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Whereto Litigation? Litigation and Arbitration Compared as Modern Commercial Dispute Resolution Measures

Abstract

In diesem Beitrag wird die Rolle nationaler Gerichte als Streitbeilegungsorgane internationaler Handelsstreitigkeiten erörtert. Dies steht vor dem Hintergrund, dass Schiedsverfahren in diesem Bereich immer häufiger gegenüber den nationalen Gerichten bevorzugt werden. Zunächst werden die Vorteile von Schiedsverfahren diskutiert. Diese werden sodann den Fortschritten in der staatlichen Gerichtsbarkeit gegenübergestellt. Abschließend wird eine Prognose für Verfahren vor den staatlichen Gerichten als Streitbeilegungsmethode in Handelstransaktionen aufgestellt.

This article discusses the future of litigation in the context of international commercial transactions, given that arbitration is the ever-preferred dispute resolution method in the context of international commercial disputes. It compares the advantages of arbitration with current developments in litigation. Based on these results, a prognosis is made for the role of litigation in international commercial disputes.

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A. Introduction

The globalization of our lives has by now become a much-cited phenomenon. The last 50 years have brought an unprecedented increase of global business endeavors, relationships and enterprises, facilitated by the greater ease with which we can connect with foreign business partners (such as through modes of transportation like planes or modes of communication like e-mail) or the mindset of our generation that sees more in common with foreign people than differences. With the ease and opportunities inherent in international commercial relationships, however, comes a concomitant level of difficulty when such relationships go awry, and the parties must find a binding and final way to resolve their disputes. In such cases, the parties usually have two avenues: take the dispute to a court, either in the plaintiff's or the defendant's country, or, if they had the foresight to so provide in the underlying agreement, immediately initiate international arbitration procedures.

International arbitration is a consensual process which results in a *prima facie* binding award made out of court to resolve a dispute between two or more parties from different jurisdictions.[1] By contrast, in litigation with a foreign element, the dispute is initiated in a national court. In an international transaction, the parties may have agreed that the courts of one country should have exclusive jurisdiction, or the jurisdiction is determined by rules of international jurisdiction. These determinations and conflict of law questions and possible difficulties regarding the enforcement of the judgment in a different country,[2] can lead to additional cost, delay and uncertainty. This explains why parties may be reluctant to choose or expose themselves to litigation.

This article investigates and discusses the advantages and disadvantages of the two dispute resolution mechanisms, arbitration and litigation, in the context of international commercial transactions with a focus on mercantile disputes arising among businesses but avails itself of some examples related to consumers as well.[3] It seems that parties greatly favor arbitration. In a survey conducted by *PricewaterhouseCoopers* (*PwC*), 73 % of the respondent corporations preferred international arbitration over litigation.[4] Scholars have even suggested that

[1] See *Leung/Clark*, Civil Litigation in Hong Kong, 5th edition, 2017, p. 691.

[2] See *Dicey/Morris/Collins*, Dicey, Morris, and Collins on the Conflict of Laws, 15th edition, 2012, Vol. 1, p. 4 at 1-003.

[3] This article will adopt the broad interpretation of "relationships of commercial nature" as listed in the UNCITRAL Model Law on International Commercial Arbitration (1985 with amendments as adopted in 2006) (hereinafter: Model Law) Art. 1 (1).

[4] *Lagerberg/Mistelis*, International Arbitration: Corporate Attitudes and Practices 2006, PricewaterhouseCoopers LLP & Queen Mary, University of London, 2006, available

arbitration should be the new default rule, rather than to oblige parties to agree on an arbitration clause first in order to avoid litigation.[5]

But what do parties to international commercial disputes dislike so much about litigation? In short: They may fear bias from the national courts with whose laws and perhaps language they are unfamiliar. It seems that parties would rather choose the law of a third country than risk being disadvantaged. And what is it about arbitration as an alternative that is so attractive? The perceived benefits, among others, include efficiency in time and costs, the final and binding nature of the arbitral award, confidentiality of the process and the award and the flexibility to freely choose specialized arbitrators, the seat, and the rules of arbitration.[6] Arbitration agreements can indeed circumvent to some extent the above-mentioned negative aspects arising in litigating international commercial disputes. But if arbitration is so pragmatic and convenient, does litigation in national courts between litigants from different countries still have a role to play?

In discussing this question, this article will in the following focus on the three most important of the perceived benefits of arbitration, namely: efficiency (**B.**), confidentiality (**C.**), and enforcement (**D.**), and evaluate with regards to each of these whether they are indeed advantages and if so, whether they will prevail in the future or whether perhaps litigation will catch up and change the balance of preferred dispute resolution methods. The scope of this article will not permit an all-encompassing overview but can only highlight the most visible developments within these methods. My assertion is that litigation will indeed play a subordinate role in international commercial disputes, with the courts' influence limited to a policing function of arbitration, but that there will be areas in which the advantages of litigation provide a safeguard in complex cases that arbitration cannot provide, or that the litigation process can be modernized to an extent to which it may match the advantages that make international arbitration so favored for the cases not requiring the safeguards.

B. Efficiency

When counsel suggests arbitration, their motivation usually is to spare their clients vast litigation costs and proceedings lingering in court for years. The

online at: <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy_2006.pdf> (last consulted on 1 December 2018).

[5] *Graves*, Court Litigation over Arbitration Agreements: Is it Time for a New Default Rule?, The American Review of International Arbitration 2012, 23 (1), 113 (115).

[6] See *Berman*, The "Gateway" Problem in International Commercial Arbitration, Yale Journal of International Law 2012, 37 (1), 2.

efficiency of arbitration appears to rely on a number of diverse factors: For example, the parties determine the schedule according to their calendars, not that of an overloaded court, allowing a much more informal conference room rather than court room process;[7] the use of specialized arbitrators promises that one may have to explain less and be more fully understood in one's position; and not least of all, arbitration procedures are said to be much more straightforward and less complex than those of courts in many jurisdictions.

I. Latest achievements in technology (Online Dispute Resolution)

Because arbitration systems - other than national court systems - have been able to develop in a more agile fashion in response to parties' needs, they have been able to include procedural modernizations at a fast pace (*e.g.*, virtual data rooms, case management websites, etc.) which materially improve the handling of international commercial disputes with the parties residing in different places and time zones. This use of technology will be exemplified in the form of Online Dispute Resolution (ODR) which will be discussed in detail below.

1. ODR developments in arbitral proceedings

ODR is a means for settlements of disputes which uses the whole range of alternative dispute resolution methods online.[8] Given the global nature of the Internet, ODR was originally designed for the realm of e-commerce disputes to eliminate jurisdictional issues and the concerns about enforceability of court judgments.[9] Today, however, it encompasses online methods that are applied to all types of disputes. The parties submit the relevant documents online and choose a service (electronic mediation or arbitration) to resolve their dispute, whereas communication can be conducted directly (*e.g.*, via *Skype*) or indirectly (via e-mail).[10] Parties may thus resolve their disputes with algorithmic tools instead of human beings as arbitrators, or enable several lawyers in different time zones to access, negotiate and finalize one document with a contract party in yet another time zone.[11] Thereby, ODR helps to avoid or reduce the costs and inconvenience of travel associated with international commercial disputes, and

[7] *Gaillard*, Sociology of International Arbitration, Arbitration International 2015, 31, 1 (11).

[8] *Mania*, Online Dispute Resolution: The Future of Justice, International Comparable Jurisprudence 2015, 1 (1), 76 (78).

[9] *Ponte*, Boosting Consumer Confidence in E-business: Recommendations for Establishing Fair and Effective Dispute Resolution Programs for B2C Online Transactions, Albany Law Journal of Science & Technology 2002, 12 (2), 441 (442).

[10] *Mania* (fn. 8), p. 78.

[11] *Arresty/Rainey/West*, Expand your Practice with Online Dispute Resolution Technology, GP Solo 2015, 32 (1), 22 (22).

encourages the parties to work together, giving them more control of the outcome of the dispute.[12]

Arbitration has already taken a significant step towards promoting and using ODR. For instance, the central treaty for international arbitration, the "New York Convention" has recently been amended inasmuch as, while it had previously required a written agreement on arbitration in international transactions, Art. 2 now permits an "exchange of letters and telegrams" and electronic arbitration agreements.[13]

2. Comparison: ODR developments in litigation

Many tasks in court procedure still use archaic technologies, such as tape recorders, stenographers and manual storage of case files; most of these tasks require neither the expertise of a jurist nor for that matter a human being (*i.e.*, repetitive tasks like management of case files) and could easily be replaced with the help of IT systems.[14] But courts, too, increasingly try to offer more cost-effective and quicker procedures, as now provided in the underlying objectives of the Rules of the High Court (RHC) in Hong Kong.[15] While the description of ODR set out above does traditionally refer to alternative dispute resolution, the same online methods have been implemented in some national courts as well.

In this context, the EU was at the helm of the development: the European Small Claims Procedure (ESCP) which provides an easy way to pursue cross-border civil or commercial claims without the need of legal representation, applies ODR to cross-border claims with an amount of € 2,000 in dispute or less.[16] This amount has increased as of 14 July 2017 to € 5,000.[17] Thus, the ESCP aims to simplify and speed up cross-border small claims litigation in civil matters and cut costs.[18] As of now, the ESCP, although not mandatory, provides an alternative

[12] *American Bar Association (ABA) Task Force on Electronic Commerce and Alternative Dispute Resolution*, What is Online Dispute Resolution? A Guide for Consumers, March 2002, p. 1, available online at: <https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/consumerodr.authcheckdam.pdf> (last consulted on 1 December 2018).

[13] *Mania* (fn. 8), p. 78; The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), "The New York Convention" UNCITRAL.

[14] *Susskind*, The End of Lawyers? Rethinking the Nature of Legal Services, 2008, p. 201.

[15] Cap. 4A The Rules of the High Court, Order 1A (Objectives), Rule 1 (a), (b), (c).

[16] EU Regulation 861/2007/2007 establishing a European Small Claims Procedure.

[17] Article 2(1) of the ESCP Regulation.

[18] *Kramer*, Small Claim, Simple Recovery? The European Small Claims Procedure and its Implementation in the Member States, ERA Forum 2011, 12 (1), 119 (119).

to other expensive and complex procedures and is an alternative to arbitration.[19] In addition, the ESCP is available and its judgments enforceable in all EU countries (except Denmark).[20] Thus, enforceability is not a concern as a negative aspect usually linked to litigation within the European Union. Similarly, an ODR Group of the UK Civil Justice Council, proposed ODR for civil disputes of value less than £ 25,000 in a report in 2015.[21] There are therefore examples where litigation may catch up with arbitration in terms of technological advances and concomitant efficiencies.

3. Use of technology in the future of dispute resolution

We will likely see much more progress in the use of online methods in the future, both in international arbitration and litigation. As ODR responds to the parties' wish for efficiency, the courts will follow with modernization at some point - whether judges may be in favor of such a development or not - not because they want to compete with arbitration, but simply because these methods are an automatic enhancement in a more technologically advanced world. People who no longer go to a brick-and-mortar bank but do all their banking online may not want to go to an actual courthouse in the future. ODR may perhaps not be the perfect attribute to resolve all disputes; but the relevant legal framework is capable of, and is in fact limiting ODR's application to those claims where it is in order[22] and promoting its application where its speed and efficiency are needed, both in arbitration and litigation. Thus, with respect to the procedural use of technological progress, arbitration is not necessarily more efficient or advanced than litigation.

II. Specialization of commercial matters

The *PwC* study referenced earlier shows that participants ranked arbitrators as the most favorable factor in arbitration:[23] It seems to be regarded as an efficiency factor for parties to choose specialists (even lay people) with commercial expertise or professionals in the respective industry rather than judges of general

[19] *Beek/D'Aubrey/Garzaniti*, Consumer Disputes in a Cross Border E-Commerce Context, Paper submitted for semi-final C of the Themis Competition in Lisbon, Portugal, 2016, on European Cooperation in Civil Matters.

[20] Articles 1(2) and 20 of the ESCP Regulation.

[21] *ODR Advisory Group*, Online Dispute Resolution for Low Value Civil Claims, February 2015, available at: <https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf> (last consulted on 1 December 2018).

[22] See ESCP and the ODR Group of the Civil Justice Council restricting the procedure to claims of a certain amount.

[23] *Lagerberg/Mistelis* (fn. 4), p. 6.

competence to resolve their disputes, and for them to stay with the proceedings from beginning to end, unlike proceedings within the chain of instances that lead to the case being heard before a new judge on each level of the proceedings.[24] Furthermore, parties are able to choose the arbitrator (or in the case of three, each choose one who then decide on the third), so that there is less perceived risk of bias against a party. Interestingly, several authors have argued that international commercial litigation has developed to a point at which it incorporates features until then restricted to arbitration.[25] If litigation can provide the same international and commercial specialization, here, too, it would then begin to match the advantages of arbitration.

1. Commercial courts and specialized decision-makers

Several commercial courts have recently been created across different jurisdictions in order to equip domestic courts with special commercial expertise; most notably, Singapore established an International Commercial Court which is unique in that it allows the appointment of foreign judges and dispenses with the application of Singapore's Rules of Evidence.[26] In this way, the court gleans from arbitration methods which may help to streamline litigation. There has long been general acceptance of commercial litigation being unique in nature: The first Commercial Court in London (LCC) was established in 1895 and today it ensures that its judicial members keep properly abreast with the rapidly changing market (*e.g.*, by having them frequently participate in seminars of the Financial Markets Law Committee).[27] This ensures that the judges can better relate to the real commercial world and it actually empowers a municipal commercial court being able to coexist with the international arbitration practice in London.[28] As such, these more specialized divisions are not burdened with other cases and therefore more readily available. Complex business cases can take priority and the specialized courts are well-equipped and often less expensive than arbitration.[29]

Similarly (but perhaps to a lesser degree of specialization), in Germany, commercial court panels are staffed with one fully-qualified lawyer (*Volljurist)*,

[24] *Denton/Heaton*, Commercial Arbitration - Does It Really Have A Future?, Victoria University Melbourne Australia Law & Justice Journal 2014, 4 (1), 117 (123).
[25] *Tiba* (fn. 26), p. 39; *Spigelman* (fn. 39), p. 212; *Maleske* (fn. 29), p. 31.
[26] *Tiba*, The Emergence of Hybrid International Commercial Courts and the Future of Cross Border Commercial Dispute Resolution in Asia, Loyola University Chicago Law Review 2016, 14 (1), 31 (32).
[27] *Warren/Croft*, An International Commercial Court for Australia, Supreme Court Victoria, 13 April 2016, p. 13.
[28] *Warren/Croft* (fn. 27), p. 13.
[29] *Maleske*, Why GCs Should Look Beyond Arbitration, Law 360, October 23, 2015.

and two non-lawyers, who come from the trade sector.[30] In the wake of Brexit which leads to uncertainty as to whether English judgments will be as easily enforceable in Europe in the future as they were pre-Brexit, there has been a new initiative to further develop these special court divisions. The legislative initiative by the *Bundesrat* (the upper house of the German parliament) upon the request of five federal states provides, for one, that proceedings are conducted in English (the *lingua franca* of the business world), and furthermore that special divisions focusing on international commercial disputes are implemented. With respect to the language of the proceedings, the German Judicature Act determines German as the official language used in court pursuant to § 184 *Gerichtsverfassungsgesetz* (GVG). Nonetheless, an English-speaking commercial chamber has been up and running in Frankfurt since January 2018. Bearing in mind the aforementioned § 184, this however, only refers to the oral hearing (*i.e.*, the pure negotiation in court), whereas the parties are not released from the obligation to perform all other procedural acts in German (*i.e.*, submission of pleadings and applications).[31] This precisely, however, is intended to be changed with the legislative initiative by the *Bundesrat*. Pursuant to a proposed amendment of § 184 clause 1 and 2 GVG, proceedings in these special divisions may be conducted in English, and additionally, protocols and the judgment itself which originally had to be written in German, can now be submitted in English.[32] Regarding the implementation of special divisions, proponents of the legislative initiative aim to concentrate expert knowledge of judges by letting judges of these special divisions rotate less often, for instance. With these promising efforts, Germany strives for a position as a potential judicial hub and may well succeed.[33]

These same endeavors can be observed in Belgium with the implementation of a new "Brussels International Business Court" which is a specialized English-

[30] See § 105(1) German Code on Court Constitution (*Gerichtsverfassungsgesetz*).

[31] *Ruckteschler/Stoß*, Englischsprachige Handelsgerichte - Ein Gegenangriff auf die Schiedsgerichtsbarkeit? (translation: "English-speaking commercial chambers - a counter attack against arbitration?"), March 2019, available at: <https://www.lto.de/recht/hintergruende/h/englischsprachige-spezialgerichte-handelsstreitigkeiten-wirtschaft-schiedsgerichte/> (last consulted on 6 March 2019); see also: <https://ordentliche-gerichtsbarkeit.hessen.de/ordentliche-gerichte/lgb-frankfurt-am-main/lg-frankfurt-am-main/chamber-international>.

[32] BR-Drucks. 53/18, p. 2 f.

[33] *Röckrath/Fischer*, Justizstandort Deutschland macht sich fit für den Brexit (translation: "The judicial hub Germany prepares for Brexit") Legal Tribune Online, 16 March 2018, available at: <https://www.lto.de/recht/hintergruende/h/justizstandort-deutschland-nach-dem-brexit-london-alternative/> (last consulted on 1 December 2018).

speaking court with jurisdiction over international commercial disputes.[34] The panel is composed of three judges, one professional and two experts in international business law.[35] As such, the conduct of the case is necessarily also more cost-efficient because experts are more likely to quickly identify the core issue in dispute and come up with a suitable solution in a timely fashion. Brussels, too, through the International Business Court therefore stands good chances at becoming a serious competitor to international commercial arbitration.

But this specialization is being explored not only in terms of commercial know-how, but also the international nature of the disputes: Especially the aforementioned LCC is well trusted by litigants who have little or no connection to the UK.[36] Furthermore, the risk that a judge applying foreign law - as often occurs in international commercial disputes - will interpret it wrongly despite expert evidence or perhaps due to conflicting evidence of what the foreign law is, is decreased by a procedural step allowing proof of foreign law by reference to the foreign court, such as the new rules implemented in New South Wales in relation to foreign law issues.[37] Pursuant to this mechanism giving judges the ability to refer a discrete question of law to the foreign court without having to stay its own proceedings altogether, an authoritative statement by the foreign court ensures that the foreign law would not be misunderstood or incorrectly applied.[38] This option has been used as an expression of cooperation between courts in order to deal appropriately with the case that a question of foreign law arises before the adjudicating court which has not yet been decided in the foreign jurisdiction. In this case, it is preferable for the question to be decided (and hence the law to be developed) by the court of the country whose law it is.[39] This alternative to expert evidence in determining a question of foreign law is not only available to judges of specialized divisions but also courts of general competence and has become a well-established tool among common law jurisdictions especially (*e.g.*, as practiced between the *Supreme Court of New South Wales* and

[34] *Croisant*, The Belgian government unveils its plan for the BIBC, Kluwer Arbitration Blog, 25 June 2018, available at: <http://arbitrationblog.kluwerarbitration.com/2018/06/25/the-belgian-government-unveils-its-plan-for-the-brussels-international-business-court-bibc/> (last consulted on 1 December 2018).

[35] *Ibid.*

[36] *Warren/Croft* (fn. 27), p. 18.

[37] *Brereton*, Proof of Foreign Law - Problems and Initiatives, Address to the Sydney University Law School Symposium: The Future of Private International Law, 2011, p. 8.

[38] See *Morris/Gibb/Tsang*, An Introduction to the Conflict of Laws in Hong Kong 2017, p. 35 at 2.48.

[39] *Spigelman*, Proof of Foreign Law by Reference to the Foreign Court, Law Quarterly Review 2010, 127, 208 (212).

Singapore based on a memorandum of understanding to determine questions of law received from each other).[40] This provides an economic procedure that will support the correct application of the law.[41]

But there is a further development which comes even closer to the choice of the arbitrator(s): Several superior courts in Canada have created commercial lists with judges who are experienced in business and even permit parties to submit short-lists of judges who they think are best equipped to hear their cases.[42] Thus, not only expertise which makes the choice of the arbitrators so attractive, but also the guarantee for impartiality is beginning to appear in litigation through the ability to choose judges and avoid others. As of now, this option remains rare in court procedure. But that is not to say that it cannot be established as an option in other commercial courts in the future. If courts can mature into agile, focused dispute resolution centers for international commercial cases, the need for arbitration would likely decrease.

2. Special features in the conduct of commercial procedure

In commercial disputes, it is desirable to save time in the process and to identify the core issue in dispute at an early stage. Delays in business disputes often affect the ability to conduct one's business (such as when preliminary injunctions have been issued), thus potentially leading to a reduction in earnings. Litigation has long been regarded as slow and expensive with its lengthy hearings or, under common law, discovery procedure. By contrast, an important timesaving aspect in favor of arbitration is that the adjudication is final and subject to a limited scope of review.[43] However, as shown before, cases can also be handled quickly in the specialized courts divisions. If general courts could in the future also offer a quicker procedure, they could match another advantage of arbitration.

a) Adversarial vs. inquisitorial theory in fact-gathering: Discovery procedure

Common law and civil law systems offer widely different means to adversaries to understand what kind of relevant evidence is held by the other party that might influence the outcome of the case. Under common law, extensive pre-trial discovery can occupy the parties for a long time before the case actually goes into hearings (adversarial). This is different in civil law systems that do not practice

[40] *Ibid.*

[41] *Ibid.*

[42] *Grosse*, The Future of Dispute Revolution: The More Things Change, The More They Really Don't, Future of Law Conference, Saskatchewan Law Review 2013, 76 (1), 213 (216).

[43] *Redfern/Hunter*, International Arbitration, 6th edition 2015, para. 1.04.

pre-trial discovery (inquisitorial or nonadversarial).[44] The kind of discovery procedure in international commercial disputes, adversarial or inquisitorial, also greatly influences the efficiency in time and cost. When the right to discovery was first introduced in the U.S. Federal Rules of Civil Procedure in 1938, these rules should allow the plaintiff to lay all the cards on the table and facilitate private settlement.[45] Today, however, full-scale discovery can cost millions of dollars in significant commercial litigation.[46] This is why corporations often favor the less formal arbitration process. However, a heavily minimized form of pre-trial discovery need not always best suit the dispute at hand: if applied to the right extent and to the right matter, the case could in the end benefit from a form of discovery procedure as applied in litigation in certain legal systems.

aa) Differences from a time- and detailed-evidence perspective

The differences between the adversarial and inquisitorial process will be shown by using the examples of the U.S. adversarial and the German inquisitorial model of fact-gathering in civil procedure: The U.S. judge's role is to hear the evidence, whereas the German judge actively gathers the evidence.[47] This mechanism can be exemplified by § 139 (1) *Zivilprozessordnung* (ZPO) (German Code of Civil Procedure) which gives the judge the right to ask questions (§ 139 (1) clause 1 and duty to work towards the parties sharing all relevant information in a timely

[44] In principle, both systems – the civil law system and the common law system – are "adversarial" in the sense that lawyers present the case and the arguments before the judge on behalf of their respective parties, whereas in a truly inquisitorial system, it would be the judge's role to investigate the case. However, with respect to the aspect of counsel's role in fact-gathering, it is well established in common law literature to distinguish between the "adversarial" common law and the "inquisitorial" Continental tradition (see the use of these terms as demonstrated in common law literature *e.g.*, *Rosenberg/Weinstein/Smit*, Elements of civil procedure, 2nd edition 1970, p. 11; *Malik*, Reforming our civil justice, The Nation (AsiaNet) 2018, 32 (225), para. 3; *Leitch*, Coming off the Bench: Self-Represented Litigants, Judges and the Adversarial Process, The Advocates' Quarterly 2017, 47 (3), 309 (317)). This is due to the fact that in the aspect of fact-gathering, the civil law system assigns judges a greater role. It is therefore rather an "inquisitorial" element within an "adversarial" system. Bearing this in mind, *John Langbein* even refers to this distinction as a "false conflict" (see *infra* fn. 47 at p. 841). In the following, the terms "adversarial" and "inquisitorial", too, are used to describe only the aspect of fact-gathering, not the system as a whole.

[45] *Higginbotham*, The Disappearing Trial and Why We Should Care, Rand Review, 2004, available at: <http://www.rand.org/publications/randreview/issues/summer2004/28.html> (last consulted on 1 December 2018).

[46] *Spigelman*, Commercial Litigation and Arbitration - New Challenges, Australian Construction Law Newsletter 2007, 117, p. 11.

[47] *Langbein*, The German Advantage in Civil Procedure, The University of Chicago Law Review 1985, 52 (4), 823 (826).

manner and in completeness. This leads to a tremendous amount of pre-trial procedure by the parties in the U.S. model, the proportion of litigation time spent in discovery being around 43 % of the time spent on a case.[48] By contrast, the German model operates without a pre-trial procedure as such, and almost no discovery.[49] In the course of the hearing, the German court will hear the parties' positions and then know enough about the case to determine a sequence for examining witnesses.[50] The biggest advantage of the inquisitorial process is therefore the following: Apart from saving pre-trial process time and costs, it avoids expert evidence (the highest cost after legal fees) being duplicated and thus wasted if both parties investigate in the same way.[51]

Interestingly, courts with an adversarial process now encourage the use of single experts by guidelines and rules.[52] This way, the adversarial system comes closer to the inquisitorial one, at least if the case permits this and where it is necessary from a time and cost perspective. However, the detailed and lengthy procedure of collecting evidence pre-trial under the adversarial approach also appears to give each party more control over the evidence gathering process, something that could be more attractive in international disputes where foreign litigants may fear bias of the court. In the above-cited survey, 78 % of the lawyers surveyed said discovery helped, and 21 % (mostly counsels who lost at trial) said it made no difference. Only 1 % said it was a hindrance.[53] This is why even the previously discussed specialized divisions cannot help parties avoid in-depth discovery and document review where it is needed to determine the facts of the case.[54] Thus, in more complex commercial cases in which the facts are controversial as is often the case in international commercial disputes, a discovery procedure in line with the customs of the adversarial system can be the better choice.

bb) Discovery procedure applied in arbitral proceedings

The scope and kind of civil discovery applied in arbitration entirely depends on the parties' discretion, either in laying out the rules of the procedure with the arbitrator in a preliminary hearing, or by adopting the rules of an institution.[55]

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[48] *Glaser*, Pretrial Discovery and the Adversary System, The Columbia Project 1968; *McKenna/Wiggins*, Empirical Research on Civil Discovery, Symposium Conference on Discovery Rules, Article 8, The Boston Law Review 1998, 39 (3), 785 (798).
[49] *Spigelman* (fn. 46), p. 11.
[50] *Langbein* (fn. 47), p. 828.
[51] *Spigelman* (fn. 46), p. 10.
[52] *Ibid.*
[53] *Glaser* (fn. 48), p. 112.
[54] *Maleske* (fn. 29).
[55] *Redfern/Hunter* (fn. 43), para. 6.41.

However, the less formal procedure conducted in arbitration in general shows parallels to the inquisitorial model in that the arbitrator can conduct inquiries into the facts.[56] Hence, if a cross-border commercial dispute goes to trial in a country in which the inquisitorial process is practiced, the procedure may not differ too much from arbitration.

However, this raises the question if this also depends on where the international dispute is arbitrated and what the culture of discovery is in the seat of arbitration or the institution.[57] Generally, the parties have the flexibility to choose the formality, the scope of discovery and any form of evidence in favor of resolving the dispute, regardless of the arbitrator's background, despite limiting rules of evidence.[58] For example, the Model Law as adopted in many proceedings, provides the broad power to "require the parties to produce documents, exhibits or other evidence", Art. 24(3), and to "determine the admissibility, relevance, materiality and weight of the evidence offered" under Art. 25(6).[59] Thus, these broad powers of arbitrators may be performed in line with the customs they are most familiar with, adversarial or inquisitorial.[60]

In an attempt to harmonize discovery procedure in international commercial arbitration, the arbitration community has agreed upon certain principles in the "IBA Rules on the Taking of Evidence in International Commercial Arbitration"[61]. These include the notion that the expansive American- or English-style discovery procedure is generally inappropriate in international arbitration but at the same time that some level of document production is necessary[62] (for the reasons demonstrated above with respect to detailed evidence). Thus, if informality is important to corporations, they can so direct the proceedings to a more limited scope of discovery and do not need to consider

[56] See *e.g.*, Section 47 of the Arbitration Ordinance Cap. 609 in Hong Kong; Art. 25 ICC Rules; Art. 43 ICSID Convention; 2010 IBA Rules on the Taking of Evidence.
[57] *Lew*, Chapter 1, Document Disclosure, Evidentiary Value of Documents and Burden of Evidence in *Giovannini/Mourre*, Written Evidence and Discovery in International Arbitration: New Issues and Tendencies, Dossiers of the ICC Institute of World Business Law, Kluwer Law International 2009, 6, p. 11; *Trakman*, Arbitration Options: Turning a Morass into a Panacea, University of New South Wales Law Journal 2008, 31 (1), 292 (303).
[58] *Trakman* (fn. 57), p. 303.
[59] Model Law (fn. 3).
[60] *Lew* (fn. 57), p. 12.
[61] *IBA Rules on the Taking of Evidence in International Commercial Arbitration*, Arbitration Committee of the International Bar Association (1999).
[62] *Ughi et al.*, Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration, International Bar Association 2000, p. 7.

what the common practice is in the seat of arbitration, as they would be advised to do when litigating.

b) Applying a timesaving approach to litigation

Litigation is beginning to apply timesaving measures to its processes and thus beginning to rival arbitration with respect to efficiency. The problem of delay has been addressed by those in charge, *e.g.*, through the Civil Justice Reforms in Hong Kong in 2009.[63] In an effort to enhance savings and time efficiency, courts are encouraged to fix time-tables and otherwise control the time the case ought to take, for instance.[64] This notion is a general phenomenon across various jurisdictions: Practices usually used in arbitration, such as the "chess clock system" (a time-management technique for complex commercial cases forcing parties to present only relevant and material evidence due to strict time limits[65]) are now being established in litigation processes in Australian courts.[66] In this system, both parties agree on the time the case ought to take in trial in advance of a hearing. This imposes some form of discipline where the trial could otherwise incur costs that are disproportionate to the amount in dispute.[67] Since introducing this timesaving approach in 2007 through a "fast track list", the Federal Court of Australia has reduced the average time for matters to 115 days, providing reasoning for the judgment within six weeks of the conclusion of the trial.[68] *E.g.*, a trademark infringement dispute that was heard in this list was scheduled to be held within six months, and in the end could be resolved within four months.[69] Hence, litigation here provides the same merits as arbitration in international commercial disputes.

[63] *Ali/Lee*, Lessons Learned from a Comparative Examination of Global Civil Justice Reforms, International Journal of Law and Management 2011, 53 (4), 262 (268).
[64] *Ibid.*
[65] *Rivkin*, Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited, Arbitration International 2008, 24 (3), 375 (378).
[66] *Spigelman* (fn. 46), p. 10.
[67] *Ibid.*
[68] *Rares*, The Significance of the Commercial Jurisdiction of the Federal Court of Australia, Federal Judicial Scholarship 2008, 23, para. 49.
[69] *Orr*, Australia: How To Reduce Litigation Costs – The Federal Court "Fast Track List", 2008, available at: <http://www.mondaq.com/australia/x/71422/trials+appeals+compensation/How+To+Reduce+Litigation+Costs+The+Federal+Court+Fast+Track+List> (last consulted on 1 December 2018).

c) Summary judgment procedure under Order 14 RHC

Litigation does not just borrow from arbitration. Another important efficiency feature present in commercial litigation are summary judgments, *e.g.*, in Hong Kong under Order 14 Rules of the High Court (O 14 RHC).[70] These do not exist in arbitration. The purpose of summary judgments is to render judgment in favor of a plaintiff before trial where there is no defense to the claim.[71] In its object similar to the chess-clock system, O 14 RHC thus provides a fast-track mechanism to judgment.[72] After certain procedural steps (*i.e.*, filing notice of intention to defend, serving a statement of claim, and issuing a summons supported by an affidavit), the Hong Kong judges will test if the defense is "incredible, or almost incredible by reason of its inherent impossibility and its inconsistency." [73] Thus, with O 14 RHC, litigation incorporates a major advantage to the plaintiff in letting it present the seriousness of the case in a time-efficient manner, which often leads to cases being settled quickly, comparable to its counterpart in arbitration, the chess-clock system.

3. Conclusion: Specialization of commercial matters

In conclusion, the effort in specializing the court system to meet the specific needs of international commercial cases has been successful to a certain point. What needs to be done to further develop this first stage of success is to match each attribute of commercial procedure with the right case, *e.g.*, through a classification scheme that does not only take into account the amount in dispute, but also the complexity of the case: More complex cases for larger values should be handled in courts with the more complex and lengthy discovery procedure of the adversarial system, whereas simpler cases should implement aids in saving time and cost, such as the chess-clock system or O 14 RHC. Linking each feature with the appropriate case similarly applies to arbitration where parties have the freedom to choose the rules of procedure as multi-million dollar disputes call for sufficient pre-trial discovery to obtain a fair hearing, even though the parties may have agreed on arbitration to speed up the process.

[70] Order 14 Rules of the High Court, Summary Judgment Cap. 4A.

[71] *Cameron/Kelly*, Principles and Practice of Civil Procedure in Hong Kong, 2nd edition, 2009, p. 121.

[72] *Allen*, Time to go Back to Basics?, The Hong Kong Lawyer, 2017, available at: <http://www.hk-lawyer.org/content/time-go-back-basics> (last consulted on 1 December 2018).

[73] See the test as laid out in *Ng Siu Kei* v. *Chong Mee Mee* (1999) 1 HKC 693 (CFI).

III. Conclusion: Efficiency in arbitration and litigation

Technology has increased the speed both of arbitration and litigation. However, the innovative methods to generate a speedy procedure were first incorporated in arbitral proceedings and then "borrowed" for litigation where they are of benefit and do not collide with the features on the other end of the spectrum that litigation must guarantee (*i.e.*, the right to a fair hearing, accuracy). Modern technologies which enhance dispute resolution (as exemplified by ODR), is therefore more closely linked to international arbitration as the more informal procedure and will in the future facilitate the process and make it even more attractive for international parties of commercial disputes. These developments exist and will follow in litigation over time, but it will take time to rid courts of the reputation of being stuffy halls with rooms drowning under file folders and devoid of electronics. The changes will only be able to appear and persist in those cases where the law and the facts are clear. This is seldom the case in the big international commercial disputes but implementation of these methods (*e.g.*, video-conferences) in major disputes is imaginable in the early stages of the procedure.

In addition, the increasing specialization of court divisions and the procedures applied in international commercial matters, expedite efficiency in court proceedings as well. As mentioned above, in order to decide whether this efficiency is on the same level as that of arbitration, one must consider each case on its own (whether it is a complex or a simple one). Nonetheless, the aspect of reaching finality of the decision after just one round of engagement that exists in arbitration but not litigation plays significantly into the efficiency in time and cost. As a result as of now, with respect to efficiency, arbitration is the more time-efficient procedure for disputes arising out of international commercial transactions, but if arbitral tribunals, on the one hand, continue to apply litigation features (like full-scale discovery), and courts, on the other hand, develop their case management according to arbitration, the balance could change with arbitration no longer dominating as the more efficient procedure in international commercial disputes.

C. Confidentiality

Citations of international commercial arbitration awards are especially rare.[74] This is because corporations involved in these transactions are often concerned about their trade secrets or faults being publicized and thus choose arbitration

[74] *Weidemaier*, Toward a Theory of Precedent in Arbitration, William and Mary Law Review 2010, 51 (5), 1895 (1895).

for the privacy with which it is conducted.[75] However, more and more critics demand transparency of arbitral awards, as they fear a decline in the development of the law which, in the common law world, heavily depends upon precedent. This raises several questions: Does the development of the law in this field need litigation to stay, and will these critics help it to do so? Will arbitration yield to its critics and become more transparent or will it remain a private procedure to the benefit of its clients?

I. Development of the law vs. party autonomy

The dispute concerns the challenge of allowing judges to use cases and develop the law under the doctrine of precedent, and respecting the parties' autonomy to shield these cases from the public eye. Judges across various jurisdictions fear that, due to the secrecy with which arbitration is conducted, areas of law once defined by judges (and especially so commercial law, as mentioned above) are not being developed by way of public judicial decisions anymore.[76] However, to this day, it seems that despite the confidentiality with which arbitration is conducted, plenty of law is still being made, as evidenced by the exponential growth of U.S. federal and state reporters.[77] This can be underscored by the fact that the common law continues to develop with a constant flood of cases over a wide area of jurisprudence.[78] Also, private parties have no obligations to finance the development of the commercial law.[79] And yet, it is ironical that private arbitration, which was created to make dispute resolution easier, is making it harder for counsels now, as they need to advise their clients that fewer and dated precedents are available to predict the outcome of their proceedings.[80] A further fear voiced by critics is that a privately paid arbitrator acting in a confidential proceeding is less likely to be neutral with big corporations as the repeat players

[75] See, *e.g.*, ICC Rules of Arbitration Art. 22(3): "the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings (…) and may take measures for protecting trade secrets and confidential information".

[76] *Higginbotham*, The Present Plight of the United States District Courts, Duke Law Journal 2010, 60 (3), 745 (745); *Means*, What's So Great About a Trial Anyway? Two Judges' Perspectives on Trial by Jury, Texas Wesleyan Law Review 2006, 12 (2), 497 (513); *Thomas*, Developing Commercial Law Through the Courts: Rebalancing the Relationship Between the Courts and Arbitration, The Bailii Lecture 2016, 9 March 2016, p. 1.

[77] *Karamanian*, Courts and Arbitration: Reconciling the Public with the Private, Arbitration Law Review 2017, 9 (65), 1 (6).

[78] *Eder*, Does Arbitration stifle Development of the Law? Should s.69 be revitalised?, Chartered Institute of Arbitrators, AGM Keynote Address, 28 April 2016, p. 4.

[79] *Saville*, Reforms Will Threaten London's Place as a World Arbitration Centre, The Times, 28 April 2016.

[80] *Grosse* (fn. 42), p. 219.

of arbitration seeking their service, as they are not publicly accountable like a judge.[81] Yet, this can be countered by referring to the parties' freedom to settle their disputes (which is a right they are entitled to[82]), and the freedom to have these settled by whoever they please.[83] Denying parties this right would, in Sir *Bernard Eder's* words, be "to drive a coach and horses through the fundamental principle of party autonomy."[84]

II. Public interest vs. right to confidentiality of dispute settlement

Another problem of confidential arbitration is the exclusion of the public. In a democratic society, the principle of open justice (*i.e.*, access to hearings and documents) has long been an individual right for two reasons: to monitor the decision-makers and to provide access to substantive information concerning the dispute.[85]

1. Monitoring decision-makers for accountability

With confidentiality as one of its underlying principles, the AAA,[86] for instance, neither has a list of all the institutions identifying it as the administrator of their arbitrations nor does it offer a public register of its arbitrators, and it keeps information about proceedings private.[87] Thus, monitoring arbitrators and proceedings is not possible. No one other than the parties and their counsel knows what happens behind closed doors, and at worst, arbitration could devolve into a "legal free-for-all" on behalf of the arbitrator or the parties.[88] *E.g.*, businesses may escape accountability for criminal offenses, such as money laundering in international trade:[89] Arbitration may facilitate crime because, unlike litigation, it will not act on offenses that may accompany an international commercial dispute such as the use of money laundered by either of the parties.[90]

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[81] *Means* (fn. 76), p. 519; *van Harten*, Investment Treaty Arbitration and Public Law, 2008, p. 4; *Higginbotham* (fn. 76), p. 753.
[82] *E.g.*, under The UK Arbitration Act 1996 (c 23).
[83] *Karamanian* (fn. 77), p. 6.
[84] *Eder* (fn. 78), p. 4.
[85] *Resnik*, Diffusing Disputes, Yale Law Journal 2015, 124 (8), 2806 (2849).
[86] American Arbitration Association, available at: <www.adr.org> (last consulted on 1 December 2018).
[87] *Resnik* (fn. 85), p. 2849.
[88] *Silver-Greenberg/Gebeloff*, Arbitration, A 'Privatization of the Justice System', Beware of the Fine Print Part 2, The New York Times, 1 November 2015.
[89] *Silver-Greenberg/Gebeloff*, Arbitration Everywhere, Stacking the Deck of Justice, Beware of the Fine Print Part 1, The New York Times, 31 October 2015.
[90] *Jan/Haruna*, The Role of Arbitration in the Resolution of International Commercial Disputes, International Islamic University Malaysia (IIUM) Law Journal 2014, 22 (2), 265

However, arbitration is not unregulated and there are limits on how informal arbitration can be. Courts have struck down awards that have not met fundamental standards of justice (*e.g.*, due to corruption, partiality or serious misconduct).[91] If these standards could not be provided in arbitration proceedings, the losing party has sufficient grounds to appeal. Also, courts are not detached from the arbitration process: Various arbitration agreements and awards are vetted by the courts and the judiciary is engaged in other aspects of the arbitration process not least because the tribunal depends on the court to give effect to interim measures in order to preserve evidence or protect assets.[92] This imperative of justice in private procedures as well can be exemplified by the U.S. Consumer Due Process Protocol[93] which also commits the use of fundamental due-process protections in the arbitration process.[94] Thus, the courts' role in arbitration proceedings may be limited, though not too small to deny the parties justice.[95] The problem of arbitration shielding offenders of money laundering has already been approached: A general consensus has emerged among arbitrators that the problem of having to respect an otherwise valid and enforceable arbitration agreement (*pacta sunt servanda* principle) can give way to more powerful considerations, such as principles of international public policy[96] or giving precedence to the mandatory provisions of another law over the governing law of the contract.[97]

2. Public receiving substantive information of the issue in dispute

The other reason for public insight in disputes is to obtain substantive information which is essential when individuals want to know their rights, as awards may be the only source for them to find out about a similar case that entitles them to a right to damages, for instance. Private proceedings reduce the court's potential to explain the law at the expense of reducing public

(293); *McDougall*, International Arbitration and Money Laundering, American University International Law Review 2005, 22 (5), 1021 (1022).

[91] *Lipsky*, The New York Times' Attack on Arbitration, Dispute Resolution Magazine 2016, 22 (4), 6 (7).

[92] *Karamanian* (fn. 77), p. 8; *Redfern/Hunter* (fn. 43), para. 7.14.

[93] *Consumer Due Process Protocol*, The National Consumer Disputes Advisory Committee, 1998.

[94] *Lipsky* (fn. 91), p. 8.

[95] *Freeman Jalet*, Judicial Review of Arbitration, The Judicial Attitude, Cornell Law Review 1960, 45 (3), 519 (556).

[96] See for example *Westacre Investments Inc* v. *Jugoimport-SDRP Holding Company Ltd* [1999] APP.L.R. 05/12.

[97] *Rogers*, Transparency in International Commercial Arbitration, Kansas Law Review 2006, 54 (5), 1301 (1332).

understanding of the law and encouraging public debate over its application.[98] The public's interest in these explanations is reasonable, but it is important to determine the degree of transparency it would require to provide such transparency: It would need information about the matter in dispute itself, the facts and the law, not however facts about the procedure and private information of the parties (commercial secrets or business strategies). These, the parties have every right to protect and could not help the public define its rights.

III. Generating more transparency: Practical proposals

Due to the issues raised, there have been practical suggestions on how to generate more transparency in international commercial arbitration.

1. Publication of arbitral awards in anonymized form

One proposal is to introduce mandatory transparency reforms which make it compulsory to publish awards in anonymized form based on a presumption in favor of publication that can only be overcome by objection.[99] "Anonymous" actually means pseudonymization of the information and could mean to leave out business secrets like salaries and sales figures with the goal to stop parallel developments in the law in back-rooms.[100] A model for such published awards is provided by the ICSID[101] tribunals which publish reasoned awards and their explanations.[102] Art. 48(5) of the ICSID Convention even allows one party to unilaterally publish the award if the other does not consent.[103]

2. Accessibility of arbitral awards by disclosure obligations

Another approach is to promote disclosure of reasoned, accessible awards so that interested parties have access to information to make strategic choices. It is not necessary to disclose how information is handled by institutions. This would

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[98] *Thomas* (fn. 76), p. 5; *Smith/Moyé*, Outsourcing American Civil Justice: Mandatory Arbitration Clauses in Consumer and Employment Contracts, Texas Tech Law Review 2012, 44 (2), 282 (297).

[99] *Buys*, The Tensions between Confidentiality and Transparency in International Arbitration, The American Review of International Arbitration 2003, 14, 121 (121); to some extent: *Thomas* (fn. 76); *Carbonneau*, Rendering Arbitral Awards with Reasons, Columbia Journal of Transnational Law 1985, 23 (3), 597 (581).

[100] *Hielscher/Kroker/Haerder/Henrich*, Justitia verzieht sich ins Hinterzimmer (translation: "Justitia retreating to the back-room"), Wirtschaftswoche, 3 May 2015.

[101] See International Centre for Settlement of Investment Disputes (ICSID) available at: <https://icsid.worldbank.org> (last consulted on 1 December 2018).

[102] *Weidemaier* (fn. 74), p. 1895.

[103] See *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (The Washington Convention), International Centre for Settlement of Investment Disputes (ICSID) 17 UST 1270, TIAS 6090, 575 UNTS 159 (14 Oct 1966).

be the more effective solution to achieve more transparency while protecting the right to privacy.[104]

3. Discussion of practical proposals (publication or disclosure)

Public pressure has driven proposals for more transparency. Unfortunately, the ICSID publication model cited by those in favor of mandatory transparency reforms does not transfer to international commercial arbitration: Although investment disputes use the institutions of international commercial arbitration, they are different in that they involve states and thus greater public interest.[105] International commercial disputes, however, are private disputes and - in the field of business to business relations - between equal parties.[106] Besides, in the practical implementation of publishing awards, it would be an issue in itself to determine which cases involve sufficient public interest.[107]

Commercial parties may choose international arbitration mostly out of fear of bias from the national courts, which calls for a stable body of legal principles and thus transparency reforms.[108] But the international arbitration community already strives towards greater transparency, with a "loyal opposition from within"[109] aiming to enhance the system. International commercial arbitration awards are already being published voluntarily more frequently.[110] This is due to major driving factors, like competition among the arbitration institutions to provide the best body of rules incorporating clarity and transparency.[111] However, the new players in the field of international commercial arbitration have pushed for greater transparency and access to past awards as well, with the market for legal services in this field gradually expanding because it used to be dominated by an elite group who learned from their own past arbitrations (so that lawyers new in the field could not get access to information).[112] This is why defendants of the idea of mandatory award publications also want to generate

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[104] *Rogers* (fn. 97), p. 1337; *Weidemaier* (fn. 74), p. 1895.

[105] *United Nations Conference on Trade and Development* (*UNCTAD*), Dispute Settlement International Commercial Arbitration, 2005, available at: <http://unctad.org/en/Docs/edmmisc232add38_en.pdf> (last consulted on 1 December 2018).

[106] *Rogers* (fn. 97), p. 1318.

[107] *Ibid.*

[108] *Carbonneau* (fn. 99), p. 604.

[109] *Buxbaum*, Introduction, International Tax and Business Lawyer 1986, 4 (2), 205 (206).

[110] *Gruner*, Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform, Columbia Journal of Transnational Law 2003, 41 (1), 923 (959).

[111] *Rogers* (fn. 97), p. 1313.

[112] *Weidemaier* (fn. 74), p. 1895.

consistency by reference to former awards (*stare decisis*)[113] and protect lawyers from the fate of realizing that the arguments they have presented have already been decided in previous awards.[114] But these reforms only work so far as it is acknowledged that arbitrators cannot create precedent the way judges can, with the awards neither determining the outcome of future disputes nor constraining the discretion of future arbitrators.[115] This notwithstanding, it does shape the lawyers' argumentation and foreshadows the direction a dispute may take.[116]

However, this can be achieved with disclosure obligations all the same because reference to former awards concerns substantial information about the case, not the way it was administered. Nonetheless, proponents of publication argue that confidentiality in international commercial arbitration is overrated in any event since knowledge of current disputes spreads in the market anyway.[117] There is a need to differentiate, however: Parties have a right to decide when to release their information to the public and especially so where the dispute is of no help to the legal advisors in future disputes (*i.e.*, where the dispute is solely a question of the law).[118] Forcing parties to publish the awards would then come at a high cost. Furthermore, the implementation of mandatory transparency reforms would require drastic measures as they would have to be implemented on the international level (or else parties opposing to reforms could just avoid those institutions that do not command transparency) and call for a complete change in the nature of the arbitration system.[119] The same objective, greater transparency, can be achieved with disclosure obligations of substantive information and in a more efficient way as it simply pursues the path the development is already taking.

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[113] See for example *Mitsubishi* v. *Soler Chrysler-Plymouth* (1985) 473 U.S. 614 (No. 83-1569) in which *James S. Campbell* and *Andrew N. Vollmer* provided briefs on behalf of the ICC as *amici curiae* and cited cases that had been previously decided by the ICC in a similar way.

[114] See for example an incident in which this happened as cited in *Tait*, When an Investment becomes an Argument, International Arbitration, Financial Times, London (UK), 16 February 2006.

[115] *Weidemaier* (fn. 74), p. 1896.

[116] *Ibid.*

[117] *Thomas* (fn. 76), p. 14.

[118] *Weidemaier* (fn. 74), p. 1895.

[119] *Rogers* (fn. 97), p. 1303.

4. Conclusion: Confidentiality in cross-border arbitration

It is interesting that by itself, arbitration as the dispute resolution method that followed litigation[120] tries to incorporate principles that are inherent parts of justice that judges must respect when reaching a decision, such as *stare decisis*. From the developments discussed above,[121] one can conclude that arbitration will become more transparent in the future and that the courts are still sufficiently involved to generate justice and discuss the complex questions of commercial law. Therefore, litigation does not constitute an absolute value in itself to ensure precedent and international commercial law thus developed - the disclosure of substantive information, albeit not substituting judgments, provides those elements of transparency (a means of marking decision-makers' words, enabling counsels to research previous awards, give the public an insight to their rights through cases) that are necessary and sufficient and suit arbitration.

IV. Protecting Confidential Information in Litigation

A different question which does not concern the development of arbitration with respect to critics of its transparency, is whether there are promising initiatives in litigation to match the confidentiality inherent in arbitration. At present, there have been several proposals to protect sensitive information in international commercial litigation. For example, in exceptional cases when confidential information is involved and publicity would damage that information, the court can conduct hearings in private.[122] This, however, is only the option of last resort.[123] Other less extreme measures like restricting confidentiality to a specific circle ("confidentiality clubs"), or issuing an injunction to prohibit the other party from using confidential information are still in conflict with the general approach in court proceedings of imposing only the minimum possible interference with

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[120] *Abi-Saab*, International Adjudication and Arbitration - The International Judicial Function, UN Lecture Series, 30 June 2008 (00:10:45-00:12:01), available at: <http://legal.un.org/avl/ls/Abi-Saab_CT.html> (last consulted on 1 December 2018) ("The Alabama Arbitration held in 1871 in Geneva marks the beginning of arbitration as we know it").

[121] See for example **C. III. 3.** increased voluntary publication of awards and **C. III. 1.** and **2.** transparency initiatives.

[122] See *England and Wales High Court* (*Patents Court*), *Smith & Nephew Plc* v. *Convatec Technologies Inc* [2014] EWHC 146, para. 7.

[123] *Toutoungi*, *et al.*, Keeping it confidential: Pursuing litigation where industrial secrets are at risk of disclosure; Eversheds diversified industrials e-briefing, 2014, available at: <https://www.eversheds-sutherland.com/global/en/what/articles/index.page?ArticleID=en/Industrial_engineering/Keeping_it_confidential_pursuing_litigation_where_secrets_are_at_risk_140624> (last consulted on 1 December 2018).

the principle of open justice.[124] These measures are therefore still alien to the system of litigation and will need greater acceptance and fine-tuning in order to match the much favored aspect of confidentiality in arbitral proceedings.

D. Enforcement

This paper will now turn to a final aspect to assess if litigation has a future in the resolution of international commercial disputes. It is likely the most important one: A winning party's moral victory will only translate into a material value, if the party can enforce the decision.[125] If enforcement of foreign judgments is not possible or made inordinately difficult, any other feature of litigation that made it attractive in the eyes of the parties will become irrelevant, particularly so if arbitral awards are easily enforceable. This will be explored below.

I. Enforcing a foreign judgment

Enforcement of a foreign judgment means a winning litigant requests that a court which did not render the judgment enforces it against the judgment debtor as if it were that of the receiving court.[126] As the example of Hong Kong which is a popular hub for international commercial dispute resolution and as a place to hold assets[127] will show, enforcement may be relatively easy or more difficult as the later examples exhibit.

1. Legal framework in Hong Kong

a) Domestic rules or common law

Foreign judgments in Hong Kong are either enforced through the statutory regime or under common law. Under Cap. 319,[128] a judgment creditor with a final and conclusive money judgment obtained from a superior court of a country designated under Cap. 319 as having jurisdiction under Hong Kong rules can apply to Hong Kong's Court of First Instance to register that judgment;[129] it will

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[124] *Ibid.*

[125] *Morris/Gibb/Tsang* (fn. 38), p. 65 at 4.1.

[126] *Johnston/Harris*, The Conflict of Laws in Hong Kong, 3rd edition, 2017, para. 9.001.

[127] *Hong Kong Trade Development Council*, *HKTDC Research*, Legal Services Industry in Hong Kong, 12 July 2019, available at: <http://hong-kong-economy-research.hktdc.com/business-news/article/Hong-Kong-Industry-Profiles/Legal-Services-Industry-in-Hong-Kong/hkip/en/1/1X000000/1X003UYK.htm> (last consulted on 11 August 2019).

[128] Foreign Judgments (Reciprocal Enforcement) Ordinance Cap. 319.

[129] *Lau*, Recognition and Enforcement of Foreign Judgments in Hong Kong and the Hague Conference's proposed Convention, 2016, available at: <http://www.deacons.com.hk/news-and-insights/publications/recognition-and-

then have the same force as a Hong Kong judgment even if it were to contain mistakes.[130] While Annex of Cap. 319 lists fifteen countries, these do not include the People's Republic of China (PRC). PRC judgments are enforced under a separate bipartite agreement, implemented in Hong Kong as Cap. 597,[131] if additional requirements are satisfied, including a choice of court agreement in favor of the Mainland.[132] If a judgment was obtained in any country other than the PRC or the fifteen countries listed in Cap. 319, it can only be enforced by reference to the common law. Similarly to Cap. 319, this requires the judgment to be issued by a court of competent jurisdiction, it must be for a definite sum of money, and it must be final and conclusive.[133] Thus, enforcement of foreign civil judgments from any court in the world is, in principle, possible in Hong Kong and can be regarded as rather simple.[134]

b) Grounds for refusal: Excursus on finality of PRC judgments

However, enforcement is not automatic in Hong Kong and there are several grounds for refusal (or in the case of common law - defenses) to enforce foreign judgments in Hong Kong, in particular, if the requirements set out above are not met: lack of finality or of a judgment for a definite sum of money; the foreign court not having jurisdiction; failure of due process; or if the judgment was procured by fraud.[135] The most notable issue in Hong Kong has been the finality (or lack thereof) of PRC judgments and shall serve as an example here that there are no safe havens for enforcements, even in a sympathetic jurisdiction as Hong Kong:[136] Under PRC law, any judgment can be reopened for review if one of the litigants or the People's Procuratorate so requests, if that judgment has already taken legal effect and has been found to be erroneous concerning the facts or the law.[137] Although this power under the so-called trial supervision procedure is seldom exercised,[138] Hong Kong courts will consider it and not enforce a PRC

enforcement-of-foreign-judgments-hague-conferences-proposed-convention.html> (last consulted on 1 December 2018).

[130] *Morris/Gibb/Tsang* (fn. 38), p. 80 at 4.56.

[131] Mainland Judgments (Reciprocal Enforcement) Ordinance Cap. 597.

[132] *Lau* (fn. 129).

[133] *Smart*, Finality and the Enforcement of Foreign Judgments under the Common Law in Hong Kong, Oxford University Commonwealth Law Journal 2005, 5 (2), 301 (302).

[134] *Johnston*, The Conflict of Laws in Hong Kong, 3rd edition, 2017, para. 9.005.

[135] Cap. 319 Art. 6(1)(a) (i), (ii), (iii) and (iv).

[136] See for example *Supreme Court of Hong Kong*, *Chiyu Banking Corp v Chan Tin Kwun* (1996) 2 HKLR 395 which lacked finality in the eyes of the court because it was possible for the case to be retried.

[137] *Smart* (fn. 133), p. 304; .

[138] *Gibb*, China Mainland - Forum non conveniens?, The Hong Kong Lawyer 2011, p. 7.

decision if it can still be altered by the court which issued it.[139] A judgment that can be appealed can still be final and conclusive,[140] however in the trial supervision procedure, the Procuratorate can order the same court to hear the case.[141] Consequently, under Hong Kong law, the supervision procedure prevents a judgment from qualifying as final. Although Cap. 597 s 6 lays out certain circumstances in which Mainland judgments shall be regarded as final and conclusive, these are limited and Cap 597's scope is still narrow with its applying only to exclusive jurisdiction clauses in favor of the Mainland and commercial transactions between businesses.[142] Thus, even with Cap. 597 directly addressing the issue of finality, enforcements of PRC judgments remain difficult.[143] Since Mainland law itself does not regard these judgments as final and conclusive, it becomes even harder for the judgment creditor to prove that they are.[144]

It seems that Hong Kong is applying a test to PRC judgments that it would not have to apply. Hong Kong courts in fact have two options: They can deny finality on the basis of the supervision procedure, or they can determine for each judgment whether it was final and conclusive "depending upon the circumstances pertaining to that judgment."[145] Other common law jurisdictions have adopted the second test and regard judgments as final until the original decision is set aside.[146] This can be underscored with comparison to the other grounds for refusal: As a consequence of the obligation theory (acknowledging the need to make the defendant's assets accessible when a judgment against him was rightfully obtained in a foreign court),[147] it is well-recognized that the

139 See *Nouvion v Freeman* (1889) 15 App Cas 1 (HI).

140 *Ibid*, 9 and *Nintendo of America v Bung Enterprises Ltd* (2000) 2 HKC 629.

141 *Smart* (fn. 133), p. 304.

142 *Morris/Gibb/Tsang* (fn. 38), p. 86 at 4.76.

143 See *HKSAR Court of First Instance*, **佛山市順德區金鳳製衣有限公司** *("Foshan Shunde Jinfeng Garment Co., Ltd.")* v. *First Dragon Fashion (Hong Kong) Limited* (2010) CWU No. 41 in which judge *To J* held that the Mainland judgment could not be enforced under Cap. 597 because it lacked finality.

144 *Liu*, Vulnerable Justice: Finality of Civil Judgments in China, Columbia Journal of Asian Law 1999, 13 (1), 35 (35).

145 See *Cheung Ja* in *Lee Yau Wing* v. *Lee Shui Kwan* (2007) 2 HKLRD 749 in which the plaintiff tried to prove that the judiciary's interpretations in the PRC developed towards restricting the trial supervision procedure.

146 See for example the Canadian approach in *Boyle* v. *Victoria Yukon Trading Co.* (1902) 9 BCR 213 (SC) and an English court on finality in *Vanquelin* v. *Bouard* (1863) 15 CBNS 341, 367-368.

147 See the principle of obligation to enforce foreign judgments that were rightfully obtained in a court of competent jurisdiction as laid out by *Blackburn J* in *Schibsby* v. *Westenholz* (1870) LR 6 QB 155, 159.

grounds for refusal (or defenses) should maintain a high threshold. For instance, the judgment debtor has to provide cogent evidence for lack of due process.[148] In order to create consistency with the other grounds for refusal, finality could be assumed by the courts unless proven that the Procuratorate or a litigant has requested a retrial. Although, in theory, the Procuratorate can do so at any time in the future (and the litigant within two years),[149] it is problematic that Hong Kong, rather than testing if is indeed being requested, automatically assumes lack of finality. This could create the impression that Hong Kong is actually expressing disregard for PRC procedure and considers the local system as superior to that of the PRC. This, however, would violate the principle of comity.[150] Lack of finality thus should be assumed only in those cases where there is a risk that the decision will be altered. Although this has been attempted in a case which interpreted finality with regard to PRC judgments as the decision being "unalterable voluntarily by the court making it,"[151] (thus understanding the supervision procedure more like "just another avenue of appeal"[152] than one of protest), without an authoritative ruling on this matter, the question whether such an interpretation could have a future remains uncertain. Thus, even in the model enforcement scheme of Hong Kong, this shows that enforcement problems exist.

2. Comparison: Rules of enforcement in other jurisdictions

An international comparison will show why the enforceability of foreign judgments is generally perceived as, and is, unpredictable. Uncertainty, however, is a drawback in litigating international commercial disputes. In contrast to Hong Kong's general openness towards judgments obtained abroad, the high threshold maintained in the U.S., for example, can require the judgment creditor to show that the assertion of jurisdiction was appropriate under applicable foreign law, or under both applicable foreign and domestic law.[153] Under common law, a court

[148] See, *e.g.*, *Xinjiang Xingmei Oil Pipeline Co Ltd* v. *China Petroleum & Chemical Corp* (2005) HKCFI 63 in which it was held to be insufficient that two Mainland parties made allegations of a "culture" favoring state-owned enterprises.

[149] *Smart* (fn. 133), p. 306.

[150] Deputy High Court Judge *Poon* on Hong Kong judges breaching the principle of comity in Chambers in *New Link Consultants* v. *Air China et. al.* (2001) HCA515, 96; for the definition of comity see *Anthony Chan J* as laid out in *Sea Powerful II Special Maritime Enterprises (ENE)* v. *Bank of China Ltd* (2016) HKEC 90,132: "This is an exercise in the fulfillment of which judges ought to be comrades in arms".

[151] *To J* in *Bank of China* v. *Yang Fan* (2016) 3 HKLRD 7, 36.

[152] *Ibid*, p. 56.

[153] *Monestier*, Whose Law of Personal Jurisdiction? The Choice of Law Problem in the Recognition of Foreign Judgments, Boston Law Review 2016, 96 (5), 1729 (1732).

may not only take into account its own laws for submission to the jurisdiction but also those of the foreign court, although the degree depends on the facts[154] which may produce a more just outcome but comes with further uncertainty whether the foreign court had jurisdiction and the decision is enforceable.

Other jurisdictions evidence other types of enforcement problems: China and Japan, for example, politicize the process as they create a deadlock of enforcement to each other's judgments with both systems based on the principle of reciprocity.[155] Russian courts have nearly unlimited discretion in enforcement decisions due to the Russian enforcement regime being based on the principles of comity and international reciprocity[156] if the judgment was issued in one of the many countries with which Russia has not concluded a treaty.[157] Based on the political influence on these principles, the Russian enforcement practice is often unpredictable (in 2015 and 2016, only 67 % of those decisions falling within this regime were successfully enforced in Russia).[158] And finally, Chinese courts take the liberty of ignoring the parties' choice of exclusive jurisdiction clauses and instead review the foreign court's jurisdiction based on China's own conflict of law rules (often concluding that the foreign court did not have jurisdiction and as a consequence refusing enforcement[159]). This punishes parties who had the sage foresight to agree on a jurisdictional clause and denies party autonomy. These selective examples demonstrate that a wide variety of blocks to enforcement exist in many jurisdictions - even or especially so in the major economic powers, U.S.A., China, and Russia.

3. Potential of the Hague Convention in addressing these issues

Currently, enforcement of foreign judgments is indeed unpredictable and thus this uncertainty represents a major disadvantage to international commercial

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154 See, *e.g.*, Lord *Collins* in *Rubin* v. *Eurofinance SA* (2013) 1 AC 236 and *Vizcaya Partners* v. *Picard* (2016) UKPC 5.

155 *Morris/Gibb/Tsang* (fn. 38), p. 69 at 4.19.

156 As established in the ruling of the *Supreme Court of Russia* of 7 June 2002 № *5-I02-64:* "lack of international treaty cannot be cited as grounds for refusal" and "enforcement can be granted on the basis of reciprocity".

157 *Mosgo/Shamatonov*, Litigation and Enforcement in the Russian Federation: Overview, Thomson Reuters, Practical Law, 1 July 2017, available at: <https://uk.practicallaw.thomsonreuters.com/Document/I2030a0321cb611e38578f7ccc38dcbee/View/FullText.html?transitionType=CategoryPageItem&contextData=(sc.Default)&comp=pluk&navId=C380755DBA78BCA50FB1ED389AD834BC> (last consulted on 11 August 2019).

158 *Ibid.*

159 *Tang,* Effectiveness of Exclusive Jurisdiction Clauses in the Chinese Courts - A Pragmatic Study, International and Comparative Law Quarterly 2012, 61 (2), 458 (459).

disputes. It appears there are two grounds for this: (1) the fact that courts favor and more highly esteem their own domestic laws (as demonstrated by Hong Kong's issues with finality of PRC judgments, or the PRC courts' attitude towards choice of court agreements) and (2) the fact that there is no international consensus to resolve the situation. This will be explored in detail below.

In 1971, the Hague Conference on Private International law sought to achieve a uniform enforcement regime through the Convention on Enforcement of Foreign Judgments in Civil and Commercial matters.[160] While the convention contains a clear road map for enforcing judgments issued abroad (not unlike Hong Kong law), it failed at unifying the international community: Only five signatories (Albania, Cyprus, Kuwait, Portugal and the Netherlands) acceded to it (while these were not the world's main industrial nations) and it has no effect as the required supplementary bilateral agreements between the parties were never made.[161] Having been issued 46 years ago, it is unlikely that there will be future progress on this matter.

On June 30, 2005, however, the Hague Convention on Choice of Court Agreements ("Convention") was promulgated to regulate enforcement with respect to exclusive jurisdiction clauses in international civil or commercial matters.[162] The hope was that this would now lead to a uniform enforcement regime encouraging international trade.[163] The Convention provides that the chosen court must act if the choice of court agreement is valid, Art. 5(1), that a non-chosen court must dismiss the proceedings if they have been commenced, Art. 6, and that a judgment issued by a court of a Contracting State designated in an exclusive jurisdiction clause shall be recognized and enforced in other Contracting States, Art. 8(1). However, to date only the EU (except Denmark), Mexico and Singapore are contracting parties, and China, Montenegro, Ukraine and the U.S. have signed but not ratified the Convention.[164] As the Convention's

[160] *The Hague Convention on Enforcement of Foreign Judgments in Civil and Commercial Matters*, Hague Conference on Private International Law (The Hague, 1971).
[161] *Regan*, Recognition and Enforcement of Foreign Judgments - A Second Attempt in the Hague?, Richmond Journal of Global Law and Business 2015, 14 (1), 63 (65).
[162] *The Hague Convention on Choice of Court Agreements* (The Hague Convention) Hague Conference on Private International Law (The Hague, 2005) Art. 1(1) and (2) (hereinafter: The Hague Convention).
[163] *Spigelman*, The Hague Choice of Court Convention and International Commercial Litigation, Judicial Review 2010, 9 (4), 389 (392).
[164] HCCH Hague Conference/ Conférence de La Haye (Hague Conference on Private International Law) *Status Table Convention of 30 June 2005 on Choice of Court Agreements*, available at: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> (last consulted on 1 December 2018).

potential positive effect critically depends on widespread international acceptance,[165] it will remain ineffective despite its objectives, with the major international players (*i.e.*, PRC, Russia and the U.S.) reluctant to fully adopt it.

But why is there such reluctance to accede to the Convention? It seems that governments take the view that the diversity of legal cultures and courts are manifestations of national sovereignty, and would therefore rather jeopardize the promotion of international economic well-being than to defer to the judgments of the courts of other nations.[166] By contrast, in Continental Europe, legal regimes seem to be more homogenous, which explains perhaps the success of achieving regional consensus on enforcement under the Brussels Convention[167] (implemented in the Brussels Ia Regulation[168]). And yet, the Convention already puts a greater emphasis on the parties' agreements than on the judgments that make up the content in the Convention that states presumably perceive as interfering with their sovereignty.[169] In theory, this should make it easier to enforce a judgment issued by a jurisdiction on which the parties expressly agreed, thereby taking away the receiving court's pressure of scrutiny[170] - technically speaking, the focus on party autonomy as expressed in a choice of court agreement is virtually the same as that expressed in an arbitration clause, yet other than the former, the latter is accepted almost worldwide by the 158 Contracting States of the above mentioned New York Convention that will be discussed in more detail below.[171]

However, even in the U.S., for example, where legal diversity is not as apparent, the Uniform Monetary Act[172] which provides an enforcement scheme of foreign (non-U.S.) judgments in an attempt to harmonize the enforcement procedure within the nation in line with the principles set forth in the *U.S. Supreme Court*

165 *Woodward*, Saving the Hague Choice of Court Convention, University of Pennsylvania Journal of International Law 2014, 29 (3), 657 (657).
166 *Spigelman* (fn. 163), p. 401.
167 The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels, 1968), "The Brussels Convention".
168 Regulation No. 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast).
169 As was the case in the Hague Convention 1971, *Woodward* (fn. 165), p. 662.
170 *Ibid.*
171 *Spigelman* (fn. 163), p. 396.
172 Uniform Foreign Country Money Judgments Recognition Act 1962, 13 pt. II U.L.A. 44 (Supp. 2013).

case *Hilton* v. *Guyot*,[173] this Act has not been adopted by all U.S. States.[174] If it is this hard of a task on the U.S. intrastate level to yield to a sister state's law and agree on a uniform enforcement scheme, it seems almost impossible to do so on a global scale. Although, in its substance, the Convention thus has potential to reach international accord, it is likely to remain ineffective if countries feel coerced into complying with extraterritorial judicial power.

II. Enforcing arbitral awards

Unlike mediation in which the process aims to produce a result acceptable to both parties, at the end of an arbitration proceeding, there is a 'winner' and a 'loser'.[175] As in the enforcement of cross-border litigation, arbitral awards must be enforced so that the 'winner' can give effect to the award. The picture that presents itself with respect to the enforcement of arbitral awards is, however, starkly different.

1. The New York Convention

The New York Convention provides a guarantee for enforcement of foreign awards to contracting states (subject to limited grounds for refusal and without review of the merits),[176] allowing states that accede to it to make reservations of reciprocity and commercial relationships.[177] It also unifies the enforcement regime in that it greatly overlaps with Art. 35 and 36 of the Model Law which many countries have adopted substantially.[178]

Hong Kong provides a good example of the ease with which arbitral awards can be enforced when a country is a signatory. Under Arbitration Ordinance Cap. 609, Hong Kong sets out its general approach that arbitral awards from any country in the world can be enforced.[179] Hong Kong then divides the field into three categories, namely the category of domestic (Hong Kong) or Macao awards

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[173] *Edelman/Jura/Loza/Bach*, Enforcement of Foreign Judgments, Getting the Deal Through, 2018, available at: <https://gettingthedealthrough.com/area/46/jurisdiction/23/enforcement-foreign-judgments-2018-united-states/> (last consulted on 1 December 2018).

[174] *Coyle*, Rethinking Judgments Reciprocity, North Carolina Law Review 2014, 92 (4), 1109 (1155).

[175] *Redfern/Hunter* (fn. 43), para. 11.03.

[176] *Morris/Gibb/Tsang* (fn. 38), p. 88 at 4.84.

[177] *Redfern/Hunter* (fn. 43), para. 11.43.

[178] *e.g.*, Hong Kong see *Morris/Gibb/Tsang* (fn. 38), p. 89 at 4.87; *UNCITRAL*, Model Law on International Commercial Arbitration, 2008, available at: <https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> (last consulted on 1 December 2018).

[179] See Arbitration Ordinance (fn. 56), Cap. 609.

as well as awards from countries that are non-signatories to the New York Convention (*Division 1*), awards from one of the 158 New York Convention signatories (*Division 2*), and finally awards from the Mainland (*Division 3*).[180] However, *Division 1* is the least relevant as non-signatories are so few and unlikely to be chosen as a seat of arbitration.[181] The enforcement is considered to be an easy and predictable process and the divisional allocation described shows Hong Kong's clear commitment to the convention and its persuasive acceptance among nation states is likely the main reason for this.

2. Grounds for refusal and non-enforcement in practice

The New York Convention contains an exhaustive list of five grounds for refusal: [182] incapacity or invalid arbitration clause, lack of due process, jurisdictional issues, composition of tribunal not in accordance with arbitration agreement, award suspended or set aside. In addition, the court has the discretion to invoke two grounds relating to public policy.[183] It seems that these public policy grounds - undefined and inherently subject to interpretation by the court - could lead to similar issues as those encountered in the refusal to enforce foreign judgments with the wider discretion and, indeed, these grounds are the basis of most litigation arising out of the enforcement of awards.[184]

Furthermore, in Art. 5(1)(a), the New York Convention provides that the law of the arbitration *situs* shall apply if the parties fail to agree on applicable law. This has led to some countries refusing enforcement of awards held to be contrary to the values of the forum.[185] However, it is well-recognized that this requires a high threshold, and most countries have adopted a non-intrusive approach in line with the "pro-enforcement-bias" of the New York Convention.[186] U.S. courts even enforced an award in favor of Iran although U.S. public policy prohibits support of a "state enemy".[187]

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[180] *Johnston/Harris* (fn. 126), para. 10.041.
[181] *Morris/Gibb/Tsang* (fn. 38), p. 89 at 4.85 and 4.86.
[182] Section 86 to section 98 Arbitration Ordinance (fn. 56) Cap. 609; Art. V New York Convention.
[183] *Redfern/Hunter* (fn. 43), para. 11.58.
[184] *Morris/Gibb/Tsang* (fn. 38), p. 90 at 4.87.
[185] *Schur*, Keeping Dispute Resolution Costs Smaller than Your Small Businesses, Loyola University of Chicago International Law Review 2016, 14 (1), 73 (81).
[186] See for example *MGM Productions Group Inc.* v. *Aeroflot Russian Airlines* WL 234871 (2nd Cir. 2004), at 3 in which the court held that "Courts construe the public policy limitation in the Convention very narrowly".
[187] *Schur* (fn. 185), p. 83.

Most importantly though, even if the court finds that a ground for refusal exists, it has no obligation to refuse enforcement.[188] As the objective is to uphold the integrity of the arbitration process under all circumstances, the party that raised grounds for refusal unsuccessfully also has to carry indemnity costs.[189] Thus, refusal to enforce awards will remain rare and reserved for extreme cases. Awards can be and are apparently enforced globally with great ease.

III. Conclusion: Enforcing foreign judgments vs. arbitral awards

All things considered, as between the enforcement of foreign judgments versus those obtained in an arbitration, the latter is the clear 'winner' thanks to the existence and widespread acceptance of the New York Convention which provides in Art. 3 that the enforcement of a foreign award shall be no harder than that of a domestic one.[190] There is simply no comparable effective international instrument for the enforcement of foreign judgments and also the Convention cannot (yet) match the advantages of the New York Convention.

It could be argued that the success in enforcing arbitration awards is based on courts' hesitation to contravene the parties' will expressed in the arbitration agreement, and the party autonomy should be equally honored in litigation if and when parties have agreed on exclusive jurisdiction clauses. But with the majority of states still putting their national sovereignty above such choice in the context of enforcing litigation awards, and courts being readier to impose their own views and customs than is the practice when enforcing arbitration agreements, this current mismatch in ability to enforce will likely remain the same.

E. Conclusion: Future of litigation in international disputes

It seems that the question whether litigation can survive or perhaps even thrive as a dispute resolution method for international commercial disputes cannot be answered generically, as it will depend in each case on the facts and how certain factors play out, most notably the complexity of the case, and the country where the dispute could be litigated. There is much to suggest that litigation is catching up with arbitration on a number of levels: With respect to efficiency, it has been demonstrated that the limited scope of discovery in inquisitorial systems can be just as informal and quick as the process in arbitration, with the advantage of arbitration being, however, that this can be decided entirely by the parties in

[188] See Articles 5(1) and (2) of The New York Convention stating that enforcement "may" be refused.
[189] *Morris/Gibb/Tsang* (fn. 38), p. 91 at 4.95; Hong Kong Court, *Chimbusco International Petroleum (Singapore) Limited* v. *Fully Best Trading Limited* (2015) HKEC 2573.
[190] See Art. 3 of The New York Convention (fn. 13).

advance and to the extent that the more expansive discovery in the adversarial model can be a decisive factor for more complex cases in basing the judgment on the right facts.[191] The establishment of commercial courts and the option of choosing one's adjudicator through short-lists creates a kind of specialization similar to that offered by arbitrators and that in the case of the LCC, for instance, can be regarded to be just as effective and popular as arbitration.[192] Great strides are also being made to accelerate the speed with which international litigation proceedings are conducted: Examples are the use of ODR and of alternative dispute resolution features, such as the chess-clock system which is encouraged by the Civil Justice Reform in Hong Kong.[193]

If all of these developments are options for a particular case at hand, then litigation can compete with arbitration in terms of efficiency. This, however, can only be the case on the presumption that has been adopted in this paper (in order to compare the two methods on a level playing field), namely that there is no need to litigate the jurisdictional issue - for example, because the parties entered into an exclusive jurisdiction clause - before getting to the substance of the issue in dispute as this would always significantly prolong the proceedings. It should be noted, however, that jurisdictional clauses, too, can be controversial[194] and ignored at the enforcement stage. As a result, there will always be an inherent risk in international litigation proceedings that these will be prolonged due to litigation arising out of jurisdictional issues even before the real issue in dispute is concerned. Bearing this in mind, the movement commercial litigation has made in the direction of molding itself after the efficiencies of arbitration cannot surpass this risk and is consequently neither persuasive nor dependable.

With respect to the next factor examined, namely confidentiality, it has been shown that there is already a development towards greater transparency within the international commercial arbitration community, and that there are practical proposals (most promisingly that of disclosure obligations) on how to generate development of the law while respecting party autonomy.[195] Thus, the confidentiality with which arbitration is conducted does not pose a threat to public interests in disputes or the law being developed, which in any event would

[191] See *supra* **B. II. 2.** *a).*

[192] See *supra* **B. II. 1.**

[193] See *supra* **B. I. 2.** and **B. II. 2.** *b).*

[194] See, *e.g.*, Queen's Bench Division (Commercial Court) *BNP Paribas S.A.* v. *Anchorage Capital Europe LLP* (2013) EWHC 3073 in which Lord *Collins* testified that a clause should be interpreted as a non-exclusive jurisdiction clause and Prof. *Adrian Briggs* that it should be exclusive.

[195] See *supra* **C. III.**

not be the parties' duty to guarantee.[196] Also, the risk of private arbitrations turning into "legal free-for-alls" as worried by the critics cannot be proven to be true with the court sufficiently involved in supervising and assisting the arbitration process as an important feature to its smooth process.[197] Hence, the confidentiality with which arbitration is conducted does not conversely mean that commercial litigation must remain for the sake of development of the law, public interest or accountability of the decision-makers.

Finally, an analysis of the enforceability of commercial litigation decisions versus arbitral awards showed that thanks to the success of the New York Convention, the number of international arbitral awards that can be enforced with ease far exceeds that of international commercial judgments.[198] This would indicate that the parties would be well advised, before choosing a dispute resolution method or place, to start with a view to the end of a proceeding and to consider what the applicable enforcement regime would be and the chances of actually obtaining an enforceable judgment or award. Only then would the other factors discussed here come into play.

It seems that the future of commercial litigation will largely hinge on progress in making foreign judgments enforceable, either through widespread acceptance of the Hague Convention or other means. Today though, arbitration still has so many advantages that commercial parties with the foresight to regulate a potential dispute already in their contract will continue to opt for the more predictable arbitration method, particularly for complex cases where predictability will be important. As long as this is true, international commercial litigation will perhaps not disappear, but play a subordinate role to arbitration in the resolution of international commercial disputes.

[196] See *supra* **C. I.**
[197] See *supra* **C. II.**
[198] See *supra* **D. I.** and **II.**