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Summary of Young-OGEMID Symposium No. 14: "International Arbitration and International Commercial Courts: Competitive or Complementary?" (March 2022)

by E.S. Delgado

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Summary of Young-OGEMID Symposium No. 14: "International Arbitration and International Commercial Courts: Competitive or Complementary?" (March 2022)

by Earvin S. Delgado[1]

Young-OGEMID conducted its fourteenth virtual symposium, ***International Arbitration and International Commercial Courts: Competitive or Complementary?*** ("Symposium") last March 21st to 28th, 2022. The Symposium focused on the rapid development of international commercial courts in various regions across the globe. The Symposium also compared and discussed different attributes and practicalities of a selected number of international commercial courts with more established dispute resolution mechanisms – particularly international commercial arbitration.

The following speakers generously agreed to share their expertise:

1. **Prof. Xandra Kramer**[2] - *European Courts*
2. **Dr. Andrew Godwin**[3] - *International Commercial Courts in Asia*
3. **Prof. Alyssa King**[4] - *Role of foreign judges in international commercial courts*
4. **Prof. Pamela Bookman**[5] - *Competition in adjudication options*

Dr. S.I. Strong[6] acted as the moderator of the Symposium.

[1] Earvin S. Delgado is a Young-OGEMID Regional Rapporteur since 2020. He is also a trained arbitrator in the Philippine Dispute Resolution Center. He completed his Juris Doctor (J.D.) degree from the De La Salle University Manila, and his undergraduate degree (B.S.) from the University of the Philippines Diliman.

[2] Prof. Xandra Kramer is a Professor of Private International Law and Civil Justice at Erasmus School of Law, Erasmus University Rotterdam and Utrecht University. She is also a Deputy Judge in the District Court of Rotterdam. Her research interests include international litigation, collective redress, innovation and digitization of justice, and funding of civil justice. She is Principal Investigator of an ERC consolidator project 'Building EU civil justice' and was a co-reporter and reporter of key working groups of the project resulting in the ELI-Unidroit Model European Rules of Civil Procedure 2020. She is an elected member to the Dutch Royal Academy of Arts and Sciences (KNAW), and of the Institut de Droit International (IDI), and currently serves on the Council of the European Law Institute (ELI).

[3] Dr. Andrew Godwin is a Principal Fellow (Honorary) at Melbourne Law School. He is also Special Counsel at the Australian Law Reform Commission, assisting its inquiry into the simplification of corporations and financial services regulation. He previously spent fifteen years as an academic at Melbourne Law School (2006 – 2021) and 15 years in practice (1992 – 2006). Andrew's Ph.D. thesis examined traditional land-use rights in China. Andrew has acted as a consultant to a broad range of organizations, including the World Bank and regulators and governments in Australia and abroad.

[4] Prof. Alyssa King is an Assistant Professor of Law at Queen's University Faculty of Law (Canada) and an expert in civil procedure, courts, arbitration, international litigation, and comparative law. Her work has appeared the Harvard Journal of International Law, the Indiana Law Journal and other journals in the United States, Canada, and Europe.

[5] Prof. Pamela K. Bookman is an Associate Professor of Law at the Fordham University Law School and an expert in the fields of Civil Procedure, Contracts, International Litigation and Arbitration, and Conflict of Laws. Her scholarship has appeared in the Stanford Law Review, the New York University Law Review, the American Journal of International Law, and other leading law journals.

[6] Dr. S.I. Strong is the Professor of Comparative and Private International Law in the University of Sydney Law School. She is also the moderator of Young-OGEMID. She works in the area of international dispute resolution and comparative law, with a particular emphasis on international commercial arbitration and large-scale class and collective suits. Dr. Strong has published numerous books and articles in Europe, Asia and the Americas, and her work has been cited as authority to the U.S. Supreme Court and in ICSID awards.

Speaker 1: Prof. Xandra Kramer, Erasmus University Rotterdam and Utrecht University

Topic: *European Courts*

In her opening discussion, **Prof. Kramer** stated that international commercial courts have been on the rise in Europe, Asia, and the Middle East, and the concept of commercial courts, was not new. She set as an example two courts in Europe: the Tribunal de Commerce in Paris, established in 1563, was the oldest court in the French judiciary, and the London Commercial Court, now known as the Business and Property Courts, was established in 1895. These courts were created to provide tailor-made procedures for business disputes. She continued that court specialization was believed to have benefits, such as increasing the efficiency, efficacy, and quality of the judiciary. She noted the recent establishment of international commercial courts added: "a unique aspect such that these courts were often established for economic reasons and to promote the country as a desirable location for high-value international business litigation." She further discussed that some of these courts adopted features from international commercial arbitration. International jurisdiction was often based on a choice of forum, the procedure conducted in English, and the judges were highly experienced in international business disputes, with more room for party autonomy and flexibility. In some jurisdictions, judges were selected from various countries and backgrounds.

She continued, "While these courts potentially spear innovation and profit national legal markets, as well as give business parties more choice, the rise of these courts has also been criticized. For instance, in Belgium, the fear for a two-tiered justice system (or a 'caviar court') has led to the failure to establish the Brussels International Business Court." She also acknowledged that there were questions about how these courts could compete with well-established international commercial arbitration institutes and that public courts will always be open courts and were part of the national judiciary, despite their international outlook. **Prof. Kramer**, however, believed that these courts do offer opportunities for the international dispute resolution market. She also expected that with the implementation of the 2019 Hague Judgment Convention and the 2005 Hague Choice of Court Convention, international commercial courts will continue to gain more traction.

Participant **Earvin Delgado** commented on the growing number of international commercial courts in continental Europe post-Brexit, noting that the United Kingdom (UK) was a preferred hub for cross-border commercial cases, especially for those which involved non-UK parties. He then asked how UK judgments have been recognized and enforced in continental Europe post-Brexit. He also brought up that international commercial courts in continental Europe were positioning themselves as alternative hubs vis-a-vis the ones in the UK, hence he also asked if there was a growing preference for international commercial courts based in continental Europe.

In response to the first question, **Prof. Kramer** noted that there was no simple or uniform answer to this question. She shared that the UK had been unsuccessful in acceding to the Lugano Convention but became an individual member of the Hague Choice of Court Convention as of January 1, 2021. She also mentioned that there have been debates on whether the Convention also applied to forum agreements made before the said date. She added that in cases where the Hague Choice of Court Convention does not apply the recognition and enforcement of UK judgments in European Union (EU) countries depended on national law. She also shared that there were "no firm data on how enforcement has evolved so far and this

may also be too early. In any case, the liberal rules and abolition of exequatur under the Regulation no longer apply."

In answering the second question, **Prof. Kramer** said it was probably too early to reach firm conclusions as to preferences between international commercial courts in the UK versus the ones in continental Europe. She explained that contracts concluded before Brexit were not affected and it would require more recent data to say more about contracts concluded post-Brexit. She added that big law firms have worked with English law and forum agreements in favor of English courts for many years, and their experience was an important factor in forum selection. She also referred to an interesting paper[7] and a book chapter[8] by Erlis Themeli which touched upon the topic. She also mentioned that a report revealed 35% of the surveyed businesses changed their contracts to include a choice for an EU court, but also that 20% were looking at arbitration instead.[9] She also shared that London courts were facing growing competition[10], but the new courts in other European countries will need more time to establish themselves.

Participant **Victoria Barausova** acknowledged that the specific expertise of the judges in such courts and the possibility of conducting proceedings in English met some of the needs of market players who commonly referred disputes to arbitration. She, however, noted that other features made arbitration attractive but such cannot be easily replicated in international commercial court proceedings.

1. "The first one is confidentiality (in the 2018 QMUL Survey[11], 36% of respondents identified it as a valuable characteristic). Although default confidentiality is by no means a universal solution, many institutional rules contain a provision to that end. By contrast, the proceedings before the commercial courts are generally public." She asked if **Prof. Kramer** was aware of the initiative to accommodate this interest in a commercial court context and, if so, what solutions were being proposed.

2. "Second, despite the well-known criticisms of the system of unilateral appointments[12], it remains an attractive feature of arbitration (in the 2018 QMUL Survey[13], 38% of respondents identified it as such). At first glance, it seems hard to envisage a possibility for a commercial court to replicate this feature." She then asked if **Prof. Kramer** knew of any proposals on how this interest could be addressed in a court setting.

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[7] Erlis Themeli, *Matchmaking International Commercial Courts and Lawyers' Preferences in Europe*, 12 Erasmus Law Review 70 (2019)

[8] Erlis Themeli , *International Business Courts: A European Global Perspective* 273 (Xandra Kramer & John Sorabji ed., Eleven International Publishing 2019)

[9] Thomson Reuters, *35% of businesses choosing EU courts over UK due to Brexit uncertainty* (Thomson Reuters, 2018), https://www.thomsonreuters.com/en/press-releases/2018/july/35-percent-of-businesses-choosing-eu-courts-over-uk-due-to-brexit-uncertainty.html

[10] The Economist, *London's business courts face growing competition* (The Economist, 2021), https://www.economist.com/britain/2021/04/24/londons-business-courts-face-growing-competition

[11] Queen Mary University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration* (White & Case, 2018), https://arbitration.qmul.ac.uk/research/2018/

[12] Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25 ICSID Review Foreign Investment Law Journal 339–355 (2010)

[13] *See note 11*

3. She shared that from the perspective of a legal system, international commercial courts offered the advantage of ensuring judicial continuity, which was somewhat curtailed in international arbitration. She asked if **Prof. Kramer** believed the issue could be addressed in international arbitration through the publishing of the awards.

Prof. Kramer acknowledged that **Ms. Barausova** was correct in noting that arbitration had more advantages which resulted to enforceable awards and that the surveys provided good insight in that regard. She also added that "it may also take decades before the 2019 Judgment Convention attracts as many ratifications as the New York Convention, or perhaps governments may always be more reluctant vis-à-vis foreign courts." She also stated that "some of these advantages can be or are addressed by international commercial courts and in particular the more flexible approach, and high levels of international business expertise. We used to teach our students that arbitration was cheaper and faster than courts, but it is well known that international commercial arbitration is very expensive and can take very long. In that regard, international commercial courts may be cheaper and faster."

As regards confidentiality, **Prof. Kramer** said that "the essence of public courts was that hearings were public", and international commercial courts, "were still part of the national judiciary and should therefore be open to the public, and public scrutiny, as a fundamental right recognized in human rights conventions and national constitutions and laws." She acknowledged that as long as commercial courts were public courts, confidentiality similar to arbitration was not an option. She, however, also clarified that there were "limits to this statement and that some courts were more flexible in this regard." **Prof. Kramer** also commented that she was not sure about **Ms. Barausova**'s comment on unilateral appointments. She expounded that in international commercial courts, it was not possible to select a particular judge by either party. "There has been a general discussion on the unilateral choice of court agreements, but I am not aware of specific problems in relation to international commercial courts", she replied. Finally, on the comments on predictability and continuity as a "plus" for international commercial courts, she answered that it was one of the disadvantages of arbitration, and that in recent years there was "more attention for publishing at least abstracts of arbitral awards."

After which, **Dr. Strong** expressed that she appreciated the reference to the Hague Judgments Convention, as it was likely to be a major determinant in whether and to what extent these types of specialty courts expand and thrive, at least if international commercial arbitration was used as the comparator rather than the English Commercial Court. She acknowledged that easy enforcement was a major reason why parties preferred arbitration. She also expressed that she appreciated **Prof. Kramer**'s point about Belgium's response to develop an international commercial court, and noted that some countries, like the United States of America (USA) and Australia, resisted the development of new courts because of the belief that their existing courts were perfectly adequate to the task. **Dr. Strong** then asked **Prof. Kramer** if she had "come across European jurisdictions that have made that same kind of analysis, i.e. concluding their judicial systems were already capable of handling such matters." She also recommended her book, *International Commercial Courts in the United States and Australia: Possible, Probable, Preferable?*[14] to those who were interested in the American and Australian views on the topic.

[14] S.I. Strong, *International Commercial Courts in the United States and Australia: Possible, Probable, Preferable?*, 115 *AJIL Unbound* 28-33 (2021)

Dr. Lucas Clover Alcolea[15] also joined and raised questions about the nature of international commercial courts. He queried whether international commercial courts can truly be called "courts" at all. He explained that traditionally courts were thought of as having certain public law roles, upholding human rights and the rule of law, and more. Although these issues do not frequently arise in commercial cases, a court hearing a commercial case could still address issues of due process and human rights. He noted that certain international commercial courts, such as those in the United Arab Emirates (UAE) or Kazakhstan, have limited jurisdiction and cannot address such issues. He also raised concerns about the independence of such courts in systems where there was an absolute ruler, and questioned whether they possessed the independence to be considered courts under European Court of Human Rights case law or EU law.

Dr. Strong responded that these "new bodies were not upholding the rule of law and questioning the relevance of human rights in determining the nature of a court." She argued that every judicial system had internal classifications that indicated which cases went to which courts and that these international commercial courts were similar to other courts of limited jurisdiction. To this, **Dr. Alcolea** replied that, outside of the commercial sense of upholding contracts and judicial independence, he struggled to see how these "artificial" commercial courts upheld the rule of law. He also argued that the limitations on jurisdictions were problematic and that "an argument could also be made that some human rights were, in theory, respected even before the universal declaration on human rights." **Dr. Strong** replied that a "court can and would address off-point issues by declining jurisdiction" such that "just because a court construes its jurisdictional reach strictly does not mean it is not a court." She illustrated that American federal courts cannot accept jurisdiction over parties if there was no subject matter jurisdiction, even if the parties consented, and such would not have made them "non-courts" per se. Following this, **Dr. Alcolea** commented that the difference was between a court being able to address issues of torture or human rights abuses that were relevant to a commercial claim and a court not being able to do so. He then shared that he never thought that "a court can be a court without having any public law functions" as that was what made it uniquely a court.

Prof. Pamela Bookman joined the discussion, and wrote that she was curious about **Dr. Strong** and **Prof. Kramer**'s "thoughts on other European jurisdictions that have decided not to pursue an international commercial court." She asked if they would consider the London Commercial Court an example of a pre-existing court in a European jurisdiction deemed already capable of handling these matters. She noted that it was "similar to the New York Commercial Division were commercial divisions that offered more efficient and specialized procedures which were designed to be more appealing to parties in commercial disputes." According to **Prof. Bookman**, the existence of both the London and New York commercial courts suggested that those cities never "needed" a separate international commercial court as

[15] Dr. Lucas Clover Alcolea is a lecturer in the University of Otago School of Law in New Zealand where he teaches a course on wills and trusts and was previously a postdoctoral associate in the Scheinman Institute on Conflict Resolution at Cornell University where he designed and taught a course on alternative dispute resolution. His research interests include international investment law, trusts, property law, dispute resolution and legal theory. Lucas obtained his undergraduate law degree from the University of Aberdeen in 2010, his LLM from Edinburgh University and his doctorate in law from McGill University. Lucas has published articles in the McGill Journal of Dispute Resolution, the Journal of International Dispute Settlement, the Chinese Journal of International Law, the Pepperdine Dispute Resolution Law Journal, the New Zealand Universities Law Review, the Alberta Law Review, and the Contemporary Asia Arbitration Review among others.

both were established before the recent wave of "international" commercial courts and were open to hearing both domestic and international commercial disputes.

In response to the common concerns about American courts in the course of the discussion, **Prof. Bookman** noted that the New York Commercial Division offered parties opportunities to opt into more efficient procedures, including opting into "accelerated procedures" that limited discovery and allowed parties to waive their rights to a civil jury trial or punitive damages. She also shared that, "under New York law, any case based on a contract designating New York as the chosen forum and chosen law can be heard in New York courts so long as it involves over $1M in controversy, even if it has no other connection to the jurisdiction." She also agreed that there were other obstacles to the establishment of a dedicated international commercial court in the USA, especially as a federal court. She referred to previous works of **Dr. Strong**, **Prof. Kramer,** and other sources, and stated that the idea has been discussed in much more detail in Australia. She also shared that she had addressed the role of the London Commercial Court and the New York Commercial Division as precursors to today's international commercial courts in her article, *The Adjudication Business*[16].

Mr. Mark Kantor[17] also commented that he was puzzled by the suggestion that a commercial court would be required to decline to hear and decide public law defense if it was adequately related to a commercial matter within its commercial jurisdiction. He cited the case of *Alexander Brothers Ltd. v. Alstom Transport S.A. and Alstom Network UK Ltd.*[18], where "the English Commercial Court granted enforcement of an ICC arbitration award despite a public policy defense based in part on corruption allegations. The respondent, Alstom, argued that enforcement of the award would be contrary to public policy since there were 'indicia' of corruption in the performance of the underlying contracts and any sums paid under the award might go to finance bribery. The Commercial Court assessed the evidence and held against Alstom on the defense."[19]

Finally, **Dr. Strong** shared that she thought **Dr. Alcolea** was talking about affirmative claims rather than defenses. She, however, did not see why a court could not hear evidence on broad defenses as those defenses would be assessed simply as defenses, and such would not be have been inherently problematic. In response, **Dr. Alcolea** stated that he agreed that one could not bring a criminal claim about torture or hacking to a family or commercial court, but it could be raised as a defense or a circumstance. He added that, at least in common law courts, it may also be possible to "bolt-on" a quasi-criminal claim to a civil claim. He questioned, however, whether certain international commercial courts could hear these types of claims due to their narrow statutory jurisdiction and past practices. **Dr. Strong** distinguished between claims and defenses and noted that historically, parties could not bring both equitable and common law claims in the same court in England. She stated that in contemporary jurisprudence, it would be impossible to "tack on" a claim over which a court did not have jurisdiction as a claim for affirmative relief versus grounds for a defense. She also pointed out that an Australian court with jurisdiction over a contract claim could not hear a claim based on a German statute giving

[16] Pamela K. Bookman, *The Adjudication Business*, 45 Yale Journal of International Law 227 (2020)

[17] Mark Kantor is an arbitrator in commercial and investment disputes, and an Adjunct Professor at the Georgetown University Law Center. He is also Editor-in-Chief of the online journal Transnational Dispute Management.

[18] *Alexander Brothers Ltd. v. Alstom Transport S.A. and Alstom Network UK Ltd.* (2020)

[19] Robert Bradshaw, *When there's smoke but no fire: English court rejects defence based on "indicia" of corruption* (Thomson Reuters: Practical Law Arbitration Blog, 2020), http://arbitrationblog.practicallaw.com/when-theres-smoke-but-no-fire-english-court-rejects-defence-based-on-indicia-of-corruption

exclusive jurisdiction over the matter to a German court. Australian courts, however, "will hear matters arising under a number of German statutes if there is jurisdiction and no grounds to exercise discretionary grounds not to exercise jurisdiction (forum non conveniens). It is just like saying a civil court cannot accept a true criminal claim, even if it is "tacked on" to a civil claim. The civil compensation schemes you mention are not true criminal claims, even if they arise out of the same behavior."

Finally, **Prof. Kramer** rejoined the discussion and provided clarifications and answers. She acknowledged that the discussion was going in different directions and that there was a considerable divergence between procedural systems in Europe which made it challenging to make bold statements or conclusions. She added that the London Commercial Court (Business and Property Courts) should be excluded from the discussion as it has a long history and was not originally set up as an international commercial court. She also noted that the international commercial courts that have been established so far differ substantially, with some being ordinary courts or simply a chamber within an existing court, while others were self-standing courts. Other commercial courts, she added, have only been set up to deal with very specific subjects, such as maritime disputes or intellectual property.

On European courts, **Prof. Kramer** remarked that "European courts – the ones in England, the Netherlands, France, and Germany" were "chambers and/or divisions of public courts, exclusively or primarily having jurisdiction in international, civil and commercial matters." This meant that "within the confines of their subject-matter jurisdiction that these courts would deal with questions of human rights and public policy as they arise, as any other civil court would." She then circled back to an earlier question by **Dr. Strong** on European jurisdictions possibly resisting the development of international commercial courts. She explained:

> "The setting up of these courts has been quite difficult in Europe and has raised different discussions as to the need and feasibility. In some countries, for instance, in France, the idea to create such a court was raised in the 1990s, but it took until 2018 to establish a genuine commercial court (chamber). Similarly to Belgium, in The Netherlands concerns were voiced about the risk of a two-tiered justice system ('better justice for a higher court fee').[20] In addition, the added value of this court has been questioned, since the Netherlands has a generally well-functioning civil justice system, and a number of special court divisions (for instance the maritime chamber in the Rotterdam District Court) were already well-equipped in dealing with complex international cases and enabled hearings to take place in English. In Germany, the establishment of international commercial chambers in a number of courts took time and effort, and fundamental debates evolved around allowing English as a court language. In Switzerland, initiatives to set up an international commercial court (in Zurich) or to gear the commercial court to deal with international cases specifically have been discussed for a number of years but have so far not materialized. But any law reform takes time."

Mr. Kantor also shared that "Among the attractions of international commercial arbitration under most arbitration laws and rules were (1) the absence of any requirement that either the dispute or the parties have a jurisdictional relationship with the seat of the arbitration, thus permitting a neutral seat, and (2) the absence of cumbersome service requirements, thus

[20] Xandra Kramer, *No fake news: the Netherlands Commercial Court proposal approved!* (ConflictOfLaws.Net, 2018), http://conflictoflaws.net/2018/no-fake-news-the-netherlands-commercial-court-proposal-approved/

assuring that a recalcitrant party can be brought into the forum." He continued, "these were two of the reasons why arbitration was attractive as an international dispute resolution forum. The court, formerly known as the English Commercial Court, sought to replicate those advantages, and was unsurprisingly also an attractive forum for pre-dispute submission by non-British contract parties." He then asked if **Prof. Kramer** was aware of other commercial courts or commercial chambers that provided similar flexibility in their jurisdictional and service arrangements. **Prof. Kramer** then answered countries "had their own rules of jurisdiction" but also in an attempt to attract cases, countries generally had very liberal jurisdiction rules and did not require a connection between the dispute or parties and the chosen court. She also shared that in the EU, the Brussels I (recast) Regulation, which was relevant when a choice was made for an EU court, did not require any connection with the chosen court.

Prof. Kramer added that "there may be more specific requirements to establish jurisdiction for the specific commercial court and that may deviate from the general *international* jurisdiction rules. For instance, for the Dutch NCC to be competent, it was required[21]:

1. the Amsterdam District Court or Amsterdam Court of Appeal has jurisdiction;
2. the parties have expressly agreed in writing that proceedings will be in English before the NCC (the 'NCC agreement');
3. the action is a civil or commercial matter within the parties' autonomy;
4. the matter concerns an international dispute (this is a very broad criterion).[22]

As regards service, **Prof. Kramer** replied that the service rules were also different per country, in particular between civil law and common law countries. She cited that "in a civil law country like the Netherlands, a document can be served to any party regardless of domicile using the rules of the Service Regulation (EU) or the Hague Service Convention, and service is not an obstacle to bring litigation in the Netherlands."

Speaker 2: Dr. Andrew Godwin, University of Melbourne

Topic: *International Commercial Courts in Asia*

Dr. Andrew Godwin began his session by citing previous research on international commercial courts in Singapore[23] and China.[24] He highlighted that the SICC was established as a result of the efforts of Singapore to become a regional hub in dispute resolution and corporate restructuring. The committee, however, whose report led to the creation of the SICC, also suggested that an international court could address some of the weaknesses of arbitration as a means of international commercial dispute resolution. He then shared that it was suggested that international commercial courts could provide an opportunity for the harmonization of substantive legal principles and civil procedure such as how the SICC operated as a special division of the Singapore High Court, which was a part of the Singapore Supreme Court.

[21] Netherlands Commercial Court, *What kinds of cases can be brought before the NCC?* (Netherlands Commercial Court, n.d.), https://www.rechtspraak.nl/English/NCC/Pages/jurisdiction-and-agreement.aspx
[22] *Ibid.*
[23] Andrew Godwin, et.al., *International Commercial Courts: The Singapore Experience,* 18 *Melbourne Journal of International Law* 219-259 (2017)
[24] Wei Cai & Andrew Godwin, *The China International Commercial Court: how far can it go?*, 68 *The International & Comparative Law Quarterly* 869–902 (2019)

He also discussed the motivations for the creation of the China International Commercial Court (CICC)[25] in mainland China, specifically the Belt and Road Initiative (BRI) and the desire of China to establish a forum for cross-border dispute resolution, particularly for cross-border BRI transactions where the contracts were governed by Chinese law. He thought that such a move was also unofficially a response to the relative inexperience of mainland Chinese courts in dealing with cross-border commercial disputes and the desire to increase China's competitiveness in this regard.

With regard to jurisdiction, he stated that the SICC only heard claims that were "of an international and commercial nature", while the CICC had jurisdiction to hear "international commercial cases." He also mentioned that matters can be transferred to the SICC and the CICC by the Supreme Court and the Supreme People's Court, respectively. On areas of innovation, **Dr. Godwin** discussed that the "SICC was quite pioneering in terms of the innovations that it introduced", such as the ability for court proceedings to be confidential, parties to apply for an order to replace Singapore evidential rules with other rules of evidence, and a simplified discovery regime. He also added that international judges have been appointed to the SICC and are tasked "to provide expertise in foreign commercial law and may be selected by the Chief Justice due to their experience in a foreign jurisdiction or a particular subject matter."

He also highlighted that the CICC was closer to domestic courts in mainland China, with all judges being Chinese, although the CICC has established a Committee of International Foreign Experts to "provide guidance on foreign law and act as mediators." He explained that:

> "In China, as is the case in other jurisdictions (including Australia), the ability to appoint international judges to international commercial courts is difficult as a result of constitutional and other restrictions; for example, the qualification (nationality) of judges and requirements for judges to serve on a full-time basis. It is interesting to note in passing that foreign common law judges sit as overseas non-permanent judges on the Court of Final Appeal in the Hong Kong Special Administrative Region (HKSAR) of the PRC under the provisions of the Basic Law of the HKSAR."

Concluding his discussion, **Dr. Godwin** touched on the topic of determination of foreign law. He explained that the SICC may determine foreign law based on submissions from the parties without requiring the parties to prove foreign law based on expert evidence. He noted this was a significant departure from other common law jurisdictions where courts were deemed to not know foreign law and foreign law was required to be proven by experts. He also compared this approach to other jurisdictions such as civil law jurisdictions, where foreign law was treated as a question of law and can be determined by the court itself. He pointed out that the approach allowed for greater flexibility and efficiency in resolving disputes related to foreign law.

After the discussion, **Dr. Strong** shared that people saw the SICC as the "gold model" of international commercial courts and asked if he had a sense of the number of cases per institution to see whether market forces have responded in that way. She also asked if he had insights on whether the "CICCs were in a position to benefit (numerically speaking) from similar restrictions" on where Chinese parties can litigate disputes, as it was a factor that contributed to the rise of China International Economic and Trade Arbitration Commission

[25] There are actually two of such courts – one on Shenzhen and one in Xi'an – both of which come under the supervision of the Supreme People's Court.

(CIETAC) internationally. She also noted that China has not yet signed the Hague Judgments Convention.

In response, **Dr. Godwin** replied that it took a bit of time for the SICC to generate momentum and it was initially dependent on cases transferred to it from the High Court. He added that it would "always takes time for parties to start including express submission clauses in their commercial contracts and, then, for disputes to find their way to the SICC accordingly." He continued by saying that **Dr. Strong** was "correct that foreign-related arbitration was traditionally limited to CIETAC. He, however, expounded that over the past twenty years or so, the jurisdiction of the more "domestic" arbitration commissions was extended to include foreign-related arbitration, so the distinction was no longer relevant. He also reiterated that one of the motivations for the creation of the CICC was to assert a degree of influence over the forum for dispute resolution in BRI-related cross-border contracts and to present mainland China as a more attractive jurisdiction for court proceedings. He also acknowledged that "China has not yet signed the Hague Convention and the enforcement of foreign judgments in China is still problematic. In this respect, the position in respect of arbitration is more favorable given that China is a member of the New York Convention."

Participant **Daniel Nicholas Pakpahan** joined the conversation and stated that the SICC and CICC were not intended to replace or compete with international arbitration, but rather to serve as a complement to increase access to justice for cross-border litigants. He also acknowledged that parties from certain jurisdictions may opt out of court mechanisms due to their unfamiliarity with foreign judicial systems or to avoid the slightest tinge of judicial corruption in the proceedings. He then had the following queries:

1. He asked whether the said courts were created with a perceived advantage such that they would appear to provide fairer outcomes and better assurances against judicial corruption due to their international nature, specific jurisdiction, and the eminence of the judges. He also clarified that his question touched upon the debate on the Hague Choice of Court Convention, specifically on the alleged inadequacy of courts[26] to handle complex cross-border commercial disputes.[27]

2. He also asked whether it was appropriate for the SICC to handle challenges on the enforcement or setting aside of international arbitral awards which were usually raised before the High Court. He questioned whether such cases would be categorized as procedural as opposed to commercial in nature, hence falling outside its jurisdiction. He noted that the policy of minimal curial intervention would in any event bar such transfer from the High Court to the SICC. He also requested information on instances where the parties brought challenges on arbitral awards directly before the SICC or the High Court transferred such challenges to the SICC.

3. Lastly, he inquired about efforts or trends in promoting the integration of mediation into the proceedings before SICC and CICC. He noted that the CICC places

[26] Gary Born, *Why States Should Not Ratify, and Should Instead Denounce, the Hague Choice-Of-Court Agreements Convention, Part II* (Kluwer Arbitration Blog, 2021), http://arbitrationblog.kluwerarbitration.com/2021/06/17/why-states-should-not-ratify-and-should-instead-denounce-the-hague-choice-of-court-agreements-convention-part-ii/

[27] João Ribeiro-Bidaoui, *Hailing the HCCH (Hague) 2005 Choice of Court Convention, A Response to Gary Born* (Kluwer Arbitration Blog, 2021), http://arbitrationblog.kluwerarbitration.com/2021/07/21/hailing-the-hcch-hague-2005-choice-of-court-convention-a-response-to-gary-born/

particular emphasis on mediation in resolving disputes which may be conducted by members of the CICC and that the CICC may then issue a mediation statement that has the same effect as a CICC judgment after it has been signed by both parties. However, he acknowledged that China has not signed the Hague Judgments Convention thus such mediation statements would be "toothless" abroad if they were breached. In light of the Singapore Convention on Mediation starting to gain momentum, he asked whether the SICC would play an active role in promoting mediation between the parties or enforcing mediated settlement agreements.

Dr. Godwin agreed "that the lack of familiarity with courts in certain jurisdictions and concerns about their experience, expertise, and independence" were relevant factors. He illustrated that in the case of the CICC, he thought that "part of the motivation was to increase confidence in this regard. For example, under the applicable regulations, the judges are 'senior judges who have extensive experience in trial work, are familiar with international treaties, practices, and trade investment practices, and are proficient in both Chinese and English'." He also added, "In the case of the SICC… the motivation was more to establish Singapore as a hub for cross-border dispute resolution and to expand the jurisdiction and foreign law expertise of the SICC." **Dr. Godwin** shared that "the SICC has heard applications to set aside arbitral awards[28] which involved a transfer from the High Court and were heard by an international judge. He also shared that he was "not aware of any reason why a distinction might be drawn between "procedural" and "commercial" in this regard.

Dr. Godwin also agreed with the observation of **Mr. Pakpahan** about the emphasis of the CICC on mediation. He noted that "China has signed, but not yet ratified, the Singapore Mediation Convention. Concerning the SICC, the government stated that 'the provisions of the SICC Rules 2021 are framed in a manner that encourages amicable resolution of disputes, such as mediation.'[29]"

Speaker 3: Prof. Alyssa King, Queen's University

Topic: *Role of foreign judges in international commercial courts*

Prof. Alyssa King opened her session by introducing how she and **Prof. Bookman** have worked on the *Traveling Judges Project* which tracked "the use of non-local judges on courts with an international commercial orientation." Their first paper related to the project, *Traveling Judges*[30], was published in the American Journal of International Law. The data presented in her discussion was drawn from the research for the said paper. **Prof. King** also noted that such was only preliminary data and that the authors have double-checked everything they could. The authors believed that the data was useful in understanding the relationships among courts, and the influence of international arbitration and served as a starting point for discussions about judicial diversity.

[28] *CMJ and another v. CML and another*, SGHC(I) 20 (2021), https://www.elitigation.sg/gd/sic/2021_SGHCI_20
[29] Singapore International Commercial Court, *Media Release: Singapore International Commercial Court introduces standalone SICC Rules 2021 to incorporate international best practices and facilitate international dispute resolution* (Singapore Courts: The Judiciary, 2021), https://www.judiciary.gov.sg/news-and-resources/news/news-details/media-release-singapore-international-commercial-court-introduces-standalone-sicc-rules-2021-to-incorporate-international-best-practices-and-facilitate-international-dispute-resolution
[30] Alyssa S. King & Pamela K. Bookman, *Traveling Judges*, 116 American Journal of International Law 477-533 (2022)

Prof. King explained that the authors define "traveling judges" as, "those judges who are not citizens or permanent residents of the host court's jurisdiction and did not have their primary legal career there." She continued:

> "Courts that invite traveling judges do not require their judges to be permanent residents of the host jurisdiction before they accept the post. Traveling judges may have had some contact with the host court jurisdiction in their work as attorneys, but our definition excludes anyone who held government office, or for whom court or law firm bios or, failing that, news articles, indicate that they practiced as local lawyers. To decide which judges to include, we essentially took a snapshot of court membership including those traveling and local judges who were on the courts on June 1, 2021. The composition of some courts changes frequently, but historical lists were not complete. Our snapshot approach can provide an overall sense of what these courts look like recently, but it does miss some nuance that one would get with more complete historical data."

Prof. King shared that the authors' list of courts in the paper was wider than the list of courts that was being discussed in the Symposium as they wanted to include courts that do not call themselves "international commercial" courts but have international commercial ambitions. To select the courts involved, the authors used membership in the Standing International Forum of Commercial Courts (SIFoCC). **Prof. King** explained:

> "SIFoCC membership is open to any jurisdiction 'with an identifiable commercial court or with courts handling commercial disputes.' Member courts all self-identify as courts that 'hear and resolve domestic and/or international disputes over business and commerce.' SIFoCC's members include specific court divisions, like the Cayman Islands Financial Services Division, entire courts that may have commercial divisions within them, like the Eastern Caribbean Supreme Court, and entire judiciaries or ministries, like the Hong Kong judiciary."

Hence, the paper included a diverse group of courts, including some that were not designated as international commercial courts like the Cayman Islands Financial Services Division, or the Hong Kong Court of Final Appeal. She, however, clarified that if what will be considered were only the international commercial courts, the following courts were included: DIFC Courts, the Qatar International Court and Dispute Resolution Centre (QICDRC), the SICC, the Abu Dhabi Global Market (ADGM) Courts, and the Astana International Financial Centre (AIFC) Courts.

She continued that, the use of traveling judges on international commercial courts varied. She then shared some examples:

> "… ADGM Courts and the AIFC Courts had no local judges. The QICDRC had one Qatari member. The DIFC, which has been working to increase the number of local judges, had 5 local judges out of 13. By contrast, approximately 62% of SICC judges were Singaporean (26/42). The SICC also had the most diverse membership in terms of home jurisdiction, including the only member from a civil law jurisdiction (France) and the US (a former Delaware judge). We are told by SICC judges that their court makes an effort to include civil law jurists (they have had Austrian and Japanese members in previous years and now have added a new Japanese judge to the roster)."

Prof. King explained that the authors had identified 49 traveling judges on international commercial courts overall, and noted that it would be considered a "very small group." She

shared that "just over half (55% or 27 people) of traveling judges on the international commercial courts had their primary career ("home jurisdiction") in England and Wales. No other jurisdiction comes close. The next most frequent jurisdiction is Scotland (6% or 3 people). The researchers also found several judges from various Australian jurisdictions. Two judges had practiced primarily in New Zealand and Hong Kong, and then one judge each from a range of other jurisdictions." **Prof. King** also shared that the judges "were mostly white (88%) and mostly male (82), although courts varied widely in terms of gender balance. Some courts, like the ADGM court, have only one woman judge, while others, like the SICC, have nearly even percentages once one adds in the local judges. 62% were UK citizens, while the next most frequently listed nationality was Australia (12%)." She explained that nationality was "a bit less revealing than home jurisdiction if you want to understand the legal culture these judges are steeped in." She also added that 67% have first law degrees from universities in the UK, followed, again by 12% from Australia."

Regarding the connection of the judges to arbitration, **Prof. King** shared that on the ICCs specifically "40 of the 49 (82%) are, or were, arbitrators. That percentage is larger than the percentage of traveling judges we found were arbitrators overall and is suggestive of the close links between international commercial courts and arbitration." She continued, "The working conditions of traveling judges on these courts were also noted to be reminiscent of arbitrators. Most were not prohibited from taking other judicial roles or arbitral work and they served part-time, flying in, or 'Zooming in', to hear cases. Like arbitrators, most were not salaried (except some administrators), but were remunerated for work done."

Dr. Strong expressed particular interest in the high percentage of traveling judges who were also arbitrators, and questioned whether these individuals were "usual suspects" (i.e. top notch arbitrators that may be looking to increase their perceived legitimacy or standardize their caseload) or not." She shared that if it were the former, then it would have appeared to be "be yet another instance of calcifying the status quo." She also wondered if any of the courts indicated why they were including non-national judges on their rosters. She speculated that it could be an "attempt to avoid having law from that jurisdiction being proven up as a question of fact, an attempt to attract more business from that jurisdiction, or an attempt to compete with international arbitration." She noted that the incidence of English judges suggested an attempt to compete with the English Commercial Court, but also acknowledged that many top-notch arbitrators were also based in London. She also commented on the frequency of Australian judges, and suggested that it could be due to pure competence, since "Australian law is not perhaps chosen as frequently as that of other jurisdictions, and it is unclear whether there are enough international disputants from Australia to merit such a high number of traveling judges."

In response, **Prof. King** said that for the courts, it seemed to be about borrowing independence and prestige, but there were also local factors such as to signal their separation from a domestic judiciary with a less-than-good reputation, or that the local or national judiciary did not operate in English or use common law. She mentioned the example of the DIFC, which consulted with general counsel at financial services firms, which advised the government that their firms wanted English language and law, so the DIFC hired English judges and sent younger Dubai judges to get Master of Laws (LLM) degrees in the UK. In the case of the SICC, it offered procedural options that included more civil law approaches, as it was looking into getting business from other Asian countries. So courts like the SICC "might lean less heavily into hiring English judges." Inviting particularly well-known judges raised the international profile of a court, which was considered also important especially when the institution was new. She

went on to explain the reasons why these judges were selected were due to several factors including colonial history, social networks, status, and opportunity. She gave the example of the Australian judges and stated that their reputation was part of the factors considered. She further explained that the judges on these courts tend to be recruited by current judges. She also mentioned that, except for the AIFC, the commercially-oriented courts which used traveling judges were in places with a history of British colonial rule, either as colonies or as protectorates. The British Empire sent judges around the world, mostly from the UK, but also from dominion colonies such as Canada and Australia. Australia is also a colonial power in the Pacific. It currently sends traveling judges to several Pacific island nations. She cited the book *Foreign Judges in the Pacific*[31] by Anna Dziedzic which discussed this phenomenon.

Prof. King also discussed that "unlike the old British Empire judges, who tended to be barristers who were not doing well in their home jurisdictions, traveling judges on international commercial courts are of high status. The judges were hand-picked, often by the Chief Justice." She acknowledged that some were "the usual suspects" as **Dr. Strong** pointed out. She also shared when the authors interviewed judges, "multiple people said their participation in arbitration was a factor in their being chosen." However, the population of traveling judges was slightly different. For one thing, most traveling judges were former judges and often come to arbitration practice after their judicial careers, so they are not rooted in the arbitration community the way many top arbitrators were. They were also more heavily trained in common law, and there was not the same French influence, for instance. And since the judges recruited and recommended each other, it was not surprising to see clusters from arbitral networks or the same locations of practice.

Finally, **Prof. King** discussed that "some jurisdictions make it easier to be a traveling judge than others." It was understood that "both Australia and Canada have a judicial retirement age, so both would have capable people who leave the bench, but still want to be judges." It was speculated that one reason more Australians than Canadians were seen was that "no Canadian province has a split profession, whereas the New South Wales legal profession is split into barristers and solicitors." Barristers worked independently and so they did not have the same conflicts of interest that lawyers who worked in law firms do. She shared that "when Ontario judges retire, they often go to work for large firms, which creates conflicts and makes it hard for them to work as neutrals. By contrast, a judge in New South Wales who becomes a barrister would not have these restrictions and would be practicing in a major commercial jurisdiction." **Prof. King** continued to emphasize that the numbers in the research were tiny in comparison to the total number of judges on commercial courts worldwide and that the authors were looking at a moment in time. She also clarified that these numbers fluctuated, and would have looked different in different regions.

Participant **Alexander Stonyer-Dubinovsky** commented that the "findings that the anglosphere is quite well represented." He then proceeded to ask if **Prof. King** could "share any insights concerning the prevalence of Latin American judges" and if there were any noticeable nationality or jurisdictional trends in relation to this region."

In response, **Prof. King** stated that out of the courts studied, none had Latin American members that they were aware of. She mentioned that there might have been some judges who considered themselves Latin American but held other passports. She also clarified that depending on the scope of the study, there was a lot of circulation of Anglophone Caribbean judges within the

[31] Anna Dziedzic, *Foreign Judges in the Pacific* (Bloomsbury Publishing, 2021).

Anglophone Caribbean or Bermuda which included courts that had similar parties to those in the international commercial courts. She added that judges who were from the region had not been hired outside of the region. She also noted that it was not surprising "that commercially-oriented traveling judges seemed to be a common law phenomenon. Common law judges were not career judges and had time to become known in international legal circles before taking the bench in their home jurisdictions. Hence, their careers and reputations were less tied to their home jurisdiction's judiciary." She also mentioned that Latin America included legal communities united by language, colonial history, and, to some extent, substantive law, and she was interested if any of those countries had used traveling judges in a commercial or similar context.

Participant **Jain Shreya** expressed interest in learning more about the mechanics of how each court invited traveling judges. Specifically, she asked about the procedural rule that allowed for the use of traveling judges, if it was similar across jurisdictions, the reasons behind such policy, whether there was a dearth of sufficient judges in these jurisdictions, the qualification criteria or restrictions for traveling judges, and if any judges were found to have traveled across more than one court outside their home jurisdiction. **Ms. Shreya** also expressed interest in hearing **Dr. King**'s thoughts on the possible reasons behind the low numbers of women traveling judges. She mentioned that she and her colleagues had briefly analyzed the numbers for women international arbitrators[32] and noticed a stark difference in the gender ratio.

Prof. King explained that the mechanics of how each court invited traveling judges varied, but for the courts specifically, judges were invited by someone in leadership and were recommended by colleagues. She also mentioned that typically the Chief Justice will recommend a slate of candidates to the one responsible for appointments, and that the courts typically had the authority to hire non-local judges under decree or statute. Regarding the reasons behind this policy, she stated that the authors did not think that the lack of local expertise was the deciding factor as "some jurisdictions, like Singapore, have plenty of qualified lawyers and judges already. In others, lack of local options may be part of the motivation, but one doesn't have to appoint traveling judges to get the benefit of foreign expertise."

Prof. King also discussed the qualification criteria and restrictions for traveling judges, mentioning that typically, a five to ten-year experience was a statutory minimum, but most judges have far more. She also mentioned that some courts have informal policies of choosing former chief justices for their chief justices. Most courts do not restrict a judge's outside neutral work as long as there's no apparent bias. As to the question about the low number of women traveling judges, **Prof. King** believed that a large part of it has to do with the diversity of the senior bar and judiciary in the source jurisdiction. For instance, she set as an example the English judiciary which was "notoriously white and male.

[32] Archismita Raha, et.al., *Growing Gender Diversity in International Arbitration: A Half Truth?* (Kluwer Arbitration Blog, 2021), http://arbitrationblog.kluwerarbitration.com/2021/09/28/growing-gender-diversity-in-international-arbitration-a-half-truth

Speaker 4: Prof. Pamela Bookman, Fordham University

Topic: Competition in adjudication options

Prof. Bookman began her discussion by summarizing and highlighting key points from the earlier sessions. She shared that the rise of international commercial courts was also a response to certain complaints about arbitration in such a way that they "offer a contrast" such as "enhanced legitimacy" which was rooted in the sovereignty of the host state, predictability as "decisions are published", and transparency. She also added that many international commercial courts "also seek to promise predictable, efficient procedures, lower costs (in part because one does not have to pay an arbitrator or a tribunal); and state-of-the-art technology, including e-filing and, even before COVID-19, remote proceedings."

Prof. Bookman highlighted how **Ms. Barausova** suggested that arbitration still offered confidentiality and easier enforcement through the New York Convention, which the recent Hague Conventions are not yet in a position to compete with. Some might respond to these concerns as follows:

1. On confidentiality: Most courts offer some opportunity for confidentiality, for example in cases involving trade secrets. Some international commercial courts seem more likely to accommodate requests for confidentiality, especially if the request comes from both parties.
2. On enforcement: **Prof. Bookman** said that the countries that have international commercial courts "have been some of the first to sign the Hague Judgments Convention" and signed many memorandums of understanding, and have been "making other arrangements to try to ensure their judgments will be enforced abroad." Thus far, such judgements seemed to have been enforced.[33] Enforcement, however, is not guaranteed through a mechanism as strong as the NY Convention.

Prof. Bookman also added that international commercial courts seemed to be "competing with international commercial arbitration to become parties' choice for where to adjudicate their disputes." She continued, " In weighing what a given international commercial court has to offer against what arbitration has to offer, parties can make their own decisions. But it is also important to note a few ways in which discussing competition between international commercial courts and arbitration can miss other perspectives."

She also emphasized the following points:

1. First, not all international commercial courts were created equal. Some were more robust and innovative than others. Even if one saw international commercial courts as the future of international commercial dispute resolution, it was unlikely that *all* international commercial courts will succeed in terms of case numbers and global influence.

2. Second, international commercial courts were created by local actors and do not all have the same principal goals. The SICC, for example, is more strategically poised to become a regional or international dispute resolution hub for litigation and other

[33] Tim Fox & Jennifer Paterson, *English Commercial Court Enforces DIFC Court Judgment Under Common Law Rules* (The National Law Review, 2022), https://www.natlawreview.com/article/english-commercial-court-enforces-difc-court-judgment-under-common-law-rules

kinds of dispute resolution than most of the courts in the special economic zones (SEZ), which have a primary purpose of serving the SEZs and reassuring its investors.

3. Third, as a dispute resolution forum, the central purpose of most international commercial courts was to give parties another viable option aside from arbitration. As it was often said about Singapore, international commercial courts were intended to "grow the pie" of dispute resolution offerings. In a world of escalating global problems and increasing numbers of disputes, both international commercial courts *and* arbitration could see growing caseloads.

4. Finally, and relatedly, all international commercial courts were also dedicated to *supporting* arbitration or complementing arbitration.

After **Prof. Bookman**'s discussion, participant **Dr. Eva Litina** asked about the potential role of international commercial courts in addition to offering more dispute resolution options to parties and supporting arbitration. She was also interested in what factors are crucial for the success of international commercial courts, given that not all of the said courts were created equal.

Participant **Dr. Piotr Wilinski** then shared, "At that time, in continental Europe, all the international commercial courts were emerging and it was yet to be seen what they would become. At the same time, other courts such as the DIFCC and the SICC were already operational and often exercising a supportive role towards arbitration." He then asked "whether to assess whether international commercial courts are rivals to international arbitration, one should assess whether the dispute resolution market was homogenous or not." He continued, "if the answer is affirmative, the potential architecture of the international litigation system might affect the international arbitration regime, as the users of international arbitration and potential/current users of the recently formed international courts would be the same individuals. If the answer is negative, it would show that there is room for the development of both systems simultaneously and in symbiosis." He also wondered about **Prof. Bookman**'s view on the international dispute resolution market being homogenous and whether the international commercial courts aim to attract the same users.

Participant **Ahan Gadkari** acknowledged that "in recent years, the increasing establishment of English-speaking courts dealing solely with the settlement of international commercial disputes has been observed throughout Europe, Asia, and the Middle East. After which, he asked, "whilst the arbitral process is often criticized for its costs, procedural delays, or lack of power against third parties, the question remains whether international commercial courts will be able to deal with these issues any better."

Prof. Bookman then proceeded to answer the participants' questions. She first addressed **Dr. Litina's** queries:

> "As for what role ICCs could and should play, there are underlying questions: in what context? to what ends? The SICC's founders, for example, speak of international commercial courts playing a role in developing transnational commercial law or in the convergence or harmonization of commercial law. They could play a role in driving greater ease of judgment enforcement across jurisdictions because they, and their sponsoring jurisdictions, seem extra-invested in ensuring cross-border enforcement.

> They could play a role domestically in encouraging foreign investment and business growth within the ICC's jurisdiction. They could play a role regionally in shifting the locus of dispute resolution and the balance of regional power. Most are still in their early stages and it is too soon to tell if they will attract any cases and have much global influence."

She then stated that her answer to **Dr. Litina**'s first question related to the answer to her question – that what was crucial for success depended on how one measures success. As she argued in *The Adjudication Business*[34], "different international commercial courts have different goals and so different metrics for success." She continued, "if a court is trying to be a litigation destination, then the number of cases filed may be a metric of success - perhaps even vis a vis another court. For example, the SICC or the European commercial divisions may gauge success based on how many cases are filed vis a vis a decrease in the number of cases where companies from their regions file their suits in London." **Prof. Bookman** added that, "another marker of success, more difficult to discern, could be how many contracts select the court in their forum selection clauses. For courts more focused on global influence, the number of cases filed may be an insufficient measure; perhaps deciding a particularly important dispute, or influencing the resolution of disputes before they are ever filed, is a better marker. For those focused on promoting investment within the jurisdiction, indicators that the courts have improved investment may be more important than the numbers of disputes filed." Prof. Bookman further explained all international commercial courts faced a "similar problem of needing to establish reputations of new institutions with credibility, efficiency, and legitimacy." She thought that transparency will be crucial to these efforts.

As for **Dr. Wilinski**'s questions, **Prof. Bookman** replied: "is the international dispute resolution market homogeneous? One part of the answer must be no. There are many different kinds of disputes even within international commercial arbitration. Even before the rise of these specialized courts, some cases went to litigation and those that went to arbitration; industries tended to prefer one or the other; employment disputes and shipping disputes, and mining disputes; there are contract disputes but also business torts and third party interference claims" and more. She continued, "Some of the cases international commercial courts hear are those supporting arbitration. The market must be heterogeneous if that's what you are asking. And the 'supply' side of the market is also increasingly heterogeneous, with arbitration and different kinds of courts and mediation and med-arb."

Continuing to answer **Dr. Wilinski's** questions, **Prof. Bookman** responded that:

> "For some subset of disputes, there are parties who, when drafting a contract (or potentially post-conflict), are choosing how to draft their forum selection clause and are choosing between arbitration and litigation. For some of those parties, (some of) these courts have entered the equation. So for an employment dispute from an executive hired to run a company in the DIFC, for example, there may have been some question of whether that dispute would be heard in the DIFC or London, and potentially in courts or arbitration, for example. Many of those disputes are now litigated in the DIFC that might not have been had the contract been entered into before the DIFC was established." She concluded that she never thought that the market was homogeneous,

[34] *See note 16*

- but for some disputes, "some international commercial courts may sometimes be aiming to attract the same users."

As per **Mr. Gadkari**'s questions, **Prof. Bookman** commented:

> "International commercial courts may be trying to 'compete' with arbitration on many different levels at once. As to costs, procedural delays, and lack of power against third parties, these are issues that courts could potentially compete quite effectively against arbitration if they are dedicated to doing so. Some international commercial courts have fast-tracked procedures to keep costs and procedural delays to a minimum. Likewise, the judges -- who many have substantial experience managing complex commercial disputes in another jurisdiction like London or New South Wales - may be committed to these values and capable of achieving them. Because the court assigns them to a case (and the parties do not select the individual arbitrator), the court will choose adjudicators who are available and can set a schedule quickly. It is sometimes said that judges feel more empowered to keep lawyers in check (for example, when they ask for additional time or discovery) than arbitrators, who may be wary of future due process challenges for example. As for power against third parties, on that account courts generally have an advantage over arbitration."

Following **Prof. Bookman**'s responses to the earlier questions in her session, **Mr. Pakpahan** asked whether they were going to see the other end of the spectrum with international commercial courts where they would be "trigger-happy" to exercise jurisdiction or powers in cases where arbitrators tend to be reluctant to do so, or if she thought the risk of an appeal was a sufficient factor for restraint. He was also keen to know **Prof. Bookman**'s view about comity or deference between international commercial courts.

Mr. Pakpahan shared that "a universal instrument regulating conflict of (court) jurisdictions was yet to be seen (although one may have reasons to be optimistic about the HCCH Jurisdiction Project[35])." He also asked if she thought "that the network of international commercial courts had the incentive to establish uniform practice among themselves in cases of conflict of jurisdiction, or would each international commercial court be more leaning towards accepting cases to increase their immediate caseload (especially for the new ones)."

After which, **Prof. Bookman** responded that such would require "some predictions that at some level can only be speculative." As to whether some international commercial courts might become "trigger happy" with the exercise of jurisdiction, she said two points must be noted:

1. "First, international commercial courts, because they are in fact domestic courts, in some cases may have more power and jurisdiction than arbitrators, for example, to join third parties or additional claims, or to freeze assets or issue other injunctive relief.
2. The second point regards the prediction about whether they will stretch the bounds of that authority. It is hard to predict. As I have written[36], these courts, especially those that merge some aspects of arbitration and litigation, may face competing incentive structures to provide the parties with what they are seeking (procedurally)

[35] Hague Conference on Private International Law , *Jurisdiction Project* (Hague Conference on Private International Law, n.d.), https://www.hcch.net/en/projects/legislative-projects/jurisdiction-project
[36] Pamela K. Bookman, *Arbitral Courts*, 61 Virginia Journal of International Law 161 (2021)

and to serve as arms of the state hosting the court." **Prof. Bookman** continued that "one potential reason for hiring traveling judges [ ] is that they may bring with them a reputation and a tradition established in their home jurisdiction for judicial restraint, which may be reassuring to parties and further enhance the court's reputation and legitimacy. Appellate review could provide another source of judicial restraint - it may depend on the circumstances." She also noted that international law might also provide limits if jurisdiction is stretched beyond internationally acceptable norms.[37]

After the conclusion of all discussions, **Dr. Strong** officially closed the Symposium by thanking the speakers for sharing both their time and expertise.

[37] Pamela K. Bookman, *Towards the Fifth Restatement of U.S. Foreign Relations Law: The Future of Adjudicative Jurisdiction Under Public International Law (November 5, 2019),* The Restatement and Beyond: The Past, Present, and Future of the Foreign Relations Law of the United States (31st Sokol Colloquium, 2020)