article has hopefully contributed.