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**How to Attract Cross-Border Litigation to Germany by Establishing
International Commercial Courts**

Lessons from a Comparative Analysis of the International Commercial
Courts in London, Singapore, and Amsterdam

Author:
Felix Müller

Supervisor:
Michelle Glassman Bock

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Abstract

Over the last ten years, a trend of setting up international commercial courts (ICCs¹) has gathered pace in various regions of the world. These courts are no genuine international tribunals. Instead, they constitute state courts specializing in cross-border commercial litigation and form an integral part of the national judicial architecture. By bringing together virtues of both traditional court litigation and private arbitration, the phenomenon has the potential to shake up the global market for international dispute resolution. In a recent bill for a ‘Justizstandort-Stärkungsgesetz’ (*Justice Location Strengthening Act*), the German federal government has proposed the introduction of a new type of commercial court at the higher regional court level. With this initiative, the government attempts to tap into this market and to strengthen the position of the German judiciary in its competition with arbitration and foreign courts. However, this thesis arrives at the conclusion that the proposed framework falls short of the standards established at successful international competitors. Pitfalls inherent to the bill threaten to obstruct the chances for German commercial courts to become international litigation hubs from the outset. By means of a comparative analysis of the ICCs in London, Singapore and Amsterdam, this paper identifies success factors and standards present in established courts in jurisdictions outside Germany. It argues that the country has a strong interest in coping with these standards and discusses how this can be achieved. Key recommendations include the removal of language barriers, a comprehensive modernization and internationalization of substantive and procedural law, as well as measures to ensure the growth of the newly founded courts to national champions.

¹ To avoid any misunderstandings, it should be noted that the *International Chamber of Commerce*, a non-state international organization based in Paris, which, among other things, acts as an arbitration forum, is usually abbreviated as ICC, too. The abbreviation is also used for the *International Criminal Court* in The Hague. In this thesis, however, the abbreviation is used to refer to a specific type of state court, for which the term *international commercial court* has recently become established.

“Litigation has become a product offered by the states to the whole world.”²

Arnaud Nuyts,
advocate and professor at the ULB

² As formulated in a lecture in October 2023 on *International Litigation and Arbitration* to the students of the LL.M. program in *International Business Law*, which inspired the author to write this thesis.

Note: Upon prior request by the author, Prof. Nuyts confirmed the correct reproduction of his statement and consented to its citation in this thesis on May 02, 2024.

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List of abbreviations

ADGM	Abu Dhabi Global Market
ADR	Alternative Dispute Resolution
AIFC	Astana International Financial Centre
Art.	Article
BGH	Bundesgerichtshof (<i>German Federal Court of Justice</i>)
BIBC	Brussels International Business Court
BGB	Bürgerliches Gesetzbuch (<i>German Civil Code</i>)
BGBI.	Bundesgesetzblatt (<i>Federal Law Gazette</i>)
BRAO	Bundesrechtsanwaltsordnung (<i>German Federal Code for Lawyers</i>)
BT-Drs.	Bundestagsdrucksache (<i>Official publication of the German Bundestag</i>)
B2B	Business-to-business
Cf.	Confer
CFR	Charter of Fundamental Rights of the European Union
CICC	China International Commercial Court
CPR	English Civil Procedure Rules
DIFC	Dubai International Financial Centre
DIS	Deutsche Institution für Schiedsgerichtsbarkeit (<i>German Arbitration Institute</i>)
DRiG	Deutsches Richtergesetz (<i>German Judiciary Act</i>)
EC	European Community
ECHR	European Convention on Human Rights
Ed.	Edition
Eds.	Editors
EEA	European Economic Area
EFTA	European Free Trade Association
E.g.	Exempli gratia
EuRAG	Gesetz über die Tätigkeit europäischer Rechtsanwälte in Deutschland (<i>Act on the Practice of European Lawyers in Germany</i>)
Et seq(q).	Et sequitur (sequentes)
GCC	Gulf Cooperation Council
GG	Grundgesetz für die Bundesrepublik Deutschland (<i>Basic Law for the Federal Republic of Germany</i>)

GTC	General Terms and Conditions
GVG	Gerichtsverfassungsgesetz (<i>German Courts Constitution Act</i>)
HCCH	Hague Conference on Private International Law
ICC(s)	International commercial court(s)
i.e.	Id est
IHK	Industrie- und Handelskammer (<i>Chamber of Industry and Commerce</i>)
JLSA	Justice Location Strengthening Act
LCC	London Commercial Court (The Commercial Court of England & Wales)
LCIA	London Court of International Arbitration
LMAA	London Maritime Arbitration Association
M&A	Mergers and Acquisitions
NCC	Netherlands Commercial Court
No	Number
NYCD	Commercial Division of the New York Supreme Court
OJ	Official Journal of the European Union/European Community
p(p).	Page(s)
QIC	Qatar International Court
SIAC	Singapore International Arbitration Center
SICC	Singapore International Commercial Court
SIMC	Singapore International Mediation Center
SME	Small and medium-sized enterprises
Stb.	Staatsblad van het Koninkrijk der Nederlanden (<i>Law Gazette of the Kingdom of the Netherlands</i>)
ULB	Université Libre de Bruxelles
UNCITRAL	United Nations Commission on International Trade Law
Vol.	Volume
ZPO	Zivilprozessordnung (<i>German Code of Civil Procedure</i>)

A. Introduction

Germany's judiciary has lost touch with foreign courts and private arbitration in the competition for the settlement of international commercial disputes. At least this is how the explanatory memorandum to the bill for a 'Justizstandort-Stärkungsgesetz' (*Justice Location Strengthening Act*) reads, which was debated in the Bundestag at first reading in October 2023.³ And indeed, this assessment corresponds to the fact that the number of proceedings brought before the commercial chambers at the regional courts fell by around 50% between 2005 and 2019.⁴ At the same time, an increase in the number of arbitration proceedings involving one or more German parties could be observed.⁵ While the growing popularity of arbitration is certainly not solely responsible for the declining caseload of German courts, it nevertheless exerts a disproportionate attraction for sophisticated commercial disputes with high amounts in controversy.⁶

Simultaneously, there is another phenomenon looming, which could have the potential to disrupt the international dispute resolution market once again. So-called *international commercial courts* (ICCs) have been experiencing a "rapid global rise"⁷. Likewise, at the heart of the JLSA bill is, alongside the admission of English-language proceedings, the authorization of the German federal state governments to set up ICCs at the higher regional courts.⁸ Underlying rationale is to provide an "attractive overall package"⁹ to businesses, especially to export-oriented domestic companies, in order to convince them to submit their disputes to the jurisdiction of German courts.¹⁰ From a comparative law perspective, the bill does not stand alone, but rather forms part of a series of measures related to the internationalization of state court litigation.

The objective of this thesis is to examine the international competitiveness of the JLSA bill and to work out recommendations for remedying its shortcomings. After a classification of ICCs within the system of cross-border dispute resolution (part B), the paper demonstrates how the proposed framework falls short of the standards established at both leading and aspiring ICCs outside of Germany (part C). Based on these findings, it provides concrete recommendations for amendments to the JLSA bill and for the implementation of comprehensive legal policy measures to make up for the country's current backlog (part D). Finally, the key insights of this thesis are summarized in a conclusion (part E).

³ Cf. BT-Drs. 20/8649, p. 1.

⁴ Cf. Ekert et al., Rückgang der Eingangszahlen bei den Zivilgerichten, pp. 52, 359.

⁵ Cf. Ekert et al., Rückgang der Eingangszahlen bei den Zivilgerichten, pp. 247 et seqq., 316 et seq.

⁶ Cf. Ekert et al., Rückgang der Eingangszahlen bei den Zivilgerichten, pp. 317, 341.

⁷ *Gu/Tam*, Chic. J. Int'l L. 2021, 443 (445).

⁸ Cf. BT-Drs. 20/8649, pp. 1 et seq.

⁹ BT-Drs. 20/8649, p. 1 [translated from German by the author].

¹⁰ Cf. BT-Drs. 20/8649, p. 1.

B. Emergence of ICCs within the system of international dispute resolution

As with any other business, companies engaged in cross-border commercial transactions will, at times, require a definitive and binding dispute resolution mechanism. Compared to companies which are solely active on one domestic market, the transnational nature of the operations makes them much more complex, though. A single transaction, let alone a comprehensive business relationship with foreign-based companies, can be linked to a multitude of jurisdictions and legal systems. Thus, the way that a disputed case will take is far from being mapped out.

The disputants may utilize a plethora of ADR tools attempting to avoid extensive court or arbitration proceedings, including simple negotiations, mediation, conciliation, neutral evaluation, expert determination, mini-trials, or pendulum arbitration.¹¹ Yet when the parties seek for a binding ruling, the available options essentially narrow down to either bringing the case before a state court or before a private arbitral tribunal.¹² Hence, the realms of state court litigation on the one hand, and arbitration on the other, constitute “the two key forms of international commercial dispute resolution”¹³.

I. Traditional distinction between commercial litigation and commercial arbitration

Arbitration is commonly understood as “a process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, who renders a binding decision finally resolving that dispute in accordance with neutral, adjudicative procedures affording the parties an opportunity to be heard”¹⁴. Unlike the international jurisdiction of state courts¹⁵, the jurisdiction of an arbitral tribunal only derives from an agreement between the parties and not already by law.¹⁶

As a “creature of contract”¹⁷, the entire process of an arbitration is shaped by the parties’ private autonomy.¹⁸ The parties can freely select the arbitrators, the seat of the tribunal and the language of the proceedings.¹⁹ In larger arbitrations, disputants usually appoint a three-member tribunal, whereby each party selects one of two arbitrators, who then choose the third together.²⁰ The parties can submit the arbitration to the procedural rules and supervision of an arbitration

¹¹ Cf. *Born*, Int. Arb., pp. 5 et seqq.; *Moses*, Int. Comm. Arb., pp. 16 et seqq.

¹² Cf. *Moses*, Int. Comm. Arb., p. 16.

¹³ *Tiba*, Loy. U. Chi. Int’l L. Rev. 2016, 31 (34).

¹⁴ *Born*, Int. Arb., p. 2.

¹⁵ Cf. *Schütze*, Rechtsverfolgung im Ausland, pp. 49 et seqq.

¹⁶ Cf. *Movsesian*, Duke J. Comp. & Int’l L. 2008, 423 (424); see also Art. II of the New York Convention and Art. 7 of the UNCITRAL Model Law.

¹⁷ Cf. *Born*, Int. Arb., p. 299; *Cordero-Moss*, Int. Comm. Contracts, p. 201.

¹⁸ Cf. *Moses*, Int. Comm. Arb., p. 1.

¹⁹ Cf. *Moses*, Int. Comm. Arb., p. 1.

²⁰ Cf. *Born*, Int. Arb., pp. 148 et seq.

institution (*institutional arbitration*) or to an individual agreement only (*ad hoc arbitration*), complemented by national arbitration legislation.²¹ Naturally, the parties can also determine the substantive law which shall govern their legal relationship.²²

Upon conclusion of the proceedings, the tribunal issues a definitive arbitral award, which has binding force for the parties.²³ In contrast to court proceedings, arbitration is generally structured as a single-stage process, i.e. there is generally no appeal to a second instance.²⁴ For a limited number of reasons, though, a party may request the nullification of an award in setting aside proceedings before the supervisory court at the seat of the tribunal.²⁵ The grounds for a setting aside are generally restricted to procedural errors²⁶, excluding in principle any review of the merits of the case²⁷.

By way of an application to a court in a country where the winning party wishes to enforce an award, it can enable the coercive satisfaction of its claim (so-called *exequatur*²⁸).²⁹ In international cases, this procedure is significantly facilitated by the New York Convention, which obliges more than 170 contracting states³⁰ to recognize and enforce foreign awards in their territory.³¹ The convention allows for a refusal of recognition and enforcement solely for few procedural and public policy reasons.³²

For state courts, on the other hand, jurisdiction can originate from two different sources. Every state can freely stipulate the international jurisdiction of its courts for any dispute, which entails a “genuine link”³³ to the forum, i.e., at least a minimum nexus.³⁴ In addition, as an implication of private autonomy, parties may designate a court in a choice-of-court agreement to have jurisdiction over their disputes.³⁵

²¹ Cf. *Born*, Int. Arb., pp. 28 et seq.

²² Cf. *Born*, Int. Comm. Arb., § 19.04[A].

²³ Cf. *Moses*, Int. Comm. Arb., p. 2.

²⁴ Cf. *Moses*, Int. Comm. Arb., p. 2.

²⁵ Cf. *Moses*, Int. Comm. Arb., p. 216.

²⁶ See for instance Art. 34 of the UNCITRAL Model Law.

²⁷ Cf. *Moses*, Int. Comm. Arb., p. 3.

²⁸ *Born*, Int. Arb., p. 332.

²⁹ Cf. *Moses*, Int. Comm. Arb., p. 3.

³⁰ Cf. *Frisby*, Do international commercial courts compete with international arbitration?.

³¹ Cf. *Lobach*, IWRZ 2017, 256 (257).

³² Cf. Art. V of the New York Convention.

³³ *Schütze*, Rechtsverfolgung im Ausland, p. 52.

³⁴ Cf. *Schütze*, Rechtsverfolgung im Ausland, p. 52.

³⁵ Cf. *Illmer*, CoC Agreements.

As a universal principle, any court before which a case is brought will conduct the proceedings according to the local procedural laws.³⁶ This “*lex fori* rule”³⁷ derives from the sovereignty of the states and is not subject to any deviating party agreement.³⁸ Contrariwise, with regard to the substantive law that governs a dispute, it is entirely possible that a court applies the statutes of another jurisdiction in accordance with the private international law of the forum.³⁹ In most legal systems, these rules allow the parties to contractually determine the substantive law.⁴⁰

With respect to the recognition and enforcement of foreign judgments, there is a handful of multilateral instruments established on the international level. The 2005 Hague Convention applies to judgments by courts which were selected in an exclusive jurisdiction agreement.⁴¹ Yet the number of contracting states is relatively limited and important jurisdictions like China, Israel, or the USA have only signed but not yet ratified the convention.⁴² Even smaller is the circle of countries where the 2019 Hague Convention applies, which entered into force in 2023, with effect solely for the member states of the EU and for Ukraine.⁴³ It attempts to complement the Hague system of mutual recognition and enforcement⁴⁴ and covers all judgments in civil and commercial matters, irrespective of the existence of a jurisdiction agreement⁴⁵. Besides the 2005 Hague Convention, comprehensive treaty frameworks only apply in EU and EFTA member states with the Brussels I *bis* Regulation and the Lugano Convention⁴⁶, and, by virtue of the GCC Convention for the Execution of Judgments in the Gulf region⁴⁷.

In the absence of an applicable multilateral or bilateral treaty, the question of recognition and enforceability will be governed by the law of the state where a creditor intends to enforce a claim.⁴⁸ The difficulties in enforcing court judgments have led Dubai to introduce an automatism for the transformation of judgments of the local commercial court into arbitral awards in order to benefit from the more favorable regimen of the New York Convention.⁴⁹

³⁶ Cf. Dolinger/Tiburcio, Tex. Int'l L. J. 1998, 425 (428 et seq.).

³⁷ Dolinger/Tiburcio, Tex. Int'l L. J. 1998, 425 (429).

³⁸ Cf. Dolinger/Tiburcio, Tex. Int'l L. J. 1998, 425 (428 et seq.).

³⁹ Cf. Dolinger/Tiburcio, Tex. Int'l L. J. 1998, 425 (428).

⁴⁰ Cf. Cordero-Moss, Int. Comm. Contracts, pp. 214 et seq.

⁴¹ Cf. Art. 8(1) phrase 1 of the 2005 Hague Convention.

⁴² See website of the HCCH, available from <https://www.hcch.net/en/instruments/conventions/status-table/print/?cid=98> (last accessed May 15, 2024).

⁴³ Cf. Adams, Hague Judgments Convention; Cordero-Moss, Int. Comm. Contracts, p. 205.

⁴⁴ Cf. Preamble of the 2019 Hague Convention.

⁴⁵ Cf. Blair, IJPL 2019, 212 (229).

⁴⁶ Cf. Lobach, IWRZ 2017, 256 (257).

⁴⁷ Cf. Blair, IJPL 2019, 212 (229).

⁴⁸ Cf. Blair, IJPL 2019, 212 (229).

⁴⁹ Cf. Bookman/Erie, AJIL Unbound 2021, 5 (8).

II. Arbitration as the preferred mode of international commercial dispute resolution

In recent decades, arbitration has ascended to become the favored forum for dispute settlement for internationally operating businesses.⁵⁰ Probably the most important driver in this development has been the dense network of arbitration-friendly legislation and multilateral instruments, notably the New York Convention, resulting in a high level of international recognition and enforceability of arbitral awards and agreements.⁵¹ Moreover, the parties value the benefit of tailoring the procedure to align with their preferences and needs.⁵² This particularly concerns the ability to choose arbitrators who they consider to be most qualified to bring the dispute to an appropriate resolution⁵³, the procedural adaptability and the option to apply a stricter regime of confidentiality rules⁵⁴. While litigation in most countries is governed by a maxim of publicity, arbitration is generally not public.⁵⁵ Furthermore, arbitral tribunals are often perceived as more neutral fora than courts of the parties' own countries or than courts in general.⁵⁶

Nonetheless, the fact that the duration and cost of arbitration have soared recently has been criticized⁵⁷, as well as the fact that arbitration suffers from deficiencies that would not exist in litigation⁵⁸. The absence of an appellate mechanism can become a problem where an award is issued in error of fact or substantive law.⁵⁹ As an arbitral tribunal is, unlike a court, a private adjudication body created by agreement, it lacks authority over anyone who is not a party to the agreement.⁶⁰ Neither is the tribunal legitimated to use coercion to sanction disputants who fail to abide by its instructions.⁶¹

III. Emergence of ICCs as state courts with arbitration-like character

Some of the recent ICCs are deliberately designed to fill the gap left by the deficiencies of arbitration.⁶² There is no established, clear definition for ICCs.⁶³ In general terms, they may be described as “specialized tribunals within the domestic court hierarchy tailored for the

⁵⁰ Cf. *Antonopoulou*, J. Int'l Disp. Settlement 2023, 328 (329); *Demeter/Smith*, J. Int'l Arb. 2016, 441 (446); *Moses*, Int. Comm. Arb., p. 1; *Movsesian*, Duke J. Comp. & Int'l L. 2008, 423; *Tiba*, Loy. U. Chi. Int'l L. Rev. 2016, 31 (34 et seq.); *Wilske*, Contemp. Asia Arb. J. 2018, 153 (155).

⁵¹ Cf. *Born*, Int. Arb., p. 12; *Lobach*, IWRZ 2017, 256 (257).

⁵² Cf. *Lobach*, IWRZ 2017, 256 (257).

⁵³ Cf. *Moses*, Int. Comm. Arb., pp. 2, 4.

⁵⁴ Cf. *Groh/Reichert*, NZG 2023, 1007 (1010); *Lobach*, IWRZ 2017, 256 (257).

⁵⁵ Cf. *Domhan*, IpS, pp. 99 et seqq.

⁵⁶ Cf. *Moses*, Int. Comm. Arb., pp. 1 et seq.

⁵⁷ Cf. *Demeter/Smith*, J. Int'l Arb. 2016, 441 (443); *Gernandt*, Contemp. Asia Arb. J. 2010, 199 (208); *Moses*, Int. Comm. Arb., p. 4; *Slate*, Contemp. Asia Arb. J. 2010, 182 (186 et seq.).

⁵⁸ Cf. *Antonopoulou*, J. Int'l Disp. Settlement 2023, 328 (333).

⁵⁹ Cf. *Moses*, Int. Comm. Arb., p. 5.

⁶⁰ Cf. *Moses*, Int. Comm. Arb., p. 5.

⁶¹ Cf. *Crook/Stamboulakis*, ELR 2019, 98 (99); *Moses*, Int. Comm. Arb., p. 5.

⁶² Cf. *Demeter/Smith*, J. Int'l Arb. 2016, 441 (444).

⁶³ Cf. *Reyes*, J. Int'l & Comp. L. 2015, 337 (338).

adjudication of complicated cross-border commercial disputes”⁶⁴. Frequently, such courts are intended to adjudicate in disputes with no nexus to the forum state except for a choice-of-court agreement.⁶⁵ The emergence of ICCs challenges „assumptions that litigation and arbitration are starkly contrasting modes of dispute resolution“⁶⁶. Bringing together virtues of both categories⁶⁷, the development has led to an “arbitralization”⁶⁸ of court proceedings.

1. Accelerating global trend of establishing ICCs

To date, a total of thirteen ICCs has been established around the globe which have achieved international relevance.⁶⁹ Already in 1895, the LCC in London was created as a purely domestic court, but subsequently became extraordinarily successful in attracting foreign litigation.⁷⁰ It served as a blueprint for the foundation of most of the newer ICCs.⁷¹

This was followed by the establishment of the NYCD in New York (1995), the DIFC Courts in Dubai (2006), the QIC in Qatar (2010), the SICC in Singapore (2015), the ADGM in Abu Dhabi (2015), the AIFC in Kazakhstan (2017), the CICC in China (2018), the NCC in the Netherlands (2019) and of commercial chambers at courts in Paris (2018) and in three German cities: Stuttgart (2015), Mannheim (2015) and Frankfurt (2018).⁷² In 2019, the Belgian government withdrew a bill to set up a BIBC in Brussels after the bill had lost backing in parliament.⁷³

The idea of creating courts or chambers specialized in international commercial disputes has lately been implemented or at least contemplated in various other jurisdictions, e.g., in India⁷⁴, South Korea⁷⁵, Saudi-Arabia⁷⁶, and Switzerland⁷⁷. Against this backdrop, the development has, rightly, been referred to as a global “surge”⁷⁸, “mushrooming”⁷⁹, or “proliferation”⁸⁰ of ICCs. As the enumeration of court formations demonstrates, the trend has accelerated in the last decade and is particularly noticeable in Asia, Europe, the Middle East, and North America.⁸¹

⁶⁴ *Gu/Tam*, Chic. J. Int’l L. 2021, 443 (445).

⁶⁵ Cf. *Reyes*, J. Int’l & Comp. L. 2015, 337 (338).

⁶⁶ *Bookman*, Yale J. Int’l L. 2020, 227 (275).

⁶⁷ Cf. *Domhan*, JI 2021, 49.

⁶⁸ *Antonopoulou*, J. Int’l Disp. Settlement 2023, 328; *Gu/Tam*, Chic. J. Int’l L. 2021, 443 (488).

⁶⁹ Cf. *Gu/Tam*, Chic. J. Int’l L. 2021, 443 (447).

⁷⁰ Cf. *Blair/Knowles*, ABL 2020, 15 (17 et seq.); *Wilske*, Contemp. Asia Arb. J. 2018, 153 (160).

⁷¹ Cf. *Grohmann*, IdH, p. 289.

⁷² Cf. *Gu/Tam*, Chic. J. Int’l L. 2021, 443 (448).

⁷³ Cf. *Price*, Problems for the BIBC.

⁷⁴ Cf. *Ashraful/Garimella*, ELR 2019, 111 (112 et seq.).

⁷⁵ Cf. *Blair/Knowles*, ABL 2020, 15 (16, 21).

⁷⁶ Cf. *Balouziyeh*, Judicial Reform in Saudi Arabia.

⁷⁷ Cf. *Baechler/Pfisterer*, Introduction of ICCs in Switzerland.

⁷⁸ *Wilske*, Contemp. Asia Arb. J. 2018, 153 (156).

⁷⁹ *Kramer/Sorabji*, ELR 2019, 1.

⁸⁰ *Bookman*, Yale J. Int’l L. 2020, 227 (230); *Rühl*, AJIL Unbound 2021, 11.

⁸¹ Cf. *Gu/Tam*, Chic. J. Int’l L. 2021, 443 (448).

There is a wide range of reasons for this movement, which vary greatly from one jurisdiction to another. European ICCs are typically designed to recapture lost market share in the dispute resolution market, whereas those in Asia and the Middle East aspire to coexist and to complement with arbitration.⁸² Some courts serve a rather external purpose, such as those in Qatar and Dubai, which are intended to encourage investment in the region.⁸³ Another example is China's CICC, which mainly aims at supporting the Belt and Road Initiative by offering comprehensive dispute settlement solutions for all legal issues occurring in this context.⁸⁴

Other ICCs, though, have been set up for the explicit purpose of hosting international commercial disputes⁸⁵ and will therefore be of particular interest for this thesis. Courts that fall in this category endeavor “to become gold-standards and go-to forums”⁸⁶ in this field. In continental Europe, these ambitions were fueled even more by Brexit and the consequent opportunity to take share of the European cross-border litigation market from a weakened LCC in London.⁸⁷

2. Common features

Even though the expression might suggest otherwise, ICCs are national courts.⁸⁸ Their designation as *international* stems from the orientation of their judiciary services.⁸⁹ Put differently, ICCs are national courts with an “international dimension”⁹⁰. By specializing in international commercial litigation, they complement the domestic court system.⁹¹ In response to companies' reservations towards court litigation, ICCs offer a flexible, innovatory, and economical approach to dispute resolution that lies between traditional litigation and arbitration.⁹² Usually, their “subject matter jurisdiction is limited to, or focuses on, international commercial disputes”⁹³. Some of the host countries also permit an internationalization of the bench, appointing foreign judges or at least national judges with a particular international expertise.⁹⁴

In comparison to traditional court proceedings, more weight is given to the party autonomy.⁹⁵ When ICCs apply foreign substantive law, e.g., by virtue of a choice-of-law agreement, the

⁸² Cf. *Antonopoulou*, J. Int'l Disp. Settlement 2023, 328 (330 et seq.).

⁸³ Cf. *Bookman*, Yale J. Int'l L. 2020, 227 (239); *Theus*, Eur. Yearbook Int'l Econ. L. 2021, 275 (293 et seq.).

⁸⁴ Cf. *Antonopoulou/Kramer*, Commercialising Litigation, p. 2; *Bookman*, Yale J. Int'l L. 2020, 227 (239).

⁸⁵ Cf. *Bookman*, Yale J. Int'l L. 2020, 227 (239).

⁸⁶ *Bookman*, Yale J. Int'l L. 2020, 227 (239).

⁸⁷ Cf. *Bauw*, ELR 2019, 15; *Kramer/Sorabji*, ELR 2019, 1 (2 et seq.); *Rühl*, Towards a European Commercial Court?; *Wilske*, Contemp. Asia Arb. J. 2018, 153 (156).

⁸⁸ Cf. *Domhan*, JI 2021, 49; *Wilske*, Contemp. Asia Arb. J. 2018, 153 (157).

⁸⁹ Cf. *Bookman*, Yale J. Int'l L. 2020, 227 (229).

⁹⁰ *Wilske*, Contemp. Asia Arb. J. 2018, 153 (157).

⁹¹ Cf. *Bookman*, Yale J. Int'l L. 2020, 227 (229).

⁹² Cf. *Bookman*, Yale J. Int'l L. 2020, 227 (229).

⁹³ *Bookman*, Yale J. Int'l L. 2020, 227 (229).

⁹⁴ Cf. *Wilske*, Contemp. Asia Arb. J. 2018, 153 (157 et seq.).

⁹⁵ Cf. *Wilske*, Contemp. Asia Arb. J. 2018, 153 (158).

necessity to prove the contents of the foreign law in an evidentiary procedure is often waived.⁹⁶ However, when it comes to choose the rules of procedure, the parties are less free than in arbitration.⁹⁷ Proceedings conducted by arbitral tribunals are governed by the rules agreed upon by the parties, limited only by a handful of mandatory rules of the *lex arbitri*.⁹⁸ Conversely, ICC proceedings follow the rules of the *lex fori*, which in some jurisdictions allow selected exceptions⁹⁹, such as the deviation from the domestic evidence laws on the basis of a party agreement.¹⁰⁰ The rules for party representation by foreign lawyers are often more permissive than for purely domestic litigation.¹⁰¹ In contrast to arbitration, the parties are usually not entitled to select the individual judges who will be responsible for their proceedings.¹⁰²

Most ICCs enable proceedings, completely or partly, to be held in English.¹⁰³ Because the proceedings are usually open to the public, they do not offer the same level of confidentiality as arbitration.¹⁰⁴ On the other hand, the fact that courts, unlike arbitral tribunals, usually publish their judgments contributes to a reliable body of case law.¹⁰⁵ Decisions rendered by ICCs are regularly subject to an appeal on the merits before a second-level court.¹⁰⁶ In some jurisdictions, the parties can contractually exclude the right to appeal, though.¹⁰⁷

3. Underdeveloped ICCs under current German legislation

A first wave of ICCs has been established in Germany as well. However, compared to the global developments, they are still in an underdeveloped stage.

a) Commercial chambers as German answer to the global rise of ICCs

With some exceptions, in Germany regional courts are assigned first-level jurisdiction over all civil claims if the value in dispute exceeds €5,000.¹⁰⁸ At these courts, the federal state governments can set up commercial chambers.¹⁰⁹ Once such a chamber is established, it assumes jurisdiction over commercial cases if the plaintiff brings the claim before it, or before a general civil chamber of the regional court provided that the defendant requests remittal.¹¹⁰

⁹⁶ Cf. *Clover-Alcolea*, J. Int'l Disp. Settlement 2022, 413 (415); *Demeter/Smith*, J. Int'l Arb. 2016, 441 (446).

⁹⁷ Cf. *Demeter/Smith*, J. Int'l Arb. 2016, 441 (446).

⁹⁸ Cf. *Demeter/Smith*, J. Int'l Arb. 2016, 441 (446).

⁹⁹ Cf. *Demeter/Smith*, J. Int'l Arb. 2016, 441 (446).

¹⁰⁰ Cf. *Antonopoulou*, J. Int'l Disp. Settlement 2023, 328 (334).

¹⁰¹ Cf. *Clover-Alcolea*, J. Int'l Disp. Settlement 2022, 413 (415); *Wilske*, Contemp. Asia Arb. J. 2018, 153 (158).

¹⁰² Cf. *Demeter/Smith*, J. Int'l Arb. 2016, 441 (446).

¹⁰³ Cf. *Clover-Alcolea*, J. Int'l Disp. Settlement 2022, 413 (415); *Kramer/Sorabji*, ELR 2019, 1 (7).

¹⁰⁴ Cf. *Wilske*, Contemp. Asia Arb. J. 2018, 153 (158 et seq.).

¹⁰⁵ Cf. *Wilske*, Contemp. Asia Arb. J. 2018, 153 (158).

¹⁰⁶ Cf. *Wilske*, Contemp. Asia Arb. J. 2018, 153 (159).

¹⁰⁷ Cf. *Antonopoulou*, J. Int'l Disp. Settlement 2023, 328 (334).

¹⁰⁸ Cf. §§ 23 No 1, 70(1) of the GVG.

¹⁰⁹ Cf. § 93 of the GVG.

¹¹⁰ Cf. §§ 94, 95, 96(1), 98(1) phrase 1, 100 of the GVG.

Commercial chambers are composed of a professional judge and two honorary judges with special expertise in commercial matters, which they are expected to bring to bear in their adjudication practice.¹¹¹ Any German citizen over the age of thirty who is or was entered in the commercial register as a merchant, member of a board of management, managing director or officer with statutory authority is eligible to be appointed as an honorary judge.¹¹² A law degree is not required.

After the first introduction of commercial chambers in 1897, the according legal provisions have not been amended in a significant manner.¹¹³ Hence, doubts have been expressed as to whether the commercial chambers still are a suitable dispute resolution forum for domestic cases, let alone for international proceedings.¹¹⁴ The skepticism towards these chambers is reflected in the dramatic drop of case numbers, which was mentioned in the introduction. Moreover, less than 3% of the parties in regional court litigation are non-German, and an even lower proportion must be assumed for the commercial chambers.¹¹⁵

While the wide absence of foreign litigants before German courts certainly results from different shortcomings of the German judiciary system, several federal states have recently attempted to remedy at least one: the language barrier. In 2010, the Higher Regional Court of Cologne (and the regional courts in Aachen, Bonn, and Cologne¹¹⁶) introduced the possibility to conduct oral proceedings in English.¹¹⁷ Written pleadings, though, still had to be submitted in German language, thwarting the initiative to a large extent.¹¹⁸ As a consequence, only two claims were filed under this framework in the first two years after the project was launched.¹¹⁹

And then there are the three courts, or more precisely commercial chambers, that are referred to as ICCs in comparative law analyses.¹²⁰ In 2018, a chamber was established at the regional court in Frankfurt, where the described language rules apply and which is, in addition, specifically dedicated to international commercial dispute resolution.¹²¹ The regional courts in Hamburg, Mannheim and Stuttgart followed suit in 2018 and 2020.¹²² The latter two chambers

¹¹¹ Cf. §§ 105 et seqq. of the GVG; *Domhan*, IpS, pp. 32 et seq.

¹¹² Cf. § 109 (1) of the GVG.

¹¹³ Cf. *Grohmann*, IdH, p. 15.

¹¹⁴ Cf. *Domhan*, IpS, pp. 33 et seq.; *Grohmann*, IdH, p. 15.

¹¹⁵ Cf. *Grohmann*, IdH, p. 16.

¹¹⁶ Cf. *Boerner/Hess*, ELR 2019, 33 (34).

¹¹⁷ Cf. *Hilgard/Siebold*, BLM 01/2018, 16.

¹¹⁸ Cf. *Hilgard/Siebold*, BLM 01/2018, 16.

¹¹⁹ Cf. *Kern*, ELR 2012, 187 (199).

¹²⁰ Cf. *Gu/Tam*, Chic. J. Int'l L. 2021, 443 (448).

¹²¹ Cf. *Bookman*, Yale J. Int'l L. 2020, 227 (255).

¹²² Cf. *Rühl*, AJIL Unbound 2021, 11 (12 et seq.).

market themselves on their website as 'The Commercial Court' and as a leading destination for international commercial litigation.¹²³ Notwithstanding this branding, in terms of their legal status these chambers are regular commercial chambers.¹²⁴ The courts deploy judges with a particular proficiency in English as well as commercial law to reside over international cases with large amounts in dispute.¹²⁵

So far, this is the state of development of ICCs in Germany¹²⁶: a handful of commercial chambers has been set up by several federal states. Albeit the chambers are presided by specialized professional judges and businessmen as lay judges and (partially) allow the use of the English language, the underlying regulatory regime has not substantially changed since the 19th century.

b) Limited margin for maneuver under the current legal framework

As a glance at the present legal situation shows, German procedural and judicial laws hinder the creation of courts that can cope with the standards present at international competitors.

In Germany's federal system, the responsibility for the judiciary generally lies with the federal states.¹²⁷ Their monopoly for the formation and administration of courts only ends where the German constitution expressly enables a federal court.¹²⁸ Such authorizations primarily exist for supreme courts for each judicial branch and for a constitutional court.¹²⁹ The power to establish ICCs hence in principle remains with the states. As multiple state legislators are involved, there is no uniform regulation, but rather a patchwork of different models, some of which only allow English as an additional court language and others conglomerate a particular subject-specific expertise.¹³⁰

However, the leeway of the federal states to configure courts and procedural rules is significantly limited by the federal constitution, too. These matters are subject to the concurrent legislation.¹³¹ That means that the legislative power of the states is precluded insofar as the federal level has made conclusive use of it¹³², which, to a large extent is the case for court constitution and procedural law¹³³. Only a few details are left to the states' discretion.¹³⁴

¹²³ Available from <https://www.commercial-court.de> (last accessed May 15, 2024).

¹²⁴ Cf. Rühl, AJIL Unbound 2021, 11 (13).

¹²⁵ Cf. Rühl, AJIL Unbound 2021, 11 (13).

¹²⁶ Cf. Riehm/Thomas, NJW 2022, 1725.

¹²⁷ Cf. Art. 30, 92 of the GG.

¹²⁸ Cf. Art. 30, 92 of the GG.

¹²⁹ Cf. Art. 92, 95(1) of the GG.

¹³⁰ Cf. Riehm/Thomas, NJW 2022, 1725.

¹³¹ Cf. Art. 74(1) No. 1 of the GG.

¹³² Cf. Art. 72(1) of the GG.

¹³³ Cf. Windthorst, in: Comm. GG, Art. 74, marginals 9, 11.

¹³⁴ Cf. Böttcher, in: GK GVG, marginal 2.

Since there are no specific rules of procedure for the commercial chambers, the general rules for regional court proceedings apply.¹³⁵ Even though several commercial chambers conduct oral hearings in English, under current procedural law, the official court language still is exclusively German.¹³⁶ Written submissions in another language are in principle of no legal value and have no effect in meeting deadlines.¹³⁷ Parties who do not speak German are required to the use of an interpreter.¹³⁸ Neither will the minutes of the hearing be taken in another language.¹³⁹ The judge has, however, the discretion to include relevant foreign language statements in the (German) minutes.¹⁴⁰

By way of exception, pursuant to § 185(2) of the GVG, an interpreter is not necessary if all persons involved have sufficient proficiency in the foreign language. The scope of this provision is controversial. While some have described it as “tiny”¹⁴¹ and “of little significance”¹⁴², it was this very exception on which the English-speaking commercial chambers base themselves.¹⁴³ Yet, such an understanding is not in line with the purpose of the rule.¹⁴⁴ The use of interpreters was permitted by § 185(1) GVG to comply with the *fair trial* principle laid down in Art. 2(1), 20(3) of the GG, Art. 6 of the ECHR and Art. 47(2) of the CFR.¹⁴⁵ To prevent that parties incur cost for an interpreter whom they do not need, the second paragraph exempts them from this necessity.¹⁴⁶ In contrast, the intention of the paragraph was not to enable courts to conduct trials in foreign languages.¹⁴⁷ Moreover, given the systematic position of the exception within a provision on oral proceedings, it definitely cannot be applied to other procedural aspects, such as court records or the formulation and pronouncement of judgments.¹⁴⁸ In this respect, the exclusive use of the German language is indisputably compulsory.¹⁴⁹ The courts are free to issue translated (non-binding) versions of their decisions, though.¹⁵⁰ In summary, the leeway for foreign language proceedings in Germany is very narrow, if at all.

¹³⁵ Cf. *Riehm/Thomas*, NJW 2022, 1725 (1727).

¹³⁶ Cf. § 184 phrase 1 of the GVG. For the sake of completeness, phrase 2 guarantees that the Sorbs, a German minority, can speak Sorbian in court in their home districts.

¹³⁷ Cf. *Grohmann*, IdH, p. 342.

¹³⁸ Cf. § 185(1) phrase 1 of the GVG.

¹³⁹ Cf. § 185(1) phrase 2 of the GVG.

¹⁴⁰ Cf. § 185(1) phrase 2 of the GVG.

¹⁴¹ *Prütting*, AnwBl. 2010, 113 [translated from German by the author].

¹⁴² *Prütting*, AnwBl. 2010, 113 [translated from German by the author].

¹⁴³ Cf. *Armbrüster*, ZRP 2011, 102; *Boerner/Hess*, ELR 2019, 33 (38); *Grohmann*, IdH, pp. 343 et seq.

¹⁴⁴ Cf. *Armbrüster*, ZRP 2011, 102.

¹⁴⁵ Cf. *Armbrüster*, ZRP 2011, 102, *Grohmann*, IdH, pp. 343 et seq.

¹⁴⁶ Cf. *Grohmann*, IdH, p. 344.

¹⁴⁷ Cf. *Armbrüster*, ZRP 2011, 102.

¹⁴⁸ Cf. *Grohmann*, IdH, p. 344.

¹⁴⁹ Cf. *Bausback*, RdF 2018, 1; *Hau*, LA Schurig, 49 (52).

¹⁵⁰ Cf. *Hau*, LA Schurig, 49 (57).

The regulation of the participation of foreign lawyers in court proceedings is similarly restrictive. Foreign-qualified lawyers are currently not allowed to work as professional judges in German courts because this requires the attainment of two German state examinations.¹⁵¹ Neither are foreign judges eligible to serve as honorary judges at a commercial chamber, as only German citizens are entitled to do so.¹⁵²

In proceedings before regional courts and higher regional courts, German procedural law stipulates a mandatory requirement to be represented by a lawyer.¹⁵³ Appearing in court as counsel requires the admission to the German bar.¹⁵⁴ An exception applies to recognized European lawyers who are established in Germany.¹⁵⁵ Other European lawyers are entitled to party representation only in conjunction and agreement with a German lawyer.¹⁵⁶ Thus, legal representation in court is largely reserved for members of the German bar.

Although the parties may designate a certain court by virtue of a choice-of-court agreement, the jurisdiction of a particular court chamber, let alone of individual judges, is subject only to the organizational chart defined by the court.¹⁵⁷

Insofar as conflict of laws rules refer to the application of foreign law, German courts may apply these provisions on their own.¹⁵⁸ The determination of the contents of foreign law is not treated as a factual question, but as a question of law.¹⁵⁹ Hence, the court must construe and apply these rules *ex officio* without a litigant having to invoke, let alone prove them (principle of “*iura novit curia*”¹⁶⁰).¹⁶¹ Even though the parties are entitled to contribute to this process by submitting evidence, the court is not bound by the submissions and may draw on any other available source of information.¹⁶² Proof is only required if the foreign law is not known to the judge.¹⁶³ The necessity of an evidentiary procedure can thus be avoided if the court is familiar with the foreign law due to its adjudication practice.¹⁶⁴

¹⁵¹ Cf. § 5(1) of the DRiG.

¹⁵² Cf. § 109(1) No. 1 of the GVG.

¹⁵³ Cf. § 78(1) phrase 1 of the ZPO.

¹⁵⁴ Cf. § 4 No. 1 of the BRAO in conjunction with § 5(1) of the DRiG.

¹⁵⁵ Cf. §§ 2 et seqq. of the EuRAG.

¹⁵⁶ Cf. § 28(1) of the EuRAG.

¹⁵⁷ Cf. *Riehm/Thomas*, NJW 2022, 1725 (1726 et seq.).

¹⁵⁸ Cf. *Schütze*, Int. ZPR, § 293 marginal 1.

¹⁵⁹ Cf. *Schütze*, Int. ZPR, § 293 marginal 2.

¹⁶⁰ *Schütze*, Int. ZPR, § 293 marginal 3.

¹⁶¹ Cf. *Schütze*, Int. ZPR, § 293 marginal 3.

¹⁶² Cf. § 293 phrase 2 of the ZPO.

¹⁶³ Cf. 293 phrase 1 of the ZPO.

¹⁶⁴ Cf. *Laumen*, in: PG ZPO, § 293 marginal 6.

C. Germany's backlog on the global market for international commercial litigation

In the previous part of this thesis, the global emergence of ICCs was delineated, revealing that the German judicial system so far has only taken first steps towards an internationalization. The backlog becomes even more apparent in the following analysis of the ICCs in London, Singapore, and Amsterdam. It will shed light on the necessity of comprehensive reforms as Germany otherwise is losing touch with international competition. In the absence of a resolute legislative intervention, the country misses out on valuable opportunities for its legal system.

I. The necessity to cope with international competition

Until recently, amongst German judges and parliamentarians, the perception prevailed that the adjudication by courts merely satisfied an obligation of the state and was not a commodity sellable on a market for international dispute resolution.¹⁶⁵ Conversely, at an international level, the emergence of an enormously lucrative market for transnational litigation can be witnessed, in which both states and litigants are actively participating.¹⁶⁶

Tapping into this global market of “forum selling”¹⁶⁷ can significantly increase the fee income generated by German courts.¹⁶⁸ The settlement of high-value disputes does not only yield substantial profits generated by the court itself but also by the local advocacy and auxiliary industries, such as the hospitality sector or translation services.¹⁶⁹ Revenues generated by this means could be utilized to subsidize the adjudication of smaller proceedings, which otherwise can hardly be conducted in a cost-covering way.¹⁷⁰ In addition, the existence of prestigious courts in a region can enhance its appeal for businesses and contribute to employment creation in the legal sector and to local economic growth in general.¹⁷¹ Furthermore, a strong commercial judiciary is likely to support export-oriented German businesses, particularly SME, by decreasing transaction cost.¹⁷²

The German justice is currently losing numerous large-scale proceedings to arbitration.¹⁷³ State courts are typically deprived of jurisdiction in certain areas of law due to arbitration clauses, e.g., in M&A or in company law.¹⁷⁴ Practitioners bemoan a far-reaching absence of published

¹⁶⁵ Cf. *Boerner/Hess*, ELR 2019, 33.

¹⁶⁶ Cf. *Childress*, Vand. L. Rev. 2013, 67 (75 et seq.), *Kötz*, AnwBl. 2010, 1 (1,7); *Yip*, ELR 2019, 82 (83).

¹⁶⁷ *Boerner/Hess*, ELR 2019, 33.

¹⁶⁸ Cf. *Bechtold/Frankenreiter/Klerman*, S. Cal. L. Rev. 2019, 487 (519).

¹⁶⁹ Cf. *Wilske*, Contemp. Asia Arb. J. 2018, 153 (156).

¹⁷⁰ Cf. *Stürner*, JZ 2019, 1122 (1123).

¹⁷¹ Cf. *Bechtold/Frankenreiter/Klerman*, S. Cal. L. Rev. 2019, 487 (519).

¹⁷² Cf. *Hoffmann*, KfH, p. 154.

¹⁷³ Cf. *Riehm/Thomas*, NJW 2022, 1725.

¹⁷⁴ Cf. *Grohmann*, IdH, pp. 363 et seq.

case law in these areas.¹⁷⁵ As a result of this detachment of sophisticated commercial law cases from the national jurisprudence, the legal framework for companies operating in Germany becomes increasingly blurred.¹⁷⁶ This causes a loss of legal certainty for businesses that lack landmark rulings as a reliable basis for drafting contracts.¹⁷⁷ Moreover, the responsibility for the development of commercial law, which is entrusted to the courts, cannot be taken over by arbitral tribunals due to the lack of both publicity and democratic legitimation.¹⁷⁸ Hence, by holding proceedings in public and publishing their judgments, ICCs can serve as vehicles to achieve a higher degree of legal certainty in business law.¹⁷⁹

In light of this, the creation of an attractive international commercial litigation framework in Germany promises to promote the state finance, the domestic economy, and legal advancement.

II. Key design features of the ICCs in London, Singapore, and Amsterdam

The following section is dedicated to analyzing three foreign courts, which newly formed German ICCs would compete with. Hereby, key factors contributing to the appeal of the foreign ICCs will be identified, along with internationally established standards, against which German courts would have to measure themselves. Based on the findings, recommendations for reforming the framework for international commercial litigation before German courts will be worked out in part D. The scope of the analysis comprises the LCC in London as the oldest ICC¹⁸⁰ worldwide, the SICC in Singapore, aspiring to be the dominant Asian ICC¹⁸¹, and the NCC in Amsterdam as a recently established competitor in continental Europe.

1. London Commercial Court

When the LCC was installed in 1895, the rationale was not primarily to create a forum for international dispute resolution¹⁸², but rather to “facilitate the allocation of commercial cases to specialist judges”¹⁸³. As one of several specialized courts, the LCC forms part of the King’s Bench Division, a division of the English High Court of Justice.¹⁸⁴ The bench is solely accessible for domestic lawyers¹⁸⁵ and currently comprises 14 judges¹⁸⁶.

¹⁷⁵ Cf. *Riehm/Thomas*, NJW 2022, 1725; *Trittmann*, AnwBl. 2012, 35.

¹⁷⁶ Cf. *Grohmann*, IdH, p. 363.

¹⁷⁷ Cf. *Diekmann*, NJW 2021, 605.

¹⁷⁸ Cf. *Raeschke-Kessler*, SchiedsVZ 2023, 158 (159).

¹⁷⁹ Cf. *Stürner*, JZ 2019, 1122 (1123); *Walker*, Arbitration 2019, 2 (18).

¹⁸⁰ Cf. *Gu/Tam*, Chic. J. Int’l L. 2021, 443 (448).

¹⁸¹ Cf. *Grohmann*, IdH, p. 197.

¹⁸² Cf. *Wilske*, Contemp. Asia Arb. J. 2018, 153 (160).

¹⁸³ *Blair/Knowles*, ABL 2020, 15 (17).

¹⁸⁴ Cf. *Gu/Tam*, Chic. J. Int’l L. 2021, 443 (455).

¹⁸⁵ Cf. *Blair/Knowles*, ABL 2020, 15 (18); *Tiba*, Loy. U. Chi. Int’l L. Rev. 2016, 31 (49).

¹⁸⁶ See website of the Courts and Tribunals Judiciary, available from <https://www.judiciary.uk/courts-and-tribunals/business-and-property-courts/commercial-court/about-the-commercial-court/the-commercial-courts-judges/> (last accessed May 15, 2024).

Notwithstanding its common law roots, proceedings before the court are regulated to a large degree by the CPR and nonbinding, though practically highly relevant, *Practice Directions*.¹⁸⁷ The judges publish a regularly updated *Commercial Court Guide*¹⁸⁸ to summarize the applicable rules.¹⁸⁹ With regards to business courts, and the LCC in particular, the parts 57A and 58 of the CPR contain some exceptions and alterations to the generally applying procedural rules.¹⁹⁰ Special emphasis is given to the streamlining of the proceedings, by the means of standardized formalities and a mandatory, comprehensive collaboration between the parties and the court in order to structure the further trial.¹⁹¹ In case management conferences, the judge will attempt to provide the parties with a tailored framework for their lawsuit.¹⁹² Moreover, the *Practice Direction 57AB* enables the parties to apply the so-called *shorter* and *flexible trial schemes*, which provide for additional modifications to the procedure.¹⁹³ To keep track with newly developing best practices, a committee composed of court staff, users of the LCC, arbitrators, and businesspeople comes together several times per year to discuss amendments to the rules.¹⁹⁴ However, apart from these exceptions, proceedings before the LCC are conducted like domestic proceedings in accordance with the general procedural rules.¹⁹⁵

The statutory jurisdiction of the LCC requires a claim arising from a transaction in trade and commerce, irrespective of whether it entails an international dimension or not, and an amount in dispute of at least £1 million.¹⁹⁶ Mostly, though, the LCC obtains jurisdiction by virtue of a choice-of-court agreement¹⁹⁷, in which case a value limit does not apply¹⁹⁸.

Under English law, in general, contentions about the substance of a foreign law are considered “as questions of fact to be established by expert evidence”¹⁹⁹. Party representation in court by foreign-qualified lawyers is not per se possible and requires a prior transfer to the local bar.²⁰⁰ The above shows that although the LCC specializes in commercial litigation, it is nevertheless “a purely domestic court that has not even adapted its procedure or composition to attract

¹⁸⁷ Cf. *Grohmann*, IdH, p. 116; *Requejoi Isidro*, IJPL 2019, 4 (20).

¹⁸⁸ Available in the 11th ed. from https://www.judiciary.uk/wp-content/uploads/2023/06/14.341_JO_Commercial_Court_Guide_FINAL.pdf (last accessed May 15, 2024).

¹⁸⁹ Cf. *Grohmann*, IdH, p. 116.

¹⁹⁰ Cf. *Grohmann*, IdH, p. 116.

¹⁹¹ Cf. *Grohmann*, IdH, p. 142.

¹⁹² Cf. *Mercer*, IWRZ 2020, 200 (201).

¹⁹³ Cf. *Grohmann*, IdH, pp. 140 et seqq.

¹⁹⁴ Cf. *Mercer*, IWRZ 2020, 200 (201).

¹⁹⁵ Cf. *Tiba*, Loy. U. Chi. Int'l L. Rev. 2016, 31 (49).

¹⁹⁶ Cf. *Grohmann*, IdH, pp. 117 et seq.

¹⁹⁷ Cf. *Grohmann*, IdH, pp. 118; *Gu/Tam*, Chic. J. Int'l L. 2021, 443 (455).

¹⁹⁸ Cf. *Wolff*, SchiedsVZ 2023, 209 (213).

¹⁹⁹ *Blair*, IJPL 2019, 212 (228).

²⁰⁰ Cf. *Rab*, Regulation of the Legal Profession in the UK, q. 12.

foreign litigants”²⁰¹. With 885 claims in 2022 and 2023²⁰², however, the LCC has the largest caseload among the three courts analyzed in this paper. Furthermore, studies demonstrate the international appeal of the LCC. In 2022, only 37% of the cases brought before the court did not include at least one party from abroad.²⁰³ In 41% of the lawsuits, the underlying facts were even entirely international.²⁰⁴ Due to its enormous success, the LCC is ascribed a “monopoly position as the European hub for international commercial dispute resolution”²⁰⁵. At least in parts, the rise of the LCC was undoubtedly fueled by its court language being English, “global *lingua franca*”²⁰⁶ of international litigation. In addition to the LCC, London also hosts the seat of the prestigious arbitration institution LCIA and the arbitrators’ association LMAA.²⁰⁷

2. Singapore International Commercial Court

Set up in 2015, the SICC forms part of Singapore’s High Court.²⁰⁸ Parties may submit their international commercial disputes to the SICC’s jurisdiction by virtue of a choice-of-court agreement in writing²⁰⁹, irrespective of whether the dispute is in any respect related to Singapore or Singaporean law²¹⁰. In addition, the jurisdiction of the SICC extends to cases that are referred to it by the High Court’s General Division.²¹¹ Hence, the SICC is both a selectable venue for the dispute resolution in international commercial relationships, and, at the same time, an integral part of Singapore’s general court system.²¹² Decisions of the SICC are in principle appealable to the Court of Appeal.²¹³ The parties are, however, free to exclude or restrict the possibility of any appeal in advance by virtue of a written agreement.²¹⁴

Currently, the bench of the SICC is composed of 28 Singaporean judges and 19 international judges.²¹⁵ Seven international judges are from the UK, five from Australia and one each from Canada, China, France, India, Japan, Hong Kong, and the USA.²¹⁶ This selection brings together judges from both civil law and common law systems.²¹⁷ To harness their expertise in a

²⁰¹ Wilske, Contemp. Asia Arb. J. 2018, 153 (160).

²⁰² Cf. *TheCityUK*, UK Legal services 2023, p. 41.

²⁰³ Cf. *TheCityUK*, UK Legal services 2023, p. 41.

²⁰⁴ Cf. *TheCityUK*, UK Legal services 2023, p. 41.

²⁰⁵ Wilske, Contemp. Asia Arb. J. 2018, 153 (169 et seq.).

²⁰⁶ *Gu/Tam*, Chic. J. Int’l L. 2021, 443 (456).

²⁰⁷ Cf. *Blair/Knowles*, ABL 2020, 15 (16).

²⁰⁸ Cf. *Chua*, ABL 2020, 23 (24).

²⁰⁹ Cf. SICC Rules 2021, Order 2 Rule 1(1).

²¹⁰ Cf. *Chua*, ABL 2020, 23 (24 et seq.); *Crook/Stamboulakis*, ELR 2019, 98.

²¹¹ Cf. SICC Rules 2021, Order 2 Rule 1(2)(a), Rule 4.

²¹² Cf. *Gu/Tam*, Chic. J. Int’l L. 2021, 443 (468).

²¹³ Cf. SICC Rules 2021, Order 21 Rule 14(1).

²¹⁴ Cf. *Requejoi Isidro*, IJPL 2019, 4 (18); *Tiba*, Loy. U. Chi. Int’l L. Rev. 2016, 31 (50).

²¹⁵ Cf. SICC, Brochure October 2023, p. 2.

²¹⁶ Cf. SICC, Brochure October 2023, p. 2.

²¹⁷ Cf. *Gu/Tam*, Chic. J. Int’l L. 2021, 443 (469).

particular legal system, the Chief Justice of the SICC has the discretion to allocate appropriate cases among the international judges.²¹⁸ Although the procedural rules are largely inspired by arbitration, party autonomy before the SICC does not go so far as to permit the parties to choose the judges themselves.²¹⁹

The SICC conducts its proceedings entirely in English, which is one of the official languages of the country, along with Malay, Mandarin, and Tamil.²²⁰ Its procedure is characterized by an “active, judge-led approach towards case management”²²¹. At case management conferences, the court, together with the parties, which have an obligation to cooperate, works towards a streamlining of the further proceedings to reduce length and cost.²²² In previous cases, the SICC used this instrument to determine relevant aspects of agreements between the parties, which required debate in a subsequent oral hearing.²²³ For SICC proceedings and consecutive appeals, party representation by a foreign lawyer is permitted if the litigation does not have a relevant nexus to Singaporean law (so-called ‘offshore case’), provided that the lawyer is ‘fully’ registered.²²⁴ Foreign lawyers can also be granted ‘restricted’ registration, in which case they are only entitled to submit statements on questions of foreign law and only to the extent admitted by the court.²²⁵ As can be seen from the SICC’s website, a hundred foreign lawyers are currently ‘fully’ registered and six have obtained a ‘restricted’ registration.²²⁶

Compared to all other ICCs, the SICC is globally the court that has come closest to arbitration in its procedure.²²⁷ In deviation from Singapore’s general procedural law, SICC proceedings are governed by a comprehensive set of rules enacted specifically for this purpose.²²⁸ The legislation is characterized by “highly customizable procedures [...] to cater to the parties’ needs and reflect foreign legal traditions”²²⁹. For instance, the parties may request the non-application of any Singaporean law on evidence and their replacement with another rule.²³⁰

²¹⁸ Cf. *Godwin/Ramsay/Webster*, Melb. J. Int’l L. 2017, 219 (224 et seq.).

²¹⁹ Cf. *Crook/Stamboulakis*, ELR 2019, 98 (98 et seq.).

²²⁰ Cf. *Domhan*, IpS, p. 68.

²²¹ *Seow/Teh/Yeo*, SAcLJ 2016, 692 (713).

²²² Cf. *Seow/Teh/Yeo*, SAcLJ 2016, 692 (713 et seq.).

²²³ Cf. *SICC*, BCBC Singapore Pte Ltd v PT Bayan Resources TBK – [2016] SGHC(I) 01, p. 2.

²²⁴ Cf. Order 3, Rule 1(1)(c)(ii), Rule 2(1)(c)(ii) of the SICC Rules 2021 in conjunction with Sec. 36O(1) and 36P(1) of the Singaporean Legal Professional Act 1996.

²²⁵ Cf. Order 3, Rule 1(1)(d)(i), Rule 2(1)(d)(i) of the SICC Rules 2021 in conjunction with Sec. 36P(2) of the Singaporean Legal Professional Act 1996.

²²⁶ See website of the SICC, available from <https://www.sicc.gov.sg/registration-of-foreign-lawyers/foreign-lawyers> (last accessed May 15, 2024).

²²⁷ Cf. *Grohmann*, IdH, p. 197.

²²⁸ Cf. *Grohmann*, IdH, p. 198.

²²⁹ Cf. *Bookman*, Yale J. Int’l L. 2020, 227 (247).

²³⁰ Cf. *Tiba*, Loy. U. Chi. Int’l L. Rev. 2016, 31 (49 et seq.).

The adaptability of the procedural rules is also reflected in their approach to the application of non-Singaporean substantive law. In Singapore, as “[u]nder common law [in general], foreign law is [...] required to be pleaded as an issue of fact and proved by expert evidence”²³¹. Hence, the party under the obligation of furnishing proof must procure legal opinions by specialists of the foreign legal system as to the contents and the interpretation of the law.²³² In contrast, a proof of foreign law may not be furnished by referring to case law.²³³ It is then required to examine the pundit in an oral hearing to adduce evidence about the submitted opinion.²³⁴ To simplify this rather unwieldy process, parties to proceedings before the SICC may request to replace the requisite of formal proof with submissions.²³⁵ The SICC will issue a corresponding order if the parties’ lawyers are, due to their legal and language knowledge, sufficiently qualified to determine the relevant questions of foreign law.²³⁶ Within the framework of the submission process, the court may also consider further sources, as for instance, legislation and case law of the foreign jurisdiction.²³⁷

Singapore has not only established the SICC but also other dispute resolution institutions. Already since 1991, Singapore has hosted the SIAC, one of the most demanded arbitration centers worldwide.²³⁸ In 2014, with the SIMC, mediation services were added to the portfolio.²³⁹ This “top-down institution building”²⁴⁰ resulted in a synergetic ADR hub, benefitting from interlinkages between the centers and their proceedings.²⁴¹

According to the court’s own reporting, between its foundation in 2015 and the end of 2021, it rendered and published 85 judgments at first instance and 19 on appeal.²⁴² Only about 12% of the cases were directly filed with the SICC, while the vast majority were transferred cases from the High Court.²⁴³ The parties in these proceedings had 40 different nationalities.²⁴⁴

²³¹ *Godwin/Ramsay/Webster*, Melb. J. Int’l L. 2017, 219 (237).

²³² Cf. *Godwin/Ramsay/Webster*, Melb. J. Int’l L. 2017, 219 (237).

²³³ Cf. *Godwin/Ramsay/Webster*, Melb. J. Int’l L. 2017, 219 (237).

²³⁴ Cf. *Godwin/Ramsay/Webster*, Melb. J. Int’l L. 2017, 219 (238).

²³⁵ Cf. *Blair*, IJPL 2019, 212 (228); *Godwin/Ramsay/Webster*, Melb. J. Int’l L. 2017, 219 (238).

²³⁶ Cf. *Godwin/Ramsay/Webster*, Melb. J. Int’l L. 2017, 219 (238).

²³⁷ Cf. *Godwin/Ramsay/Webster*, Melb. J. Int’l L. 2017, 219 (238).

²³⁸ Cf. *Bookman*, Yale J. Int’l L. 2020, 227 (247).

²³⁹ Cf. *Bookman*, Yale J. Int’l L. 2020, 227 (247).

²⁴⁰ *Erie*, Va. J. Int’l L. 2020, 225 (263).

²⁴¹ Cf. *Erie*, Va. J. Int’l L. 2020, 225 (263).

²⁴² Cf. *SICC*, The Year 2021 in Review, p. 1.

²⁴³ Cf. *SICC*, The Year 2021 in Review, p. 1.

²⁴⁴ Cf. *SICC*, The Year 2021 in Review, p. 1.

3. *Netherlands Commercial Court*

The NCC, which stems from a 2014 initiative by the judiciary²⁴⁵, was launched on January 1, 2019²⁴⁶. Technically, it comprises three courts, or, more precisely, court chambers, which have been woven into the Amsterdam court hierarchy.²⁴⁷ Two of these chambers are located at the Amsterdam District Court – the NCC District Court and the NCC Court in Summary Proceedings, which has jurisdiction for expedited proceedings and interim relief.²⁴⁸ These first-instance courts are subordinated to the NCC Court of Appeal, a chamber at the Amsterdam Court of Appeal, whose rulings are appealable to the Dutch Supreme Court.²⁴⁹ The NCC is exclusively composed of Dutch judges²⁵⁰, who have been appointed for their proficiency both in English and in cross-border commercial litigation²⁵¹.

The first-level jurisdiction of the NCC encompasses, with certain exceptions, all commercial and civil claims that involve an international element.²⁵² In addition to this, the Amsterdam District Court must have jurisdiction over the action, based on either a jurisdiction agreement or on other grounds.²⁵³ There must be, moreover, an explicit written agreement between the parties to litigate in English before the NCC.²⁵⁴

Under the NCC Rules, English is the default court language for all NCC proceedings.²⁵⁵ Upon a concordant request by all parties after the filing of the lawsuit, the court has the discretion to submit the proceeding or parts of it to the Dutch language.²⁵⁶ Any third party who joins the proceedings is in principle tied to the existing language agreements of the litigants.²⁵⁷ The NCC Rules allow submissions of documents in other languages than the language of the proceedings, but the court may require the submitting party to procure a (certified) translation.²⁵⁸ As long as not ordered otherwise by the court, such translation is dispensable for any kind of material submitted in Dutch, English, French, or German.²⁵⁹ If a party, or the witness or expert whom it intends to interrogate, lacks sufficient English proficiency, the party must employ an interpreter

²⁴⁵ Cf. *Lobach*, IWRZ 2017, 256.

²⁴⁶ Cf. *Antonopoulou/Kramer*, Commercialising Litigation, p. 2.

²⁴⁷ Cf. *NCC*, Introducing: The NCC, p. 4.

²⁴⁸ Cf. *NCC*, Introducing: The NCC, p. 4.

²⁴⁹ Cf. *NCC*, Introducing: The NCC, p. 4.

²⁵⁰ Cf. *Gu/Tam*, Chic. J. Int'l L. 2021, 443 (477); *Lobach*, IWRZ 2017, 256 (259).

²⁵¹ Cf. *Antonopoulou/Kramer*, Commercialising Litigation, p. 5.

²⁵² Cf. Art. 1.3.1(a) and (b) of the NCC Rules.

²⁵³ Cf. Art. 1.3.1(c) of the NCC Rules.

²⁵⁴ Cf. Art. 1.3.1(d) of the NCC Rules.

²⁵⁵ Cf. Art. 2.1.1 phrase 1 of the NCC Rules.

²⁵⁶ Cf. Art. 2.1.1 phrase 2 of the NCC Rules.

²⁵⁷ Cf. Art. 2.2.2 phrase 1 of the NCC Rules.

²⁵⁸ Cf. Art. 2.1.2 phrase 1 of the NCC Rules.

²⁵⁹ Cf. Art. 2.1.2 phrase 2 of the NCC Rules.

and bear the corresponding cost.²⁶⁰ The admission of English as the language of proceedings is not maintained throughout all stages of appeal. While it applies to trials and judgments at first and second level, appeals at the Dutch Supreme Court can only be heard in Dutch.²⁶¹

The NCC applies Dutch procedural law, complemented by the modifications as set out in the NCC Rules.²⁶² These rules summarize the applicable Dutch laws of procedure²⁶³ and “incorporate multiple novel features that improve the administration of cases at the NCC on the model of global best practices”²⁶⁴. For instance, these features include the use of an online forum for court correspondence, optional early case management conferences and verbatim minutes.²⁶⁵ Several of the additional rules are borrowed from the procedure of the LCC.²⁶⁶ Moreover, under the NCC Rules, the litigants may deviate by agreement from Dutch procedural law in certain respects, for instance, when it comes to the gathering of evidence.²⁶⁷

The applicable substantive law depends on the Dutch conflict of laws rules, in particular the regulations Rome I and Rome II.²⁶⁸ Under these rules, the freedom to choose a law, including from extra-European jurisdictions²⁶⁹, is widely recognized.²⁷⁰ Responsibility for determining the content of foreign law lies with the court and not with the parties, which is why the NCC may deploy legal experts only at its own cost.²⁷¹ For the purpose of applying foreign law, the judges may also make use of their special expertise in foreign law, particularly in English contract law, or instruct the parties to submit expert reports.²⁷²

Before the NCC, only Dutch lawyers are entitled to represent parties.²⁷³ Foreign lawyers who are qualified in the EU, the EEA, or Switzerland may appear on behalf of a party, but only with the restriction that they must collaborate with a Dutch lawyer.²⁷⁴ In any case, the right to perform procedural acts, particularly to make submissions²⁷⁵, is exclusively reserved to members of the Dutch bar.²⁷⁶ Lawyers from outside Europe are excluded from party representation but

²⁶⁰ Cf. Art. 2.1.4 of the NCC Rules.

²⁶¹ Cf. *Antonopoulou/Kramer*, Commercialising Litigation, p. 9.

²⁶² Cf. Art. 1.1 and 1.2.1 of the NCC Rules.

²⁶³ Cf. Art. 1.2.1 of the NCC Rules.

²⁶⁴ Cf. *Antonopoulou/Kramer*, Commercialising Litigation, p. 8.

²⁶⁵ Cf. *Antonopoulou/Kramer*, Commercialising Litigation, p. 8.

²⁶⁶ Cf. *Bauw*, ELR 2019, 15 (19).

²⁶⁷ Cf. *Bauw*, ELR 2019, 15 (19).

²⁶⁸ Cf. NCC, NCC and applicable law, p. 1.

²⁶⁹ See Art. 2 of the Rome I Regulation and Art. 3 of the Rome II Regulation

²⁷⁰ See Art. 3 of the Rome I Regulation and Art. 14 of the Rome II Regulation.

²⁷¹ Cf. NCC, NCC and applicable law, p. 2.

²⁷² Cf. NCC, NCC and applicable law, p. 2.

²⁷³ Cf. Art. 3.1.1 of the NCC Rules.

²⁷⁴ Cf. Art. 3.1.2 phrase 2 of the NCC Rules.

²⁷⁵ Cf. *Bauw*, ELR 2019, 15 (18).

²⁷⁶ Cf. Art. 3.1.2 phrase 1 and 2 of the NCC Rules.

may be heard by the court, if it decides to grant them this right.²⁷⁷ The parties are not entitled to select the judge in charge, since the case assignment is determined by the NCC Case Assignment Rules, which do not allow for such a choice.

Higher court fees are charged for proceedings before the NCC than before other Dutch courts.²⁷⁸ Underlying rationale is to make the court “financially self-supporting”²⁷⁹. A further particularity of the NCC court ecosystem is that the parties of an international arbitration in Amsterdam may agree on the jurisdiction of the NCC Court of Appeal for the setting aside of awards.²⁸⁰ This option is intended to complete Amsterdam’s offering for international dispute resolution in English language.²⁸¹ During the first four years after its inauguration in 2019, the NCC dealt with 32 cases, involving parties from the USA, five Asian and ten European countries.²⁸² As of the submission of this thesis, the NCC courts have rendered and published 24 judgments, 11 of them since the beginning of 2023.²⁸³

D. How to reform international commercial dispute resolution by German courts

As the comparison with the case studies of the LCC, SICC and NCC shows, the current German framework for cross-border commercial litigation is not competitive in the global dispute resolution market. Given the potential gains for the German economy and for the development of German law, the question arises as to which reforms are necessary to catch up with competition.

I. The federal government’s response

With last year’s JLSA bill, the incumbent German federal government provided an answer to this question. Already in its coalition agreement from 2021, it had articulated its demand for the establishment of ICCs, albeit somewhat hidden in a paragraph dealing with test cases and class actions.²⁸⁴ Concretely, the coalition agreement envisaged the creation of “English-speaking specialized chambers for international commercial and economic disputes”²⁸⁵. The JLSA bill now implements this project and entails essentially three innovations.

First, the draft law authorizes the federal state governments in a newly added § 119b of the GVG to establish one or several commercial courts as specialized senates at the higher regional courts. The jurisdiction of a commercial court shall be extendable across multiple court

²⁷⁷ Cf. Art. 3.1.2 phrase 3 of the NCC Rules.

²⁷⁸ Cf. *Antonopoulou/Kramer*, Commercialising Litigation, pp. 8. et seq.; *Bauw*, ELR 2019, 15 (17).

²⁷⁹ *Bauw*, ELR 2019, 15 (17).

²⁸⁰ Cf. Art. 1.3.3(c) of the NCC Rules in conjunction with Art. 1064a of the Dutch Code of Civil Procedure.

²⁸¹ Cf. *Antonopoulou/Kramer*, Commercialising Litigation, p. 5.

²⁸² Cf. NCC, NCC in number 2019–2023, p. 2.

²⁸³ For a list of all judgments see <https://www.rechtspraak.nl/English/NCC/Pages/judgments.aspx> (last accessed May 15, 2024).

²⁸⁴ Cf. *Federal Government of Germany*, Coalition Agreement 2021, p. 84.

²⁸⁵ *Federal Government of Germany*, Coalition Agreement 2021, p. 84 [translated from German by the author].

districts. Moreover, the bill enables the federal state governments to cooperate to create a joint commercial court with cross-border jurisdiction. The courts shall have jurisdiction over civil B2B disputes, excluding in the field of IP or competition law, and for disputes in relation to corporate acquisitions. In addition, an amount in disputes of at least €1 million is required. Even in case of a prorogation of the court by virtue of a choice-of-court agreement, the fore-mentioned conditions must be met.²⁸⁶ Irrespective of the amount in controversy, the commercial courts may also be designated as an appeal stage for regional court judgments that pertain to the described subject matters.²⁸⁷ It shall be possible to lodge an appeal on points of law with the German Federal Court of Justice (BGH) against any judgment of a commercial court.²⁸⁸

Second, the federal state governments can allow English as court language for the entire proceedings before the commercial courts and before commercial chambers at the regional courts in the aforementioned areas of law. In deviation to § 184 of the GVG, proceedings are conducted in English before these courts if the parties explicitly or tacitly agree on negotiating in English or if the defendant does not contest an according request by the plaintiff. However, the guaranteed availability of English-language proceedings ends where a case reaches the level of the BGH. From that point on, the maintenance of the language of the proceedings is at the discretion of the BGH.²⁸⁹

Third, the bill contains several amendments to the German Code of Civil Procedure (ZPO) to adapt the procedure before a commercial court. An early case management conference at the outset of the proceedings shall be mandatory. In addition, upon request by all parties, the minutes will be taken in a verbatim record, which is simultaneously readable during the hearing or taking of evidence.²⁹⁰

II. Lessons learned from the case studies of the LCC, the SICC, and the NCC

The JLSA bill certainly takes the first steps toward enabling more internationalized and modernized court proceedings in Germany. However, the proposed framework falls short of the standards established in foreign ICCs. Moreover, pitfalls inherent to the bill threaten to obstruct the chances for German commercial courts to become international litigation hubs. Considering the case studies on the ICCs in London, Singapore, and Amsterdam, several amendments to the bill are necessary in order to ensure its competitiveness in international comparison.

²⁸⁶ For the entire paragraph cf. JLSA bill, BT-Drs. 20/8649, p. 7.

²⁸⁷ Cf. JLSA bill, BT-Drs. 20/8649, pp. 9, 26.

²⁸⁸ Cf. JLSA bill, BT-Drs. 20/8649, p. 14, 39.

²⁸⁹ For the entire paragraph cf. JLSA bill, BT-Drs. 20/8649, pp. 8 et seq.

²⁹⁰ For the entire paragraph cf. JLSA bill, BT-Drs. 20/8649, p. 13.

1. Elimination of language barriers

Through the admission of English-language civil proceedings, the JLSA bill addresses one of the major shortcomings of the current framework. The mandatory use of German significantly decreases the appeal of German courts for foreigners, as it results in languages barriers and translation cost.²⁹¹ All three examined ICCs enable the general use of English as court language. Without expanding the reachable audience by this means, it is hard to imagine that the courts could have achieved the same international relevance.

In contrast to the Dutch approach, the JLSA bill even goes somewhat farther by not entirely excluding the continuation of English proceedings before the respective court of last instance. Not maintaining the same language regime for all court levels seems inconsistent and reduces the possible time and cost savings.²⁹² On the other hand, the importance of the supreme courts' jurisprudence extends beyond the cases of the commercial courts to the entire legal system of a country.²⁹³ Therefore, by allowing appellate proceedings in English in principle, but making them subject to the approval of the BGH, the JLSA bill found an appropriate trade-off.

Notwithstanding this clear advancement, it alone is not able to overcome the existing language barriers.²⁹⁴ Neither German legal texts nor German legal literature are reliably available in English translations.²⁹⁵ Although the federal ministry of justice publishes translations of legislation on the internet, many of them are inaccurate and out of date.²⁹⁶ During the parliamentary debate on the JLSA bill, a member of parliament from the conservative opposition pointed out that the ministry had only published 130 English translations for the approximately 4,500 federal laws and regulations.²⁹⁷ For instance, the published translation of the ZPO, is up-to-date as of 2013.²⁹⁸ There is no automatic update mechanism for changes in the law. Apart from a few exceptional cases, court decisions are never translated.²⁹⁹

A recurring element of all the three courts analyzed is that they provide brochures or user guides on their website, which summarize the applicable rules of the local procedure. For example, the NCC Rules include an explanation of Dutch procedure and an overview and translation of Dutch legal terminology.³⁰⁰ By providing an easily accessible introduction to the legal system

²⁹¹ Cf. *Antonopoulou/Kramer*, Commercialising Litigation, pp. 8 et seq.; *Riehm/Thomas*, NJW 2022, 1725 (1728).

²⁹² Cf. *Antonopoulou/Kramer*, Commercialising Litigation, p. 9.

²⁹³ Cf. *Antonopoulou/Kramer*, Commercialising Litigation, p. 9.

²⁹⁴ Cf. *Riehm/Thomas*, NJW 2022, 1725 (1729).

²⁹⁵ Cf. *Riehm/Thomas*, NJW 2022, 1725 (1729).

²⁹⁶ Cf. *Riehm/Thomas*, NJW 2022, 1725 (1729).

²⁹⁷ Cf. *German Bundestag*, Plenary protocol 20/128, p. 16078.

²⁹⁸ Cf. *Wolff*, *SchiedsVZ* 2023, 209 (223).

²⁹⁹ Cf. *Riehm/Thomas*, NJW 2022, 1725 (1729).

³⁰⁰ Cf. *Bauw*, *ELR* 2019, 15 (19).

and culture, the deterrent effect of linguistic obstacles for foreigners can be mitigated even further. In addition, the FAQ, which the SICC made available on the internet, is also very helpful.³⁰¹ It does not solely inform about basic procedural rules, but also responds to pragmatic questions, for instance, about the dress code and the appropriate form of addressing the judges. To truly level the playing field between foreign and domestic parties, not only language barriers must be eliminated, but barriers in terms of legal culture as well.

Considering the above, a German ICC is only likely to succeed if the admission of English-language trials is accompanied by measures to open the legal system and culture to non-native speakers.³⁰² The most urgent step will be to provide an accurate and timely updated translation service for legislation and jurisprudence which could be relevant for commercial court cases.

2. Enhancing the appeal of the national substantive law for commercial contracts

As it has become clear in the case studies, the success of an ICC is largely dependent on its designation in a jurisdiction clause. At the same time, the trend is to be observed that parties tend to align their choice of court with the choice of the substantial law governing the contract.³⁰³ Often the underlying consideration is to prevent a situation where judges must apply laws with which they are not familiar from their home jurisdiction.³⁰⁴

When advising their clients on this bundled choice of both law and court, empirical studies suggest that lawyers in large law firms give somewhat more consideration to the substantive law³⁰⁵ and that clients have a strong tendency to take the advice³⁰⁶. Consequently, the success of the LCC is largely due to the persistent popularity of English contract law³⁰⁷, allegedly providing for “more legal certainty and predictability to contracting parties than other legal systems”³⁰⁸. Moreover, the available data indicates that not only the substantial quality of a given judiciary or legal system drives the lawyers’ advice on choice of law or jurisdiction, but their “perception”³⁰⁹ of these systems as well.³¹⁰ For the situation in Germany, two lessons can be derived from these findings.

³⁰¹ See website of the SICC, available from <https://www.judiciary.gov.sg/singapore-international-commercial-court/faqs> (last accessed May 15, 2024).

³⁰² Cf. *Riehm/Thomas*, NJW 2022, 1725 (1729).

³⁰³ Cf. *Bauw*, ELR 2019, 15 (20 et seq.); *Themeli*, ELR 2019, 70 (74).

³⁰⁴ Cf. *Themeli*, ELR 2019, 70 (74).

³⁰⁵ Cf. *Themeli*, Great Race of Courts, p. 295.

³⁰⁶ Cf. *Themeli*, Great Race of Courts, p. 294.

³⁰⁷ Cf. *Bauw*, ELR 2019, 15 (20 et seq.); *Blair*, IJPL 2019, 212 (224); *Rühl*, AJIL Unbound 2021, 11 (15); *Rühl*, Building Competence in Comm. L. in the MS, p. 27; *Themeli*, ELR 2019, 70 (75); *Tiba*, Loy. U. Chi. Int’l L. Rev. 2016, 31 (37).

³⁰⁸ *Bauw*, ELR 2019, 15 (21).

³⁰⁹ *Themeli*, ELR 2019, 70 (76).

³¹⁰ Cf. *Themeli*, ELR 2019, 70 (75 et seq.).

First, the legislator must increase the appeal and suitability of the domestic substantive law for cross-border commercial contracts.³¹¹ German civil law is doubted to suit the needs of businesses as it contains an array of general clauses (e.g., §§ 133, 138, 157, 242 of the BGB) and a strict control of GTC (§§ 305 et seqq. of the BGB), even for B2B contracts, which gives the judge a wide margin of discretion to the detriment of party autonomy.³¹² Under German GTC control, it is not uncommon that B2B agreements are being declared invalid, even though they are customary in international commerce and had been subject to intensive negotiations in the drafting phase.³¹³ By limiting these uncertainties for B2B contracts, businesses are more likely to opt for German law in their contracts.³¹⁴ In general, greater openness by the legislator to suggestions from businesses could help to align contract law more closely with trade practice.³¹⁵ In contrast to the German legislative process, business representatives are much more involved in the development of reforms to English law.³¹⁶ Moreover, reforms in the UK are often less driven by legal doctrine and more by practical needs.³¹⁷ The Bundestag should therefore be more sensitive to input of the business community and show more courage to put pragmatism before tradition and dogma – at least where consumers are not affected.

Second, as the perception of a legal system is to a certain degree “more a matter of communication and marketing than of legal substance”³¹⁸, it is necessary to implement appropriate advertising measures for the choice of German law³¹⁹. This aspect is often neglected when new laws are enacted in Germany.³²⁰ In contrast, the marketing of their legal system and services is routinely considered in the work of English lawmakers.³²¹ Particularly receptive targets for a comparable communication strategy by the German state might be jurisdictions that share the same roots in Roman law, e.g., China or many Eastern European countries.³²²

3. Improving the legal framework for ADR and arbitration

A crucial factor in the success of the LCC has been that London is frequently selected as a venue for arbitrations subject to the jurisdiction of the LCC as a supervisory court.³²³ The

³¹¹ Cf. *Riehm/Thomas*, NJW 2022, 1725 (1729).

³¹² Cf. *Calliess/Hoffmann*, AnwBl. 2009, 52; *Riehm/Thomas*, NJW 2022, 1725 (1729 et seq.); *Salger*, AnwBl. 2012, 40.

³¹³ Cf. *Burianski/Fleckenstein*, ZRP 2023, 162 (163).

³¹⁴ Cf. *Riehm/Thomas*, NJW 2022, 1725 (1729).

³¹⁵ Cf. *Triebel*, AnwBl. 2008, 305 (308).

³¹⁶ Cf. *Triebel*, AnwBl. 2008, 305 (308).

³¹⁷ Cf. *Triebel*, AnwBl. 2008, 305 (308).

³¹⁸ *Bauw*, ELR 2019, 15 (21).

³¹⁹ Cf. *Grohmann*, IdH, p. 465.

³²⁰ Cf. *Triebel*, AnwBl. 2008, 305 (308).

³²¹ Cf. *Gorst/Hunter/Vivswan*, SchiedsVZ 2023, 254 (262); *Triebel*, AnwBl. 2008, 305 (308).

³²² Cf. *Triebel*, AnwBl. 2008, 305 (308).

³²³ Cf. *Blair*, IJPL 2019, 212 (224).

aggregation of an ICC and of arbitration institutions in London gave rise to a synergetic dispute resolution center.³²⁴ A similar development can be observed in Singapore³²⁵, which is striving “to become the leading one-stop shop for dispute resolution”³²⁶. To enhance the appeal of Germany as a dispute settlement location, it is necessary to boost the entire spectrum of dispute settlement mechanisms.³²⁷ In particular, this is true for arbitration due to its leading role in the dispute resolution market for multinationals, as described above. Hence, a German ICC would highly benefit from a parallel reinforcement of the arbitration location in Germany.³²⁸

To this end, the admission of English as a court language *de lege ferenda* should be extended to courts conducting arbitration-related proceedings.³²⁹ According to figures published by the DIS, the country’s largest arbitration institution³³⁰, in 2022, already 35% of the DIS and IHK arbitrations in Germany were conducted in English³³¹. Given this increasing³³² share, in order to prevent language breaks, parties should be enabled to continue to use the English language for ensuing court proceedings³³³, e.g., on the annulment of an award.

In addition, the newly created commercial courts should be given statutory jurisdiction over arbitration-related proceedings.³³⁴ Under current law, unless the arbitration agreement designates a different higher regional court, the statutory jurisdiction lies with the higher regional court in whose district the arbitral proceedings take place.³³⁵ Concentrating the jurisdiction in the commercial courts would allow for a pooling of expertise, avoid language breaks, and promote cross-fertilization between the two dispute resolution methods.

4. Measures to promote the establishment of an international reputation

From the case studies, a lesson can be learned that newly established ICCs depend on the state taking adequate measures to foster their development, at least initially. The legal systems under review chose different approaches to ensure the growth of their courts to national champions.

a) Centralization or federal fragmentation?

Should the JLSA bill be enacted as law, the federal states will have a large margin of discretion in setting up new commercial courts. This reflects Germany’s federal constitution, as seen

³²⁴ Cf. *Gul/Tam*, Chic. J. Int’l L. 2021, 443 (456 et seq.).

³²⁵ Cf. *Erie*, Va. J. Int’l L. 2020, 225 (263, 265).

³²⁶ *Yip*, ELR 2019, 82 (83).

³²⁷ Cf. *Wolff*, SchiedsVZ 2023, 209 (211).

³²⁸ Cf. *Burianski/Fleckenstein*, ZRP 2023, 162; *Illmer*, ZRP 2011, 170; *Lobach*, IWRZ 2017, 256 (257).

³²⁹ Cf. *Illmer*, ZRP 2011, 170 (170, 172 et seq.).

³³⁰ Cf. *BMJ*, Schiedsgerichtsbarkeit.

³³¹ Cf. *DIS*, Our work in numbers.

³³² Cf. *Gorst/Hunter/Vivswan*, SchiedsVZ 2023, 254 et seq.

³³³ Cf. *Trittmann*, AnwBl. 2012, 35 (37).

³³⁴ Cf. *Salger*, AnwBl. 2012, 40 (43).

³³⁵ Cf. § 1062(1) of the ZPO.

above. By contrast, the jurisdictions under review established a central ICC. It stands to reason that a centralized commercial jurisdiction facilitates attaining an international visibility.

In view of this, the question arises as to whether a federally fragmented German judicial system can compete with centralized commercial courts abroad.³³⁶ A stronger local concentration leads to a higher caseload per court³³⁷, which is essential for them to develop their specialization and to build a reputation³³⁸. Against this backdrop, it can be seen as a progress that the JLSA bill enables the establishment of cross-district and even cross-state commercial courts. According to the draft, the commercial courts would be located at the higher regional courts, of which there are 24 in Germany³³⁹. It is to be hoped that the 16 federal state governments will make prudent use of the authority to set up joint cross-border courts.

While other countries installed ICCs in the capitals, this cannot be a model for Germany, since Berlin as the political capital is not simultaneously the country's economic heart.³⁴⁰ Following the case of the LCC, which is located in one of the largest financial hubs worldwide³⁴¹, an evident choice for a German ICC would be Frankfurt³⁴², occupying the 13th rank of the Global Financial Centres Index³⁴³. In addition, other cities considered to be international business hubs are being discussed as suitable locations, in particular Düsseldorf, Hamburg, and Munich.³⁴⁴

Besides setting up a centralized commercial court, another promising approach would be to establish a handful of courts with nationwide jurisdiction for non-overlapping subject areas.³⁴⁵ In any case, when determining one or more court locations, it must be considered that too much dispersion would run counter capacity and reputation building.³⁴⁶ The federal government expects that a total of five commercial courts will be established nationwide.³⁴⁷

b) Ensuring a sufficient volume of cases

ICCs benefit from mechanisms which ensure a continuous supply with a sufficient caseload. It comes as no surprise that businesses initially approach a new dispute settlement forum with reluctance, awaiting how it proves itself in practice.³⁴⁸ Accordingly, the SICC in its first three

³³⁶ Cf. Pfeiffer, IWRZ 2020, 51 (57).

³³⁷ Cf. Grohmann, IdH, p. 394.

³³⁸ Cf. Wolff, SchiedsVZ 2023, 209 (211 et seq.).

³³⁹ Cf. Council of Europe, Judiciary at a glance in Germany, p. 3.

³⁴⁰ Cf. Pfeiffer, IWRZ 2020, 51 (57).

³⁴¹ Cf. Grohmann, IdH, p. 114.

³⁴² Cf. Pfeiffer, IWRZ 2020, 51 (57).

³⁴³ Cf. Mainelli/Wardle, GDFI 35, p. 4.

³⁴⁴ Cf. Pfeiffer, IWRZ 2020, 51 (57).

³⁴⁵ Cf. Wolff, SchiedsVZ 2023, 209 (222).

³⁴⁶ Cf. Curschmann, IWRZ 2018, 241 (242).

³⁴⁷ Cf. JLSA bill, BT-Drs. 20/8649, p. 21.

³⁴⁸ Cf. Yip, ELR 2019, 82 (92).

years only had to decide on cases assigned to it by way of a referral from the high court.³⁴⁹ In spite of the lack of claims directly filed with the SICC, the internal transfer mechanism assured that the court was constantly involved in a fair number of cases.³⁵⁰ This underscores the consolidating effect of its dual nature as both a selectable ICC and a domestic court embedded in the national court hierarchy. An internal transfer system for high court cases is also in place for the LCC.³⁵¹

The JLSA bill does not provide for such a mechanism, nor does the Dutch legislation for the NCC. In contrast to the Dutch court, however, the German commercial courts' jurisdiction under the bill will not entirely depend on a choice-of-court agreement. The courts can be assigned additional cases as appellate instances, if the federal state governments make use of this option stipulated in the bill.³⁵² Considering the importance of the referral system in Singapore, though, this mechanism should be further strengthened. In this regard, it is advisable to revise the JLSA bill to the effect that the establishment of a commercial court is always accompanied by an appellate jurisdiction. By such a specification in federal law, the uncertainties inherent to a delegation of the decision to the federal state governments can be avoided.

Furthermore, the strict value-in-dispute threshold of €1 million, which even applies in the case of a jurisdiction agreement, could prove to conflict with the necessity of ensuring a sufficient caseload. On the one hand, the threshold in the JLSA bill has already been lowered in comparison to an earlier proposal of the Federal Council of Germany from 2022, which had it fixed to €2 million to attract extraordinarily large-scale litigation only.³⁵³ Nonetheless, the proposed requirement does not reflect the standards established at the courts under review. The jurisdiction of the LCC³⁵⁴ or the SICC³⁵⁵ can be effectively agreed upon without having to meet any value threshold. Art. 1.3.1(a) of the NCC Rules excludes cases from the jurisdiction of the NCC that belong before subdistrict courts, i.e., where the value in controversy does not exceed €25,000³⁵⁶.

Admittedly, there are legitimate reasons for pushing minor lawsuits away from ICCs. Justices at the LCC have repeatedly criticized an inundation of the court with five-figure claims.³⁵⁷ In

³⁴⁹ Cf. *Yip*, ELR 2019, 82 (92).

³⁵⁰ Cf. Gu/Tam, Chic. J. Int'l L. 2021, 443 (468).

³⁵¹ Cf. Gu/Tam, Chic. J. Int'l L. 2021, 443 (468).

³⁵² See § 119b(4) of the GVG in the version as proposed in the JLSA bill.

³⁵³ Cf. Council draft, BT-Drs. 20/1549, pp. 6, 17.

³⁵⁴ Cf. *Wolff*, SchiedsVZ 2023, 209 (213).

³⁵⁵ Cf. SICC Rules 2021, Order 2 Rule 1.

³⁵⁶ Cf. *Aslan/Vermeulen*, NCC, p. 5.

³⁵⁷ Cf. *LCC*, [2023] EWHC 2829 (Comm), p. 8; *LCC*, [2023] EWHC 3036 (Comm), p. 2.

a ruling from 2003, Mr. Justice *Foxton* underscored the court's tight time constraints and the need for its limited resources being allocated to cases which are appropriate to the forum, in terms of both substance and amount in dispute.³⁵⁸

On the other hand, linking jurisdiction to (high) value thresholds is accompanied by the drawback of making the formulation of choice-of-court clauses much more complex.³⁵⁹ At the time of the conclusion of a contract it is often not possible to anticipate the value of a dispute that may arise in the future.³⁶⁰ The framework proposed in the JLSA bill would force the parties to take precautions to avoid that statutory rules on jurisdiction apply if a claim turns out not to meet the threshold.³⁶¹ To this end, they would have to agree on a subsidiary jurisdiction of another court or arbitral tribunal, potentially in another country to uphold advantages like English-language proceedings.³⁶² Such bifurcation of the dispute resolution clause would also vest the plaintiff with unilateral influence over where a case will ultimately be heard by quantifying the damages claimed.³⁶³

In this light, the threshold proposed in the bill is not only out of line with international standards, but as well detrimental to the international competitiveness of a German commercial court. Hence, the requirement should be eliminated from the draft for cases where the commercial court is designated by a choice-of-court agreement.

c) Effective marketing measures

Furthermore, fostering the development of an international reputation of an ICC requires that the state pursues a proactive marketing strategy.³⁶⁴ While the assignment of cases is the fundamental prerequisite that the court can make its mark, the communication of its achievements must follow in a second step. In comparison to other countries, notably common law jurisdictions, Germany does not invest significantly in promoting its legal system and its courts abroad.³⁶⁵

The already mentioned websites of the SICC and the NCC, which list all decisions rendered by the courts, can serve as an initial guide. To reach an international audience, it is essential to give the website a modern look and make it easily accessible, both in terms of the technical design and the available languages.

³⁵⁸ Cf. *LCC*, [2023] EWHC 3036 (Comm), p. 2.

³⁵⁹ Cf. *Wolff*, *SchiedsVZ* 2023, 209 (213).

³⁶⁰ Cf. *Wolff*, *SchiedsVZ* 2023, 209 (213).

³⁶¹ Cf. *Wolff*, *SchiedsVZ* 2023, 209 (213).

³⁶² Cf. *Wolff*, *SchiedsVZ* 2023, 209 (213).

³⁶³ Cf. *Wolff*, *SchiedsVZ* 2023, 209 (213).

³⁶⁴ Cf. *Grohmann*, *IdH*, pp. 465 et seq.

³⁶⁵ Cf. *Curschmann*, *IWRZ* 2018, 241.

d) Sustainable funding

The Dutch approach to strive for budget neutrality by charging an elevated fee rate for commercial court proceedings seems to be promising to contribute to the sustainability of the NCC. In contrast, pursuant to the JLSA bill, the usual fees for higher regional court proceedings will be charged for litigation before commercial courts.³⁶⁶

Then again, lower cost can certainly lead to the attraction of an increased number of cases. It seems crucial to conduct an in-depth cost-benefit analysis on this issue and to consider the results in the further process of legislation. A prudent solution would be to maintain the standard fee system for the start-up period and add to the bill a requirement for an evaluation of the cost policy after a period of five years³⁶⁷ in the light of the experience gained in the meantime.

e) Ensuring a reliable enforceability of judgments abroad

For ICCs, the recognition and enforcement of their judgments abroad is a much more urgent issue than for purely domestic courts, since usually neither the parties nor their assets are situated in the forum state.³⁶⁸ A main driver for the choice of arbitration is the easier enforceability of awards because of the global track record of the New York Convention.³⁶⁹

Hence, to convince a business to decide for a German ICC, the country must take appropriate measures not to fall behind in this respect. To increase the enforceability of SICC judgments, Singapore acceded the 2005 Hague Convention.³⁷⁰ However, as explained above, the existing international treaties do not suffice to ensure global enforceability of court judgments. Alongside the Hague Convention, Singapore therefore utilizes additional instruments to ensure the enforcement of SICC judgments abroad.³⁷¹ This includes a regimen of laws in different common law countries, which provide for the possibility to register and enforce judgments in other jurisdictions of the Commonwealth.³⁷² Furthermore, Singapore concluded a bilateral treaty on reciprocal enforcement with Hong Kong.³⁷³

A German ICC can only achieve international relevance if the enforceability of its judgments is guaranteed beyond the Brussels-Lugano framework and the existing bilateral treaties. Hence, Germany should use diplomatic channels to work towards further dissemination of the 2019 Hague Convention and, in the meantime, seek for bilateral cooperation with additional states.

³⁶⁶ Cf. BT-Drs. 20/8649, p. 22.

³⁶⁷ Cf. Wolff, SchiedsVZ 2023, 209 (222).

³⁶⁸ Cf. Godwin/Ramsay/Webster, Melb. J. Int'l L. 2017, 219 (233); Reyes, J. Int'l & Comp. L. 2015, 337 (338).

³⁶⁹ Cf. Yip, ELR 2019, 82 (96).

³⁷⁰ Cf. Curschmann, IWRZ 2018, 241 (242).

³⁷¹ Cf. Grohmann, IdH, p. 215; SICC, User Guides, Note 7.

³⁷² Cf. Godwin/Ramsay/Webster, Melb. J. Int'l L. 2017, 219 (235); SICC, User Guides, Note 7.

³⁷³ Cf. Grohmann, IdH, p. 215.

5. Greater adaptability of the procedural rules for commercial court proceedings

A crucial factor in attracting foreign litigants to an ICC has proven to be the flexibilization of the applicable rules of procedure.³⁷⁴ Since ICCs are designed to bring together parties from different legal backgrounds, they must find a way to accommodate the varying procedural traditions and preferences.³⁷⁵ As established above, the Dutch, the Singaporean and – to a certain extent – the English law have chosen the path of enacting a separate set of rules for ICC proceedings, instead of reforming the general procedural laws. Currently, this is the predominant model for ICCs around the globe.³⁷⁶ While this framework may be criticized for resulting in a fragmentation of procedural law, the economic preconditions in a dispute between financially highly potent companies differ profoundly from those in many other civil proceedings.³⁷⁷ Therefore, the creation of a separate set of rules can lead to a more appropriate allocation of judicial resources.³⁷⁸ Furthermore, some of the new procedural elements tested at ICC proceedings are likely to find their way into the legal policy discourse and eventually to be incorporated into general civil procedural law.³⁷⁹ Against this backdrop, the implementation of special rules for proceedings before a German ICC could prove to be a driver of innovation in the further development of the law.

The JLSA bill does not mark a great leap in terms of a comprehensive flexibilization of procedural law. On the one hand, amendments are foreseen for the court language, mandatory case management conferences, and verbatim records.³⁸⁰ On the other hand, pursuant to § 619(1) of the ZPO as proposed in the bill, commercial court proceedings remain subject to the same procedural rules, which apply before the regional courts in first instance.³⁸¹ Further concessions to foreign legal traditions, e.g., with regards to the taking of evidence, are not foreseen. This is in stark contrast to the extensive opt-out possibilities before the SICC. Time will show whether the proposed framework entails enough flexibility in terms of procedural law to lure foreign disputes to Germany. At the same time, a more extensive opening of the procedural law would have to answer to the question if the German legal education prepares aspiring judges sufficiently for such scenarios, e.g., for discovery.

³⁷⁴ Cf. *Bookman*, Yale J. Int'l L. 2020, 227 (247 et seq.); *Gu/Tam*, Chic. J. Int'l L. 2021, 443 (467).

³⁷⁵ Cf. *Grohmann*, IdH, pp. 84 et seq.

³⁷⁶ Cf. *Grohmann*, IdH, p. 454.

³⁷⁷ Cf. *Grohmann*, IdH, pp. 456 et seq.

³⁷⁸ Cf. *Grohmann*, IdH, p. 457.

³⁷⁹ Cf. *Bauw*, ELR 2019, 15 (22); *Yip*, ELR 2019, 82 (88).

³⁸⁰ Cf. JLSA bill, BT-Drs. 20/8649, pp. 8 et seq., 13.

³⁸¹ Cf. JLSA bill, BT-Drs. 20/8649, p. 12.

In view of this, the solution proposed in the JLSA bill is as reasonable compromise between ensuring a high-quality case handling and adopting elements of procedure established in commercial arbitration and other ICCs. In addition, the current procedural law already places great emphasis on party autonomy and allows litigants to a certain extent to shape the proceedings according to their needs.³⁸² They can, e.g., agree to waive their right to appeal even before a judgment has been issued or contractually exclude certain procedural actions.³⁸³

6. Demands on the judiciary at a German ICC

Handling ICC cases differs in several ways from the ordinary work of judges at German courts. Not only the high amounts in dispute, but also the common applicability of foreign law as well as the different nationalities of the litigants require a particular profile of the judges.

The jurisdictions under review have taken different approaches to tackle the question of the necessary properties of this profile. While the LCC and the NCC are staffed purely by domestic judges with a special expertise in cross-border commercial disputes, solely the SICC uses foreign ('international') judges. The deployment of prestigious judges from a wide range of jurisdictions at the SICC is perceived as a key element of its international appeal.³⁸⁴ Analyses of its early judgments demonstrate that the SICC was keen to assign its international judges from the outset.³⁸⁵ By offering litigants a judiciary with a background in both civil law and common law jurisdictions, the SICC enables the parties to have their dispute treated by adequately skilled and experienced judges.³⁸⁶ To some extent, this levels the playing field with arbitration.³⁸⁷

As the JLSA bill does not entail a liberalization of professional law, it is in line with the English and Dutch models. At a closer look, the deployment of foreign judges is neither necessary nor advisable in Germany. As long as the proceedings in principle remain subject to general procedural law, domestic judges are best qualified for their conduct. Moreover, many German judges nowadays have a considerable proficiency in English and Anglo-American legal terminology due to having obtained an additional master's degree from English-speaking countries³⁸⁸ or a prior employment in internationally operating companies or law firms³⁸⁹. In the appointment of judges to the new commercial courts, it will be essential to concentrate these language skills

³⁸² Cf. *Diekmann*, NJW 2021, 605 (606).

³⁸³ Cf. *Diekmann*, NJW 2021, 605 (606).

³⁸⁴ Cf. *Godwin/Ramsay/Webster*, Melb. J. Int'l L. 2017, 219 (254); *Gu/Tam*, Chic. J. Int'l L. 2021, 443 (467).

³⁸⁵ Cf. *Godwin/Ramsay/Webster*, Melb. J. Int'l L. 2017, 219 (254); *Yip*, ELR 2019, 82 (94).

³⁸⁶ Cf. *Gu/Tam*, Chic. J. Int'l L. 2021, 443 (469 et seq.).

³⁸⁷ Cf. *Gu/Tam*, Chic. J. Int'l L. 2021, 443 (470).

³⁸⁸ Cf. *Salger*, AnwBl. 2012, 40 et seq.

³⁸⁹ Cf. *Diekmann*, NJW 2021, 605 (609).

as well as commercial and industry-specific knowledge.³⁹⁰ A mitigation of personnel turnover at the commercial courts would be further conducive to this end.³⁹¹ In addition, more compulsory English-language elements need to be integrated into legal education at German universities to ensure a sufficiently qualified next generation of judges. By this means, not only the law students would benefit who have the financial means to afford the participation in an often highly expensive supplementary program abroad, but also those who have potential but lack the necessary fundings.

From the perspective of the parties, it might be the most effective way to harness a court's expertise by being entitled to appoint the individual judges for their dispute, just as they would be in arbitration.³⁹² In Germany, such an option is prohibited by the constitution, which enshrines the guaranteed jurisdiction of the lawful judge in Art. 101(1) phrase 2 of the GG.³⁹³ As the case studies have shown, this possibility is not the international standard either. Moreover, the non-controllability as to the composition of the adjudication body can also be marketed as a virtue, by emphasizing its neutrality. As an example, the commercial court in Mannheim and Stuttgart highlights on its website that its judges "are fully impartial [...] [,] only subject to the law [...] [and] not appointed by the parties themselves"³⁹⁴.

Finally, the judges at the new ICCs must be equipped with state-of-the-art technology and courtrooms, which is not yet the case throughout the country.³⁹⁵

E. Conclusion

Given the dynamic global developments, the phenomenon of ICCs appears to have come to stay. The proposed JLSA bill marks a first step by the federal government to enter the increasingly heating international litigation market. Close attention must be paid to the further competition in Europe, especially among the member states of the Brussels-Lugano treaty regime. As it usually takes several years after concluding a dispute resolution agreement before a first lawsuit is filed³⁹⁶, it is likely to become clear soon if any of these jurisdictions will succeed in capturing market share from the LCC, capitalizing on late effects of Brexit. Due to the geographical proximity and a comparable procedural framework, particularly fierce competition can be expected between German ICCs and the NCC.

³⁹⁰ Cf. *Burianski/Fleckenstein*, ZRP 2023, 162; *Curschmann*, IWRZ 2018, 241 (242); *Diekmann*, NJW 2021, 605 (606).

³⁹¹ Cf. *Curschmann*, IWRZ 2018, 241 (242).

³⁹² Cf. *Riehm/Thomas*, NJW 2022, 1725 (1727).

³⁹³ Cf. *Stürner*, JZ 2019, 1122 (1128).

³⁹⁴ Website of the court, available from <https://www.commercial-court.de/en/judges> (last accessed May 15, 2024).

³⁹⁵ Cf. *Calliess/Hoffmann*, AnwBl. 2009, 52 (53); *Curschmann*, IWRZ 2018, 241 (242).

³⁹⁶ Cf. *Wolff*, SchiedsVZ 2023, 209 (222).

There is no doubt that the current legal framework in Germany is not sufficient to establish the country as a hub for international litigation. Very limited options to litigate in English language, based on an uncertain legal foundation³⁹⁷, as well as an outdated regulation of both procedural³⁹⁸ and substantive law³⁹⁹, have caused the country to lag behind considerably. To a certain degree, the proposed bill could remedy this. Nevertheless, this thesis has revealed deficiencies of the bill and the fact that German ICCs will only achieve international competitiveness if German civil procedure is substantially modernized and internationalized⁴⁰⁰. This requires a paradigm shift in policymaking and a stronger focus on international recipients⁴⁰¹.

In this paper, several key elements in the design of ICCs have been identified. Some factors are certainly beyond the domestic legislator's control. This is the case, e.g., for the region of the court being "a commercial and financial hub with an ecosystem in which commercial dispute resolution is an integral part"⁴⁰² or for a reputation and experience as that of the LCC, which it has acquired in well over a century⁴⁰³. Moreover, the federal legislation depends heavily on the cooperation of the states because of Germany's federalist constitution. The JLSA bill only establishes a framework that the federal governments have to fill with life.⁴⁰⁴ However, based on the findings from the case studies made in this thesis, necessary amendments to the JLSA bill and further measures of legal policy law could be elaborated to contribute to the international attraction of German ICCs.

Firstly, it is crucial to eliminate language barriers, which currently obstruct foreign firms' access to German law. With its bill, the government has proposed an adequate framework to enable the use of English in commercial court cases. In addition, though, a translation mechanism should be created for higher and supreme court rulings, at least in areas of business law, where repercussions for ICC cases are expectable.⁴⁰⁵ The same applies to legal texts, which need to be published in English accurately and promptly after their adoption.⁴⁰⁶ Recommendable is, furthermore, the publication of comprehensible summaries on German law and legal terminology.

³⁹⁷ Cf. *Armbrüster*, ZRP 2011, 102 et seq.

³⁹⁸ Cf. *Diekmann*, NJW 2021, 605 (609); *Domhan*, IpS, pp. 33 et seq.; *Grohmann*, IdH, p. 15.

³⁹⁹ Cf. *Calliess/Hoffmann*, AnwBl. 2009, 52; *Riehm/Thomas*, NJW 2022, 1725 (1729 et seq.); *Salger*, AnwBl. 2012, 40.

⁴⁰⁰ Cf. *Curschmann*, IWRZ 2018, 241 (242).

⁴⁰¹ Cf. *Triebel*, AnwBl. 2008, 305 (308).

⁴⁰² *Blair*, IJPL 2019, 212 (224).

⁴⁰³ Cf. *Grohmann*, IdH, p. 111.

⁴⁰⁴ Cf. *Wolff*, SchiedsVZ 2023, 209 (222).

⁴⁰⁵ Cf. *Riehm/Thomas*, NJW 2022, 1725 (1729).

⁴⁰⁶ Cf. *Riehm/Thomas*, NJW 2022, 1725 (1729).

Secondly, the modernization of international court litigation in Germany must be ensued by reforms in neighboring fields of law to achieve, as the bill puts it, an *attractive overall package*. Given the empirically established link between jurisdiction agreements and choice-of-court agreements⁴⁰⁷, German substantive law must be aligned closer with international best practices for B2B situations⁴⁰⁸. In particular, a relaxation of the strict GTC control and a more careful application of general clauses is advisable.⁴⁰⁹ The legal framework for ADR and notably arbitration must be enhanced. Synergies and a concentration of competences can be generated by interlinking the work of the ICCs and arbitration proceedings conducted in Germany.⁴¹⁰

Thirdly, Germany and its federal states must take far-reaching action to help its ICCs to become national champions. The state governments should establish only a handful of joint courts, preferably combined with a division of subject-matter jurisdictions.⁴¹¹ For these, a steady stream of a sufficient number of cases must be guaranteed from the outset. To this end, the bill should stipulate a mandatory appellate stage. Moreover, when stipulating the jurisdiction of a German commercial court, parties must have the certainty that this court will hear a matter as soon as substantial sums are at stake.⁴¹² The value-in-dispute threshold should hence either be lowered decisively or omitted. To ascertain sustainable funding of the courts, the new law should be reviewed after five years to determine whether an increase in court fees is required. Finally, regarding the recognition and enforceability of the judgments issued, Germany must proactively seek a more effective treaty regime outside Europe.

Fourth, Germany must pursue an offensive communication strategy to market its legal system and legal services at an international level.⁴¹³

Fifth, the new ICCs must adequately be prepared for large-scale international commercial disputes. This requires excellent human and material resources⁴¹⁴, for the acquisition of which substantial upfront investments are required. If Germany succeed in establishing itself as international dispute resolution hub, it may have the opportunity to more than amortize this cost.

By setting the course according to these ideas, litigation before German courts has the potential "to become a product offered [...] to the whole world"⁴¹⁵.

⁴⁰⁷ Cf. *Bauw*, ELR 2019, 15 (20 et seq.); *Themeli*, ELR 2019, 70 (74).

⁴⁰⁸ Cf. *Riehm/Thomas*, NJW 2022, 1725 (1729).

⁴⁰⁹ Cf. *Calliess/Hoffmann*, AnwBl. 2009, 52; *Salger*, AnwBl. 2012, 40.

⁴¹⁰ Cf. *Burianski/Fleckenstein*, ZRP 2023, 162; *Illmer*, ZRP 2011, 170; *Lobach*, IWRZ 2017, 256 (257).

⁴¹¹ Cf. *Wolff*, SchiedsVZ 2023, 209 (222).

⁴¹² Cf. *Wolff*, SchiedsVZ 2023, 209 (213).

⁴¹³ Cf. *Gorst/Hunter/Vivswan*, SchiedsVZ 2023, 254 (262).

⁴¹⁴ Cf. *Grohmann*, IdH, p. 397.

⁴¹⁵ *Arnaud Nuyts* (see quotation on p. III).

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