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COMMERCIAL COURTS: EXPLORING KEY MODELS,

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1. Executive Summary

The Assessment provides an overview of the commercial court systems around the world. It analyses in a comparative way, the establishment and operation of commercial courts in selected civil law and commercial law countries. The jurisdictions examined include France, Germany, Kazakhstan, South Africa, UK, US, India, Singapore, as well as a selected sample of International Commercial Courts. The analysis is focused on the establishment of the commercial court systems, the jurisdiction of commercial courts, the procedural framework, and practical considerations such as costs, length of proceedings, and expertise of judges.

Based on this analysis, the assessment reveals certain challenges that need to be addressed with the aim to develop an efficient commercial court system. These include, the specialisation of judges and lack of judicial training, the approach to international parties, the procedural challenges, and the existence of appropriate court facilities. The recommendations put forward by the assessment with the aim to strengthening public confidence towards the judicial system are the training of judges, the development of procedures tailored to commercial disputes, the development of court facilities technologically optimised, and the promotion of early dispute settlement.

ABBREVIATIONS

ADB	–	Asian Development Bank
ADR	–	Alternative Dispute Resolution
AfriMAP	–	Africa Governance Monitoring and Advocacy Project
AIFC	–	Astana International Financial Centre
BPC	–	Business and Property Courts of England and Wales
CCP	–	French Code of Civil Procedure
CICC	–	China International Commercial Court
COVID-19	–	Coronavirus disease 2019
CPR	–	Civil Procedure Rule
DIFC	–	Dubai International Financial Centre
EBRD	–	European Bank for Reconstruction and Development
ENM	–	École Nationale de la Magistrature
EU	–	European Union
HCJP	–	Legal High Committee for Financial Markets of Paris
ICCP-CA	–	International Commercial Chamber Paris – Court of Appeal
INR	–	Indian Rupee
IP	–	Intellectual Property
KBD	–	King’s Bench Division
M&A	–	Mergers and Acquisitions
NY	–	New York
OCJ	–	Office of the Chief Justice, South Africa
OSCE	–	Organisation for Security and Co-operation in Europe
OSI	–	Open Society Initiative
QIC	–	Qatar International Court
SDNY	–	United States District Court for the Southern District of New York
SGD	–	Singapore Dollar
SICC	–	Singapore International Commercial Court
UAE	–	United Arab Emirates
UK	–	United Kingdom
UKSC	–	United Kingdom Supreme Court
UNECE	–	United Nations Economic Commission for Europe
USA	–	United States of America

USD – United States Dollar
ZPO – German Code of Civil Procedure

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2 - Introduction

2.1. Project Background and Aims

This Assessment has been developed by the Asian Development Bank (ADB) and an international expert in commercial law as part of the technical assistance project to “Strengthening Judicial Capacity Towards Sustainable Economic Development in Asia and the Pacific”. The knowledge and support technical assistance aims to strengthen judicial capacity in adjudicating commercial and environmental and climate change disputes in selected ADB developing member countries. Fostering regional judicial knowledge sharing and cooperation will lead to an effective and efficient adjudication of disputes.

The purpose of the specific Assessment is to assist the commercial court organising committees of the Cambodian Ministry of Justice to develop procedures and guidelines for commercial courts to be established in Cambodia and to assist the Royal Academy of Judicial Professions of Cambodia to develop training programs for commercial court judges and other commercial court functionaries.

The Assessment provides an overview of selected commercial courts globally, considering differences and similarities in models, practices and jurisdictional scope, including outlining material differences between commercial courts. A representative sample of courts has been analysed under both commercial law and civil law jurisdictions. From a civil law perspective, the analysis includes France, Germany, Kazakhstan, and South Africa (hybrid law), whilst from a common law lens, it analyses the UK (England & Wales), US, India, and Singapore. The areas examined are the establishment of the commercial court systems, the jurisdiction of commercial courts, the procedural framework, as well as practical considerations such as costs, length of proceedings, and expertise of judges. A selected sample of International Commercial Courts has also been assessed in order to point out the similarities and differences between domestic and international dispute resolution procedures.

Building on the data and information provided by the preceding chapters, the last two chapters describe potential challenges faced by commercial courts and practical recommendations to remedy these challenges as well as possible ways to improve the overall efficiency of the commercial dispute resolution process.

Before taking a deep dive into the intricacies and operation of commercial courts, it is important to first outline below the meaning of a commercial court and a commercial dispute. Then, attention is drawn to the relevance of commercial courts from the point of view of economic development and foreign direct investment flows.

2.2. Definition of a “Commercial Court”

There are various concepts of how different jurisdictions perceive a commercial court. According to the Cambridge Dictionary, a commercial Court is “a court that deals with disagreements relating to business”.¹ Thus, a commercial court is a specialised court within the judicial order of a given state which is established in order to decide on cases which involve commercial or business activity. The rationale behind treating commercial disputes separately is associated to their perceived complexity and the need for a differentiated procedure as well as expertise and industry knowledge. Therefore, a commercial court is thought to be constituted of judges who possess special expertise and experience, and adjudicate a case through a procedure which is tailored to address the needs of the parties.

However, the reality is that this concept of commercial courts or these expectations regarding the function of commercial courts are not met frequently. A majority of jurisdictions have differing views on how commercial disputes shall be treated, and thus, the structure and characteristics of commercial courts can differ significantly. For instance, there are jurisdictions without specialised commercial courts, but with commercial subdivisions within already existing civil courts. There are also instances where the judges serving are not specialised in commercial law disputes. Along the same lines, there are significant differences in the procedure of commercial courts, the costs involved and the case management. All these are factors influencing the predictability and

¹ Available at <https://dictionary.cambridge.org/fr/dictionnaire/anglais/commercial-court>.

certainty of the dispute resolution system which in its turn affects the trust of commercial parties in the commercial courts.

Ultimately, there is no one-size-fits-all solution for commercial adjudication. A solution, be it procedural or material, in the form of a legal transplant could increase the efficiency of the dispute resolution framework. However, transposing the exact same solution without taking into account the domestic legal culture will be counterproductive and lead to a rejection of the solution imported. As such, it should be kept in mind that transposing commercial rules to a legal system requires on one hand, a compatibility check with the general judicial framework, and on the other hand, to adapt any changes to the receiving jurisdiction's legal tradition.²

2.3. Definition of a “Commercial Dispute”

A commercial dispute, just as a concept of a “commercial court”, could have various definitions that differ from country to country. A commercial dispute could “arise out of a variety of situations, from contract violations, intellectual property infringement, or any number of other situations that result in the potential for legal action for the business clients and parties involved.”³

Generally, a commercial dispute can intervene between economic agents undertaking commercial activity. Yet, the extent of what exactly falls under the category might differ from legal system to legal system. Usually, the domains which are associated with a commercial dispute are the following: commerce and trade; contractual disputes between merchants; shareholder disputes; M&A; IP; banking and finance. There are certain jurisdictions where this list is exhaustive and certain jurisdictions which provide for an indicative list of commercial disputes. For example, there are jurisdictions which consider that issues of property could be subject of commercial adjudication whilst others which view it essentially as a civil matter (France). The common element, however, is that business or trade activity is involved.

² For the adaptation theory see Mary Mitsi, *The Decision-making process of Investor-state Arbitration Tribunals* (Kluwer Law International 2019)pp. 128-135.

³ Bremer Whyte, 'What is a Commercial Dispute?' <<https://bremerwhyte.com/news-thought-leadership/what-is-a-commercial-dispute/>>

2.4 Commercial Courts and Economic Development/Foreign Direct Investments

Adjudicating commercial disputes is highly influential upon a country's economy and economic development, as well as its potential to attract foreign direct investment. The growth of modern economies is highly dependent on trade development.⁴ Promoting increased trade through the reach to international markets, especially by small and medium-sized enterprises (SME's), should be seen as a key priority.⁵ SMEs account for the majority of businesses worldwide and are important contributors to job creation and global economic development.⁶ All business transactions, however, may give rise to complicated disputes. The uncertainty over how to design the dispute resolution strategies has been identified as a trade barrier, as many enterprises may avoid taking the risk of trading cross-border or even expanding their trade activities domestically. A predictable, stable and efficient commercial court system could eliminate business risks and enhance business activity through decreasing the time and costs spent over dispute resolution strategies and procedures.

When it comes to FDI, there are additional considerations. National legal frameworks in case of international investments are characterised as “exceptionally diverse”⁷. Thus, businesses have to look for general characteristics and common patterns in order to evaluate legal systems from a legal point of view.

The risk of ending up in a domestic court which is not efficient is likely to influence negatively the benefits that the investors had intended to derive from their investment.⁸ Similarly, when the law is applied in an inconsistent way by courts for one reason or another, this could reduce predictability and can translate directly to investors becoming less willing to invest their capital in

⁴ Alcalá F and Ciccone A, ‘Trade and Productivity’ (2004) *The Quarterly Journal of Economics*, Vol. 119 No. 2, 613–46

⁵ United Nations General Assembly (21 October 2015), ‘Transforming our World: the 2030 Agenda for Sustainable Development’, A/RES/70/1.

⁶ Formal SMEs contribute up to 40% of national income (GDP) in emerging economies <<https://www.worldbank.org/en/topic/sme/finance>>.

⁷ Jeswald W. Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital*, OUP, 2013, p. 35.

⁸ *ibid*, p. 33.

that region.⁹ Furthermore, courts should be able to embrace their general role in securing assets from seizure, protecting personnel or enforcing contracts in a country where foreign investment takes place.¹⁰

These disputes have to be resolved either through litigation, or an alternative dispute resolution mechanism such as arbitration. However, businesses will likely orient themselves towards dispute settlement mechanisms which are efficient, fair, expeditious and cost less.¹¹ Equally, as there is no supranational business court which could decide any and all business disputes, the judicial systems of sovereign states become increasingly relevant.

Based on the above, the existence of commercial courts could enhance business activity and serve as one of the factors which could attract FDI. Towards this direction, the aim of this assessment is to highlight procedural and material best practices that could help in creating a stable, predictable and efficient commercial court system.

⁹ *ibid*, p. 26.

¹⁰ *ibid*, p. 29.

¹¹ *ibid*.

3. Commercial Courts in Civil Law Systems

3.1. France

3.1.1. Introduction

- *What are the main commercial courts?*

France has a strong system of specialised commercial courts, with 134 commercial courts located all over the country.¹² By far the most significant court is the Paris Commercial Court (“Le Tribunal de Commerce de Paris”). It consists of 172 judges and handles over 6000 cases every year.¹³ It also has an International Chamber dedicated to international cases, which will be presented in-depth below. Some other important Commercial Courts are the Commercial Court at Marseille, Lyon, Nanterre et Bobigny.¹⁴ There is also a geographic particularity, as there are no Commercial Courts in the Alsace-Moselle region, but Commercial Chambers on Tribunal’s level (“Chambre Commerciale du Tribunal Judiciaire”).¹⁵

On an Appeal level, the Courts of Appeal (“Cour d’Appel”) have divisions dedicated to Commercial matters.¹⁶ Additionally, the Court of Cassation (“Cour de Cassation”) which is the Supreme Court in case of civil matters, has a chamber dedicated to commercial cases.¹⁷

- *When were commercial courts first established?*

¹² Le tribunal de Commerce, available at <https://tribunauxdecommerce.fr/linstitution/le-tribunal-de-commerce/>

¹³ Standing International Forum of Commercial Courts, France, available at <https://sifocc.org/countries/france/>

¹⁴ Assemblée Nationale, Rapport Fait au Nom De La Commission D'enquête (1) Sur L'activite Et Le Fonctionnement Des Tribunaux De Commerce, available at <https://www.assemblee-nationale.fr/11/dossiers/tribunaux-de-commerce/rap1p1.asp>.

¹⁵ Karburan, À quoi sert le Tribunal de commerce ?, <https://www.karburan.com/fiches-pratiques/tribunal-de-commerce>.

¹⁶ Vie Publique, Comment fonctionne une cour d'appel ?, available at <https://www.vie-publique.fr/fiches/268757-comment-fonctionne-une-cour-dappel>

¹⁷ Cour de Cassation, Les six chambres de la Cour de cassation, available at <https://www.courdecassation.fr/la-cour/lorganisation-de-la-cour-de-cassation/les-six-chambres-de-la-cour-de-cassation>

Commercial courts (“Les Tribunaux de Commerce”) were first established in 1792¹⁸, and although a number of commercial courts underwent subsequent modifications, the system remained largely unchanged. The long tradition of specialised commercial courts in France has its origins in the Paris Commercial Court¹⁹ that succeeded the Paris Merchant Court (“Juridiction Consulaire de Paris”), which was created as early as the 16th century (1563) in accordance with a Royal order.

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The International Commercial Chambers of the Commercial Courts have only been created recently, with the International Chamber of the Paris Commercial Courts being established in 1995, while the International Commercial Chamber of the Paris Court of Appeal having been created in February 2018.²¹

3.1.2. Jurisdiction

- *What differentiates a Commercial Court from other civil courts?*

The greatest difference lies in the composition of the court in case of civil and commercial law disputes. In Commercial Courts, as will be further analysed below, the judges are not professional judges but practitioners/lay judges who are elected by their peers (representatives of the business world).²² It is also possible in some instances to conduct the proceedings in English.²³ The underlying procedure, including the costs, are common elements in both Commercial and Civil courts.

¹⁸ Tribunal de Commerce de Paris, L'histoire Des Tribunaux De Commerce, available at <https://www.tribunal-de-commerce-de-paris.fr/fr/histoire-des-tribunaux-de-commerce>.

¹⁹ The rules of procedure applicable to cases heard by the International Chamber are outlined in a *Protocol on Procedural Rules Applicable to the International Chamber of the Paris Commercial Court*, available at:

www.cours-appel.justice.fr/sites/default/files/2018-06/CICAP_EnglishVersion_Protocole%20barreau%20de%20Paris%20-%20Tribunal%20de%20commerce%20de%20Paris.pdf

²⁰ Tribunal de Commerce de Paris, L'histoire Des Tribunaux De Commerce, Available at <https://www.tribunal-de-commerce-de-paris.fr/fr/histoire-des-tribunaux-de-commerce>.

²¹ Standing International Forum of Commercial Courts, France, available at <https://sifocc.org/countries/france/>

²² Nicole Stolowy, How France’s Commercial Courts Stay Relevant Through the Centuries, Available at <https://www.hec.edu/en/knowledge/articles/how-france-s-commercial-courts-stay-relevant-through-centuries>

²³ AcerisLaw, New English-Speaking Commercial Court in Paris, available at <https://www.acerislaw.com/new-english-speaking-commercial-court-in-paris/>

- *What is the basis of jurisdiction of Commercial Courts?*

Articles L 721-3 and L721-4 of the French Commercial Code (“Code de Commerce”) establish jurisdiction providing that the Commercial Courts have the competence to hear the following disputes:

- a. In case of commitments made by merchants, financial and credit institutions;
- b. Between commercial companies (including those relating to unfair competition);
- c. Dealing with commercial transactions;
- d. In case of promissory notes issued within commercial transactions;

- *What are the types of disputes that may not be considered by Commercial Courts?*

In France, the Civil Courts (“Tribunal Judiciaire”) are the courts of first instance and have general jurisdiction over disputes. Civil Courts have competence in cases where the disputed amount exceeds EUR 10,000 and when the law has not expressly conferred jurisdiction on another court. Therefore, any dispute which is not expressly submitted to Commercial Courts, such as family or property matters, successions, or contracts between non-merchants which do not fall under any category of the Commercial Code, are excluded from the Commercial Courts’ jurisdiction. Moreover, there are special courts for employment disputes (“Conseil des Prud’hommes”).

- *Can Commercial Courts hear international commercial disputes?*

The French legal system is generally positioned favourably towards the resolution of international disputes. The International commercial chambers to which parties can submit their dispute are the Paris Commercial Court and Court of Appeal (“Chambre Commerciale Internationale”) (ICCP-

CA)²⁴, the Nanterre Commercial Court²⁵ and the Versailles Court of Appeal²⁶. All of these international chambers were established pursuant to protocols executed between 2017 and 2020.²⁷

The Paris Commercial Court's "Placement Chamber" ("*chambre de placement*") is competent to allocate the disputes to the Paris International Chamber when the dispute is of an economic and commercial nature. Generally, in terms of jurisdiction, the international chambers are allocated disputes with an international dimension (where the performance of a transaction does not occur within a single state and involves cross-border trade, or where the parties are foreign, or the dispute involves foreign law). For instance, in case the domicile or the registered office of the defendant, or one of the defendants, where multiple defendants are involved, is in France, jurisdiction will be upheld according to article 42 and 43 of the French Code of Civil Procedure ("Code de procédure civile") and articles 4 and 8-1 of the recast Brussels I Regulation (No. 1215/2012) (Recast Brussels I). Furthermore, French courts will be granted jurisdiction over a (commercial) dispute when:

- a. performance of the contract takes place in France (article 46 of the CCP and article 7(1) of Recast Brussels I);
- b. the harmful event of a tort occurred in France (article 46 of the CCP and article 7(2) of Recast Brussels I), which, however, might rarely be the base of jurisdiction in case of a commercial dispute.

Furthermore, according to the principle of party autonomy, the parties may depart from these rules and insert a jurisdiction clause in their agreement (article 48 of the CCP, article 25 of Recast Brussels I), granting exclusive jurisdiction to their preferred Court. It must be mentioned that

²⁴ The International and European Commercial Chamber ("*Chambre internationale et de droit européen*") was the predecessor of the International Chamber of the Paris Commercial Court.

²⁵ <https://www.greffe-tc-nanterre.fr/>

²⁶ <https://www.cours-appel.justice.fr/versailles>

²⁷ Report of the HCJP (3 May 2017) with 41 practical proposals for integrating international divisions within the current French judicial system, available at < http://www.justice.gouv.fr/publication/Rapport_chambres_internationales.pdf>. Protocol Relating To The Procedure Before The International Chamber Of The Paris Commercial Court, available at https://www.shearman.com/-/media/files/perspectives/2018/04/protocol_relating_to_the_procedure_before_the_international_chamber_of_the_paris_commercial_court.pdf; Protocol Relating To The Procedure Before The International Chamber Of The Paris Court Of Appeal, available at <https://www.shearman.com/-/media/files/perspectives/2018/04/protocol_relating_to_the_procedure_before_the_international_chamber_of_the_paris_court_of_appeal.pdf>.

French law requires jurisdiction clauses to be expressly stated, and they are valid only if they were entered into between merchants or commercial entities.²⁸

More than that, if none of the above criteria applies, French commercial courts might still have jurisdiction, under exceptional circumstances, in case of the involvement of a French party (strict conditions, regulated by articles 14 and 15 of the French Civil Code (“Code Civil”) and where there is a proven risk of denial of justice, doubled by the existence of a connecting factor with France.²⁹ These provisions apply to both civil disputes as well as commercial disputes. However, for a commercial court to be competent, there is a further need to fulfil the criteria set out above regarding the “commercial” nature of the case.

For over two decades, the Paris Commercial Court and, since its establishment in 1995, its international chamber, have offered lieu for parties having selected Paris as their preferred forum. Most frequently in these cases the defendant is a non-resident of France, or, the governing law of the contract is foreign.

On appeal level, the Paris Court of Appeal’s international chamber has jurisdiction over all the cases decided by the Paris Commercial Court’s international chamber as well as disputes arising from international economic and financial relations, including those concerning³⁰:

- a. Commercial contracts and the breach of commercial relations,
- b. Unfair competition,
- c. Transactions on financial instruments, master agreements, contracts pertaining to financial instruments and financial products,
- d. Transportation,
- e. Claims for compensation following anti-competitive practices,

²⁸ Anne-Claire Hans, Jean-Luc Larribau and Julie Spinelli, Litigation: France, GAR, Available at <https://globalarbitrationreview.com/insight/know-how/litigation/report/france>

²⁹ See generally: The French legal system, available at https://www.justice.gouv.fr/art_pix/french_legal_system.pdf.

³⁰ Art 1(1) Protocol relating to procedural rules applicable to the International Chamber of the Court of Appeal of Paris available at <https://www.cours-appel.justice.fr/sites/default/files/2019-04/Traduction%20en%20anglais%20du%20protocole%20CCIP-CA%20-%20V4%20.pdf>.

3.1.3. Procedure, Function and Organisation

- *What are the distinguishing features of the procedural framework dealing with commercial disputes?*

Civil and commercial proceedings start when the claimant files the complaint (following service on the defendant) with the clerk of the court. The clerk then allocates the case to one of the chambers of the court based on a summary review of the subject matter, and puts the case on the chamber's docket. Except in very simple cases, this opens the "pre-trial phase" of the proceedings, during which the parties are expected to submit briefs to the court and exchange the exhibits on which they intend to rely.³¹

The procedure before the Paris Commercial Court is oral and, in principle, all procedural documents (e.g., procedural applications, submissions and orders) must be submitted in French.³² Proceedings are adversarial and the burden of proof falls upon both parties in terms of proving the facts they allege and providing evidence in support of their claims.³³ The principle in French law is that proof may be brought by any means, but the law itself gives more weight to written documentary evidence. Regarding document disclosure however, there are no specific rules or procedures, albeit courts might order the disclosure of certain documents by parties, if requested by the other party and if certain, restrictive conditions are met, including request obtained *ex parte*, before any proceeding on the merits has commenced.³⁴

The international chambers' protocols, nevertheless, provide for special procedural rules applicable before them, provided that the parties expressly agree to their use. In case there is no agreement between the parties, the case will be processed in accordance with standard procedural law. Under these special rules, the main difference compared to standard procedure relates to the production of exhibits in English without translation, a great novelty in France. Similarly, although French will remain the official language of the proceedings and written pleadings, English language may be used for cross-examination of witnesses and experts, under the supervision of

³¹ Antoine F. Kirry, Frederick T. Davis, Fanny Gauthier, Alice Rault "10 Things U.S. Litigators Should Know About Court Litigation in France" (2017) p.17.

³² Article 111 of the 1539 Villers-Cotterêts Ordinance.

³³ Articles 132 § 1 and § 2, CCP

³⁴ Articles 132 - 135, CCP

the judge in charge of the case.³⁵ Procedural documents must still be submitted in French (e.g. the writ of summons, the notice of appeal, the parties' submissions, etc).³⁶ As for decisions, the Paris international chambers are supposed to issue their decisions in French, with an English translation, but, generally, in practice, the international chamber of the Paris Court of Appeal instead publishes summaries of its decisions in both French and English on its website.³⁷

- *What are the key aspects of case management for commercial disputes?*

Case management constitutes the responsibility of the relevant court. Before the *Tribunal Judiciaire* (cases brought before the former High Court) and the court of appeal, a judge is specifically assigned to oversee the proceedings (the procedural judge). This judge sets the procedural timetable within certain mandatory time limits, especially before the court of appeal.³⁸ However, there is no procedural judge before a commercial court or labour tribunal.

As a general rule, the parties have no direct influence over case management. Although parties may apply for extensions of deadlines and for leave to file additional briefs or evidence, the final decision lies with the court. There are signs that French judges feel encouraged to be actively involved in case management, as they can, for instance, bifurcate procedural or admissibility objections, or they could be more involved in monitoring the progress of the case (for example, they could set out a procedural agenda, etc.).³⁹

In both civil and commercial cases, the pre-trial phase consists of a series of procedural conferences presided by one judge of the court (called “juge de la mise en état” or “pre-trial judge”), in which the judge essentially checks that the briefing of the case is progressing in a satisfactory manner.⁴⁰ In case of the commercial courts, the “juge de la mise en état” is a lay judge.

³⁵ Art 2 Protocol Relating To The Procedure Before The International Chamber Of The Paris Commercial Court, available at https://www.shearman.com/-/media/files/perspectives/2018/04/protocol_relating_to_the_procedure_before_the_international_chamber_of_the_paris_commercial_court.pdf

³⁶ Ibid.

³⁷ <https://www.cours-appel.justice.fr/paris/decisions-ccip-ca-iccp-ca-judgements>

³⁸ Bredin Prat, “In review: court procedure in France” available at <https://www.lexology.com/library/detail.aspx?g=953a3459-1141-4357-bfcb-43e79210106b>

³⁹ Anne-Claire Hans, Jean-Luc Larribau and Julie Spinelli, Litigation: France, GAR, Available at <https://globalarbitrationreview.com/insight/know-how/litigation/report/france>

⁴⁰ Antoine F. Kirry, Frederick T. Davis, Fanny Gauthier, Alice RAULT “10 Things U.S. Litigators Should Know About Court Litigation in France” (2017) p.17.

3.1.4. Review of Court Decisions

- *Is there any recourse available against a decision rendered by the Commercial Court?*

A decision of a main first instance civil court (*Tribunal de Grande Instance*) or a commercial court (*Tribunal de Commerce*) can be challenged before a Court of Appeal (*Cour d'Appel*).⁴¹ An appeal must be lodged before the Court of Appeal located in the jurisdiction where the dispute was decided (*ressort*).⁴² There is a notable exception – the ICCP-CA, which has a unique jurisdiction for some commercial disputes, as set out above.

The right to appeal decisions of the commercial courts ensures that professional judges, serving on the appeal courts, decide on the dispute initially ruled on by non-professional/lay judges, serving in courts of first instance.⁴³ An appeal has a suspensive effect, unless the appealed judgment is subject to provisional enforceability. Court of Appeal decisions can be challenged before the Court of Cassation on points of law only.

- *What are the grounds available for an appeal against a decision rendered by the Commercial Court?*

Based on Article 543 of the CCP, the appeal is open in every area of the law against the decisions of first instance courts. Any decision can be appealed on both legal and factual arguments.⁴⁴

3.1.5. Practical Considerations

- *What are the practical considerations to be mindful of in pursuing a case before the Commercial Court?*

⁴¹ Anne-Claire Hans, Jean-Luc Larribau and Julie Spinelli, Litigation: France, GAR, Available at <https://globalarbitrationreview.com/insight/know-how/litigation/report/france>

⁴² Articles 542-570 CCP.

⁴³ Alexandre Bailly and Xavier Haranger, Morgan, Lewis & Bockius, “Litigation and enforcement in France: overview”, Practical Law.

⁴⁴ Anne-Claire Hans, Jean-Luc Larribau and Julie Spinelli, Litigation: France, GAR, Available at <https://globalarbitrationreview.com/insight/know-how/litigation/report/france>

An important practical consideration is the presence of practitioners acting as judges, the so-called lay judges.⁴⁵ On one hand, this offers to the parties decision-makers with expertise in specialised commercial law areas and with practical experience and knowledge of trade customs. On the other hand, the effective management of the procedure will also depend on the judge and is linked to judicial rather than commercial experience.

Other practical considerations which can increase procedural efficiency pertain to the tendency of French judges to bifurcate issues (for instance first making a decision on jurisdiction before deciding upon merits), the possibility to use fast-track procedures as well as the opportunity to appeal a judgment relatively free of limitations. These are some procedural solutions which are often employed in international dispute settlement so it might seem appealing for commercial entities.

What should also be noted is that the pre-trial phase (*mise en état*) is not intended to discuss the merits of the case (even though some issues may occasionally arise with consequences on the merits). Therefore, parties should not count on extensive conversations with the court at the procedural conferences that punctuate the pre-trial phase. Except if some of the procedural questions are raised, parties have very few communications with the judge during the pre-trial phase.⁴⁶

The aim of the pre-trial phase is for parties to set out their views on the procedure. However, it should be noted that the procedure of commercial courts is regulated by the Code of Civil Procedure. As such, the parties will be able to influence the course of the case only in instances where there is a gap in the law or where the general rule of procedure needs to be further interpreted based on the facts of the specific case. An example is document disclosure for which there are no specific rules or procedures. Courts might order the disclosure of certain documents by parties, if requested by the other party and if certain, restrictive conditions are met, including request obtained *ex parte*, before any proceeding on the merits has commenced.⁴⁷

⁴⁵ Ibid.

⁴⁶ Antoine F. Kirry, Frederick T. Davis, Fanny Gauthier, Alice Rault “10 Things U.S. Litigators Should Know About Court Litigation in France” (2017) p.17.

⁴⁷ Articles 132 - 135, CCP

In case of the international commercial chambers, the stronger leeway given to the use of English, as well as the traditionally high degree of openness when judging on foreign commercial disputes could be important practical considerations when deciding upon France as a jurisdiction to litigate a commercial dispute.

Especially in cross border disputes where foreign applicable law is applied, the role of experts is idiosyncratic in France and plays an important role during the decision-making process. In French litigation, a court will take into consideration the parties' submissions on scientific or other specialised questions of facts and foreign law but will almost always seek an opinion from a neutral expert whom the court has appointed to provide views on the issue of foreign law. The short of it is that the expertise is only as good as the expert; the quality of the expert is to a great extent unpredictable. As such, while this system is intended to provide assurance that experts are always knowledgeable in the fields for which the court appoint them, reality sometimes falls short of this objective.⁴⁸

- *What are the typical costs associated with pursuing a claim before Commercial Courts?*

In case of Commercial Chambers there is no difference with regard to the costs associated with pursuing a claim. In principle, the unsuccessful party will bear all the legal costs incurred by the court (*dépens*). However, the judge can decide that the successful party will pay the whole or any part of the legal costs (*Article 696, CCP*). Legal costs correspond to costs incurred during the proceedings and the enforcement of the decision (including court fees, translation fees and expert's fees) (*Article 695, CCP*). The costs not included in the legal costs mentioned above (*frais irrépétibles*) must be allocated to the party that has to pay the legal costs, or the unsuccessful party (*Article 700, CCP*).⁴⁹

- *What is the average time taken to adjudicate a commercial dispute?*

⁴⁸ Antoine F. Kirry, Frederick T. Davis, Fanny Gauthier, Alice Rault “10 Things U.S. Litigators Should Know About Court Litigation in France” (2017).

⁴⁹ Guillaume Le Nagard, Un procès, combien ça coûte?, Available at <https://www.notretemps.com/droit-argent/demarches-administratives/un-proces-combien-ca-coute-21762>

Although there is no statistical data available on the duration of commercial disputes on first instance, the duration in case of civil matters might serve as a point of comparison. Before the District Courts (“Tribunal d’instance”) the average procedure is 4.2 months and varies between 2.6 and 6.8 months. Proceedings before the “Tribunal de Grande Instance” (regional court) last on average 3.2 months and vary between 0.2 and 8.7 months.⁵⁰

The appeal level in a commercial case, on average, will take less than six months (whereas, in a labor court it can exceed a year).⁵¹ In case of appeals lodged before the Cour de Cassation, a decision takes about 12 to 24 months.⁵²

- *Expertise of Judges*

As opposed to civil courts, where the judges sitting are professional judges, Commercial Courts are constituted by lay judges appointed for successive mandates of periods which cannot exceed a total of 14 years.⁵³ These lay judges are elected by merchants and professionals (and they usually have considerable business expertise, such as directors or executives). A commission made up of the court’s president, one of the professional judges, a representative of the Prefect, as well as business representatives, conducts the elections after setting up a list of the members of commercial and industrial chambers and chambers of handicrafts.⁵⁴ There is a possibility for electronic voting as well as mail voting, a feature aimed to make voting the least burdensome.⁵⁵

The fact that they are peer-elected judges and come from the business world means that they are aware of the specific needs of the business community and understand its rules and practices. Their experience of the business world reflects a thorough knowledge of its technical as well as commercial aspects. As observed by a commentator: “The judges are very involved as they are working within their specialisation. They take on this role in addition to their day job and have

⁵⁰ Rödl & Partner, System of the French jurisdiction, Available at <https://www.roedl.com/insights/litigation-arbitration/france-jurisdiction-system-structure-costs-duration-protection>

⁵¹ Nicole Stolowy, How France’s Commercial Courts Stay Relevant Through the Centuries, Available at <https://www.hec.edu/en/knowledge/articles/how-france-s-commercial-courts-stay-relevant-through-centuries>

⁵² Anne-Claire Hans, Jean-Luc Larribau and Julie Spinelli, Litigation: France, GAR, Available at <https://globalarbitrationreview.com/insight/know-how/litigation/report/france>

⁵³ Standing International Forum of Commercial Courts, available at: <https://sifocc.org/countries/france/>

⁵⁴ See Code de commerce, Articles R723-1 to R723-31.

⁵⁵ Ibid R723-9 to R-723-21.

deep understanding of the hurdles that a manager or company might encounter.”⁵⁶ However, cases are randomly assigned, so there is no guarantee that the specific experience of a lay-judge will be relevant to the case.

Lay judges exercise their duties on an unpaid, voluntary basis. In order to ensure that the public commercial justice system meets the needs of businesses and other economic stakeholders, the national school for the judiciary (ENM) provides both initial and in-service training to these non-professional judges. The ENM has been training them since 2003 in partnership with the general conference of commercial court judges (conférence générale des juges consulaires de France) and is the sole organiser of these courses (Decree no. 2018-664 of 27 July 2018 on the initial and in-service training of commercial court judges). It is the school’s specialist professional training department that provides their training. Initial and in-service training for commercial court judges became mandatory on 1 November 2018.⁵⁷

In case of other Courts, the judges are trained legal professionals, but can move between different fields (such as a transfer from a court dealing with criminal cases to another dealing with civil cases) and be less aware of specificities. The role of professional judges within the Commercial Court is limited to the Appeal level. Professional judges working in commercial courts generally are conscious of common practices and understandings in business as well as with relevant commercial legislation.⁵⁸

In the international chamber of the Paris Commercial Court, if the nature of a dispute requires the qualifications of specialised judges (e.g. in intellectual property or competition law), the international chamber may request the assistance of a judge sitting in another specialised chamber.⁵⁹

⁵⁶ Nicole Stolowy, How France’s Commercial Courts Stay Relevant Through the Centuries, Available at <https://www.hec.edu/en/knowledge/articles/how-france-s-commercial-courts-stay-relevant-through-centuries>

⁵⁷ École Nationale de la Magistrature, available at: <https://www.enm.justice.fr/en/training-courses/commercial-court-judges>

⁵⁸ Ibid.

⁵⁹ ‘International Commercial Courts Review 2022’, Linklaters p. 6 available at < <https://lpscdn.linklaters.com/-/media/files/document-store/pdfs/2022/may/iccr2022final.ashx?rev=ca8e6e99-5d90-43a4-ad14-9426ed35249e&extension=pdf>>

Nevertheless, the system was the subject of important criticism, as the average age of Commercial Court judges is 61 in Paris, since 50% of the judges are retired merchants. The same problem persists in the other parts of the Hexagon.⁶⁰

- *Strong features and Main challenges*

French commercial courts are widely regarded as being increasingly quick, transparent and skilled, while maintaining the costs of proceedings to a minimum level.⁶¹ As a result, they are frequently chosen by international parties. What is more than that, the International Chamber of the Paris Court of Appeal has reinforced Paris' attractiveness as a forum for cross-border disputes, due to the use of English and the services provided by it in case of disputes with a foreign governing law.⁶²

Another element which could help evaluate the efficiency of France's commercial courts, is the appeal rates. The rate of appeal in commercial courts is slightly over 13% (which is a lower percentage of cases getting appealed than cases in district courts, and half the appeal rate of labour court cases).⁶³ However, a more staggering finding is the rate of commercial court rulings overturned on appeal which is less than 3% in case of the Paris Commercial Court⁶⁴, constituting a much lower percentage compared to that of other courts. If we agree that the appeal rate is a good measurement of court efficiency, fewer appeals can indicate a high quality of decision-making and party satisfaction.

⁶⁰ Assemblée Nationale, Rapport Fait au Nom De La Commission D'enquête (1) Sur L'activité Et Le Fonctionnement Des Tribunaux De Commerce, Available at <https://www.assemblee-nationale.fr/11/dossiers/tribunaux-de-commerce/rap1p1.asp>.

⁶¹ Anne-Claire Hans, Jean-Luc Larribau and Julie Spinelli, Litigation: France, GAR, Available at <https://globalarbitrationreview.com/insight/know-how/litigation/report/france>

⁶² Ibid.

⁶³ Nicole Stolowy, How France's Commercial Courts Stay Relevant Through the Centuries, Available at <https://www.hec.edu/en/knowledge/articles/how-france-s-commercial-courts-stay-relevant-through-centuries>

⁶⁴ Standing International Forum of Commercial Courts, France, available at <https://sifocc.org/countries/france/>

3.2. Germany

3.2.1. Introduction

- *What are the main Commercial Courts?*

In Germany, competence in case of commercial disputes is usually allocated to Regional Courts (“Landgericht”), which infers that an appeal will be decided by Higher Regional Courts (“Landgericht”). Small claims, up to a value of 5000 € are allocated to Local Courts (“Amtsgericht”).⁶⁵

Despite the lack of a specific statutory obligation, some of the Regional Courts, which are courts of first instance, have established Commercial Chambers (“Kammer für Handelssachen”).⁶⁶ The most important Regional Courts maintaining Commercial Chambers are the Hamburg Court⁶⁷ (which is the second largest Regional Court in Germany), Stuttgart, Mannheim⁶⁸, and Frankfurt am Main⁶⁹.

- *When were Commercial Courts first established?*

Germany first followed the French model, with the creation of Commercial Tribunals (“Kommerzetribunale”). However, after the Imperial Judiciary Acts of 1871 (“Reichjustizgesetze”) the German court system was reorganized establishing Commercial Chambers within the Regional Courts.⁷⁰

⁶⁵ Rüdiger Harms and Patrick Gerardy, Litigation: Germany, available at <https://globalarbitrationreview.com/insight/know-how/litigation/report/germany>. Litigation and Enforcement in Germany: Overview Court Structure, Practical Law, Available at [https://uk.practicallaw.thomsonreuters.com/1-502-0728?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#co_anchor_a237668](https://uk.practicallaw.thomsonreuters.com/1-502-0728?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a237668)

⁶⁶ Standing International Forum of Commercial Courts, Germany, available at <https://sifocc.org/countries/germany/>

⁶⁷ International Chambers at the Regional Court of Hamburg, available at <https://justiz.hamburg.de/landgericht-hamburg/zustaendigkeit/>

⁶⁸ Commercial Court, Stuttgart/Mannheim available at <https://www.commercial-court.de/en/commercial-court>

⁶⁹ LandGericht Frankfurt am Main, available at <https://ordentliche-gerichtsbarkeit.hessen.de/landgerichtsbezirk-frankfurt-am-main/landgericht-frankfurt-am-main>.

⁷⁰ Gerhard Wagner and Arvid Arntz, Commercial Courts in Germany in Lei Chen and André Janssen (eds.), Dispute Resolution in China, Europe and World, Springer, 2020, p. 8.

3.2.2. Jurisdiction

- *What differentiates a Commercial Court from civil courts?*

The main difference between Commercial Chambers and Civil Chambers is the composition of the Court (Commercial Chambers can involve lay judges, in contrast to Civil Chambers) as well as, in some instances, the possibility to conduct the hearings in English. The existence of a general fast-track or expedited procedure is only available in certain cases, such as an application for a payment.⁷¹

- *What is the basis of jurisdiction of Commercial Courts?*

The basis of jurisdiction is Article 95 of the Courts Constitution Act⁷², which enlists the following cases as falling under the competence of a Commercial Chamber:

- a. claims against merchants (including legal entities) arising out of transactions that are commercial transactions for both parties
- b. financial and banking cases
- c. claims arising out of corporate relationships, e.g. between the members of a company or commercial partnership or between the managers of a commercial partnership and the company
- d. stock corporation cases;
- e. M&A cases, e.g. claims arising out of the legal relationship with regard to the acquisition of a commercial business between the previous owner and the acquirer;
- f. IP cases, e.g. claims based on the infringement of registered trademarks, registered designs;
- g. unfair competition cases;
- h. competition cases excluding claims for damages;
- i. maritime cases

⁷¹ Rüdiger Harms and Patrick Gerardy, *Litigation: Germany*, Available at <https://globalarbitrationreview.com/insight/know-how/litigation/report/germany>

⁷² Available at https://www.gesetze-im-internet.de/englisch_gvg/englisch_gvg.html

However, the jurisdiction is not exclusive, as based on Article 96, the plaintiff will be able to choose between the Commercial Chamber and an ordinary Civil Chamber.⁷³

It is worth mentioning that although all Regional Courts have the competence to hear commercial disputes, certain courts primarily deal with specialised topics of commercial law.⁷⁴ As an example, the so-called Commercial Courts in Mannheim and Stuttgart only hear selected commercial disputes which include corporate, M&A, banking and finance disputes.⁷⁵

- *What are the Types of disputes that may not be submitted to Commercial Courts?*

Just as in the case of France, purely civil law disputes (such as matters of family law, succession, etc.) as well as criminal law related matters cannot be submitted to the jurisdiction of commercial courts.

- *Can Commercial Courts hear international commercial disputes?*

As mentioned above, the German regional courts have general commercial chambers that deal with domestic commercial disputes. In addition to these general commercial chambers, certain regional courts have established, in recent years, special chambers for international matters with the aim to attract cross-border disputes. Such Regional courts are namely in Berlin, Bonn, Bremen, Cologne, Düsseldorf, Frankfurt, Hamburg, Mannheim and Stuttgart.⁷⁶ Special procedural rules apply, although these and the extent to which proceedings are conducted in English vary from court to court.

Generally, the international chambers of the regional courts have the competence to decide on any type of international commercial dispute. However, there are international chambers of certain

⁷³ Cf. Litigation and Enforcement in Germany: Overview Court Structure, Practical Law, Available at [https://uk.practicallaw.thomsonreuters.com/1-502-0728?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#co_anchor_a237668](https://uk.practicallaw.thomsonreuters.com/1-502-0728?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a237668) ("However, legal disputes can only be referred to this chamber by motion of one of the parties.")

⁷⁴ Ibid.

⁷⁵ Commercial Court, Stuttgart/Mannheim available at <<https://www.commercial-court.de/en/commercial-court>>

⁷⁶ Further information on the International Chambers of Commercial Courts in Germany can be found here: <<https://ordentliche-gerichtsbarkeit.hessen.de/ordentliche-gerichte/lgb-frankfurt-am-main/lg-frankfurt-am-main/chamber-international>>

regional courts that are specialised in specific areas of international commercial law. In Berlin, one of the two international chambers is dedicated to commercial disputes, as well as disputes concerning unfair trade practices and trademark matters, while the other hears disputes concerning construction law and general civil law disputes.⁷⁷ Along the same lines, certain international commercial disputes are submitted to specialised commercial chambers and not to any international chamber of regional courts (e.g., competition and IP disputes in Frankfurt and M&A disputes in Düsseldorf).⁷⁸

The international jurisdiction of these courts is regulated by the applicable legislative framework. However, due regard is also given to the consent of the parties to submit their dispute to the jurisdiction of the International Chamber of the Regional Court. The applicable laws include Brussels Ia Regulation, international treaties and the German Code of Civil Procedure (“Zivilprozessordnung”). The common denominator of these rules is the restrictive view on jurisdiction *ratione personae* which establishes the court jurisdiction over the parties depending on their nationality. However, it should be noted that in Germany, irrespective of whether the court’s international jurisdiction is determined by EU, international or German law, the parties have the right to express a choice in a jurisdiction agreement, which will generally be given effect by the courts.⁷⁹ Jurisdiction Agreements are also valid in domestic disputes and are important in allocating cases to regional courts. In the absence of a prior jurisdictional agreement, and as a general rule, an international chamber will assume jurisdiction upon the request of the claimant and the consent of the defendant. For some chambers, minimum thresholds for the amount in dispute apply (e.g., €2m in Mannheim).⁸⁰

The introduction of specialist Commercial Chambers where document submissions and hearings are able to take place in English has changed the landscape for the resolution of international commercial disputes by regional courts. As will be further analysed below, on the legislative front, this initiative has been enhanced by the *Bundesrat* which has made a proposal at federal level advocating the extensive introduction of Chambers dealing with international commercial disputes

⁷⁷ International Chambers at the Regional Court of Berlin, available at <<https://www.berlin.de/gerichte/landgericht/das-gericht/zustaendigkeiten/internationale-kammern/artikel.1039251.en.php>>.

⁷⁸ International Commercial Courts Review, p.10.

⁷⁹ International Commercial Courts Review, p.10.

⁸⁰ International Commercial Courts Review, p.10.

within regional courts.⁸¹

3.2.3. Procedure, Function and Organisation

- *What are the distinguishing features of the procedural framework dealing with commercial disputes?*

There is no distinct, general procedural framework designated to Commercial Chambers, thus disputes are governed by the rules of Civil Procedure. A procedure starts by a plaintiff filing a detailed statement of claim. This is filed with the court of first instance, which undertakes the duty to communicate it with the defendant(s). Then, the defendant shall file a detailed statement of defence, in a period of two to four weeks. That period might be extended when necessary, for example in high complexity cases.

Once the statements are exchanged, the Court might order the exchange of further briefs, or it might already hold an oral hearing. It is required that German courts take a fairly active part in the dispute resolution process. For example, the Court will decide on which witnesses to summon, or which expert to appoint to solve a given issue. Production of documents is usually not ordered.⁸² Streamlining the proceedings is also encouraged by prompting parties to specify their pleadings or supplement them, if necessary. The Court might also inform the parties about its preliminary assessment, even during an early stage of the proceeding. Questioning of both witnesses and experts is led by the court, as a principle. A common law style cross-examination is not a characteristic of the German system.⁸³

There is a special electronic lawyers' mailbox (beA), which as of 1 January 2022 needs to be used by every party represented by attorneys to submit documents, as well as for communicating with the Court. This has been introduced for fostering digitalisation of German civil proceedings and to enhance the keeping of court files. During the pandemic, remote hearings using video and audio

⁸¹ Gesetz zur Stärkung der Gerichte in Wirtschaftsstreitigkeiten, Linklaters available at: <https://wissen.linklaters.de/publications/alerts-newsletters-and-guides/2020/november/11/germany---gesetz-zur-einfuehrung-von-kammern-fur-internationale-handelssachen-kfihg>

⁸² Litigation and Enforcement in Germany: Overview Court Structure, Practical Law, Available at [https://uk.practicallaw.thomsonreuters.com/1-502-0728?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#co_anchor_a237668](https://uk.practicallaw.thomsonreuters.com/1-502-0728?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a237668)

⁸³ Ibid.

technology was introduced into German procedural law. Courts used this feature to quite some extent in civil litigation, especially if the case is less complex, without several plaintiffs or defendant parties, or a sophisticated procedure of evidence-taking.

In line with the above, some international chambers, such as the Mannheim and Stuttgart Commercial Courts^[1] offer additional advantages apart from conducting the proceedings and submitting documents in English, such as video-conferencing and transcription services.

- *What are the key aspects of case management for commercial disputes?*

There are no major variations in Case Management in case of Civil and Commercial Chambers.

German procedural law provides for a case management conference⁸⁴. In this context, a pre-hearing meeting can be held in advance in order to structure the later stages of the proceedings. If a hearing is set to be complex, preliminary discussions can be held in video-conferences and the various legal matters are structured into an agenda. The Stuttgart Commercial Court and the Mannheim Commercial Court can also accommodate prompt proceedings, potentially even over multiple days, and hear evidence at the same time.⁸⁵

One notable difference in terms of procedure, is the existence of specialised appellate bodies at the Higher Regional Court of Stuttgart and Karlsruhe, which decide on appeals and uses the same procedural framework just as the Commercial Courts of Stuttgart and Mannheim – i.e., a procedure conducted in English with increased speed.⁸⁶

3.2.4. Review of Court Decisions

- *Is there any recourse available against a decision rendered by the Commercial Court?*

⁸⁴ Ibid.

⁸⁵ Commercial Court, Stuttgart/Mannheim available at <<https://www.commercial-court.de/en/commercial-court>>

⁸⁶ Marta Requejo Isidro, New Courts for International Commercial Disputes in Germany, Available at <https://capil.org/2020/11/23/new-courts-for-international-commercial-disputes-in-germany/>

There are several different types of appellate remedies available under German civil procedure law.⁸⁷ The most relevant categories by far are the two levels of appeals:

- first appeals, which deal with both the facts and the law of the case, are heard by the regional court or the higher regional court if filed against a trial judgment issued by a local or a regional court respectively; and
- second appeals against first-appeal judgments, which concern only points of law, are heard by the Federal Court of Justice.

The way to contest a decision rendered by the Commercial Court is through a first appeal (Berufung), which is heard by one of the 24 German Higher Regional Courts.⁸⁸ On the level of Higher Regional Courts, there are no specialised Chambers, however, commercial cases are habitually allocated to specific divisions of the Courts, competent to hear cases related to a particular area of law. The appeal can be launched both on points of fact and law.⁸⁹

Similarly, the decision of a Higher Regional Court can be submitted to the Federal Court of Justice (“Bundesgerichtshof”) through a second appeal (Revision), but the Federal Court only decides on points of law. Just as Higher Regional Courts, the Federal Court lacks a Commercial Chamber, but maintains specialised divisions for cases requiring expertise.

For some court districts, special rules apply to appeals against decisions of the international chambers. For instance, the Higher Regional Courts of Stuttgart and Karlsruhe have specialised panels which handle appeals and complaints against the decisions of the international chambers in Stuttgart and Mannheim, and which also offer similar advantages to those chambers.⁹⁰

- *What are the grounds available for an appeal against a decision rendered by the Commercial Court?*

⁸⁷ Federico Parise Kuhnle, Andreas Klein, ‘Appeals in Germany’ (2019) Lexology, available at <<https://www.lexology.com/library/detail.aspx?g=160fe113-6ff8-429c-99f2-7673512bcf51>>.

⁸⁸ Standing International Forum of Commercial Courts, Germany, Available at <https://sifocc.org/countries/germany/>

⁸⁹ Litigation and Enforcement in Germany: Overview Court Structure, Practical Law, Available at [https://uk.practicallaw.thomsonreuters.com/1-502-0728?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#co_anchor_a237668](https://uk.practicallaw.thomsonreuters.com/1-502-0728?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a237668)

⁹⁰ Commercial Court, Stuttgart/Mannheim available at <<https://www.commercial-court.de/en/commercial-court>>

An appeal relates to the substantive correctness of a decision: that is, to findings of fact and law. Some of the grounds for an appeal on points of law are mentioned in Article 545 of the Code of Civil Procedure. Based on this, there is an absolute presumption for a violation of the law in the following situations⁹¹:

1. The composition of the bench i.e. judge(s) hearing the matter is not in-line with relevant provisions;
2. A judge decided in violation of a conflict of interest (except if a motion of recusal was submitted and subsequently denied);
3. A judge was involved in the decision after being recused;
4. One of the parties was not represented as required by the law (except if it approved the litigation);
5. The decision was given after a hearing, during what the rules regarding the admission of the public to the proceedings were violated;
6. The reasons for the judgment are not set out.

However, the Court charged with the appeal can find other violations as well, so the above list contains only the cases where the misapplication of the law is presumed.

3.2.5. Practical Considerations

- *What are the practical considerations to be mindful of in pursuing a case before the Commercial Court?*

The aim of the German Commercial Chambers is to provide the business community with special units within the civil justice system which are tailored to commercial needs, offering expedient, proficient and efficient dispute resolution. However, even if these goals are compelling, there are concerns that specific characteristics of these courts may hinder the effectiveness of their functions. A point of concern is the presence of lay judges that might slow down the procedure, due to their lack of judicial case management skills, as well as lack of experience in accurately interpreting and applying the law.⁹²

⁹¹ Code of Civil Procedure, Available at https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html

⁹² Gerhard Wagner and Arvid Arntz, Commercial Courts in Germany in Lei Chen and André Janssen (eds.), Dispute Resolution in China, Europe and World, Springer, 2020, p. 11.

- *What are the typical costs associated with pursuing a claim before Commercial Courts?*

In case of Commercial Chambers there is no difference regarding the costs associated with pursuing a claim in Civil Chambers. The court fees are moderate with a transparent schedule of court fees set out by the law. The Court fees are capped when the value in dispute reaches € 30 million.⁹³

- *What is the average time taken to adjudicate a commercial dispute?*

It is considered that obtaining a decision at the Regional Court level takes 14 months on average⁹⁴, but complex commercial cases could easily be more time-demanding. A decision on appeal is rendered on average in 5.5 to 8 months, except if the appeal is manifestly unfounded, in which case the decision might only take a few months. A second appeal is usually adjudicated in 9.4 to 12.5 months.⁹⁵

- *Expertise of Judges*

Commercial Chambers consist of a senior professional judge and two lay judges, who serve as honorary judges. The two lay judges are members of the business community (generally they are senior managers or executives with significant experience) who are over 30 years of age and are appointed by the local subdivision of the Ministry of Justice.⁹⁶ However, there is a possibility in case of the parties' consent to have the case adjudicated without the involvement of practitioners.⁹⁷

In this context, parties can decide whether they would like the case to be heard in the civil division with three regular judges or in the division for commercial matters with one regular judge and two lay judges. The civil division might be advisable in case the dispute involves highly complex legal

⁹³ Commercial Court, Stuttgart/Mannheim available at <https://www.commercial-court.de/en/commercial-court>.

⁹⁴ Standing International Forum of Commercial Courts, Germany, available at <https://sifocc.org/countries/germany/>

⁹⁵ Lexology, Appeals in Germany, Available at <https://www.lexology.com/library/detail.aspx?g=160fe113-6ff8-429c-99f2-7673512bcf51>

⁹⁶ Gerhard Wagner and Arvid Arntz, Commercial Courts in Germany in Lei Chen and André Janssen (eds.), Dispute Resolution in China, Europe and World, Springer, 2020, p. 9.

⁹⁷ Ibid p. 11.

matters. The division for commercial matters can be ideal if the case mainly requires expert commercial knowledge and experience regardless of the legal issues or if it demands a combination of legal and industry-specific expertise. The lay judges normally have years of entrepreneurial experience as managing directors, executives or freelancers in a wide range of industries.⁹⁸

Whilst proceedings before the chambers of commerce are essentially the same as those before civil chambers, the existence of lay judges poses specific questions with regard to their role in the proceedings. The professional judge is a preparatory single judge, whose right to take evidence is somewhat restricted under sec. 349 ZPO, if and to the extent that the expertise of lay judges is not important for the evidentiary fact. According to sec. 349 para. 2 ZPO the professional judge has an exclusive power of decision as regards purely procedural decisions (referral, complaints, stay of proceedings, default of the parties, costs, legal aid etc.).⁹⁹

In general, the reputation of lay judges is still rather high today.¹⁰⁰ It is said that among all honorary judges, commercial lay judges take an outstanding position and their participation is not as controversially discussed as the engagement of lay judges in other areas of law.¹⁰¹ Nevertheless, there are several concepts of restructuring the idea of commercial lay judges, from abolition to reinterpretation of their standing and importance. According to experience reports from practice, in up to 90% of the cases dealing with commercial matters as set forth in the law, the participation of commercial lay judges in the decision-making process is waived by mutual agreement of the parties pursuant to sec. 349 para. 3 ZPO.¹⁰²

Lastly, it must be noted that judges are exclusively of German origin even in case of Courts specifically designed to hear more complex or international cases¹⁰³, such as the Commercial

⁹⁸ Commercial Court, Stuttgart/Mannheim available at <https://www.commercial-court.de/en/commercial-court>.

⁹⁹ Gerhard Wegen, Taras Shepel, "The Functioning of The Commercial Lay Judges In Germany. The History And The Perspective of Resuming The Activity of Commercial Lay Judges In Ukraine With The Application of German Experience" (2020) p.11 available at: <https://drive.google.com/file/d/1WfSt8t-e6vUt_GJiIkE11-Uz8-Hsgxkn/view>.

¹⁰⁰ Weber in Hartmann/Toussaint, *Kostenrecht*, 50th ed. 2020, § 107 no. 5.

¹⁰¹ Kramer, *Die Geschichte der Handelsgerichtsbarkeit*, Kurzvortrag anlässlich der Jahreshauptversammlung des Bundesverbandes der Richter in Handelssachen e.V., October 2002, p. 1.

¹⁰² Gerhard Wegen, Taras Shepel, "The Functioning of The Commercial Lay Judges In Germany. The History And The Perspective of Resuming The Activity of Commercial Lay Judges In Ukraine With The Application of German Experience" (2020) p.11 available at: <https://drive.google.com/file/d/1WfSt8t-e6vUt_GJiIkE11-Uz8-Hsgxkn/view>.

¹⁰³ Marta Requejo Isidro, *New Courts for International Commercial Disputes in Germany*, available at <https://eapil.org/2020/11/23/new-courts-for-international-commercial-disputes-in-germany/>

Chambers in case of Stuttgart or Mannheim.¹⁰⁴ However, considerations such as expertise in commercial matters, academic background or command of a foreign language (mainly English) are really influential.¹⁰⁵ Especially with regard to international commercial disputes, highly skilled judges with qualifications and expertise in commercial law are able to conduct the proceedings in English without it being necessary to obtain extensive translations of contractual documents or engage the services of interpreters.¹⁰⁶

- *Strong features and Main challenges*

One of the main challenges of the German Commercial Chambers is the steep decline of cases filed with them. In a decade, the Courts workload decreased by a staggering 42%, or an absolute number of 19.500 cases.¹⁰⁷ Some commentators concluded that the decline is not related solely to economic conditions.¹⁰⁸ Thus, Germany has to readjust the commercial framework and potentially institute a procedural framework which is more conscious of the needs of the parties.

With regard to international commercial cases, Germany has set the road for the widespread introduction of Chambers dealing with cross-border disputes. As mentioned above, the *Bundesrat* has made such a proposal at federal level which, inter alia, aims at the extension of the use of English as a procedural language and other special procedures that will be introduced in a more uniform manner. While a law to that end has not yet been passed, some federal states (*Bundesländer*) have reintroduced the draft from the last legislative period to the *Bundesrat*.¹⁰⁹ In its statement on the draft law, the German government announced that it will take up the initiative and present its own draft in the course of 2022.

¹⁰⁴ Library of Congress, Germany: New English-Speaking Commercial Court Opened in the State of Baden-Württemberg, available at <https://www.loc.gov/item/global-legal-monitor/2021-01-15/germany-new-english-speaking-commercial-court-opened-in-the-state-of-baden-wrttemberg/>

¹⁰⁵ Marta Requejo Isidro, New Courts for International Commercial Disputes in Germany, available at <https://eapil.org/2020/11/23/new-courts-for-international-commercial-disputes-in-germany/>

¹⁰⁶ Commercial Court, Stuttgart/Mannheim available at <https://www.commercial-court.de/en/commercial-court>.

¹⁰⁷ Statistisches Bundesamt, 2018, p. 42 f

¹⁰⁸ Gerhard Wagner and Arvid Arntz, Commercial Courts in Germany in Lei Chen and André Janssen (eds.), *Dispute Resolution in China, Europe and World*, Springer, 2020, p. 11.

¹⁰⁹ Gesetz zur Stärkung der Gerichte in Wirtschaftsstreitigkeiten, Linklaters available at: <https://wissen.linklaters.de/publications/alerts-newsletters-and-guides/2020/november/11/germany---gesetz-zur-einfuhrung-von-kammern-fur-internationale-handelssachen-kfihg>

In terms of strong features, the flexibility, speed and use of English in case of some of the recently created Commercial Chambers¹¹⁰, having the objective to attract international commercial disputes, could be a good example to follow by other courts. A special infrastructure has also been developed in the context of technically supporting the court procedure. Certain courts such as the ones in Mannheim and Stuttgart are equipped with technical support staff and equipment that allows for video-conferences and video testimonies of witnesses and experts.¹¹¹

Another strong feature is the importance of party autonomy which gives the opportunity to the parties to select the court division, whether civil or commercial, that will hear the dispute, as mentioned above.¹¹²

In terms of procedure, the Court can issue quick and effective temporary injunctions pursuant to Section 935 ff. of the German Code of Civil Procedure (ZPO) and judgments ordering seizure and orders of seizure pursuant to Section 916 ff. ZPO. Third parties can also easily accede to the proceedings, such as by means of a third-party notice within the meaning of Section 72 ff. ZPO.

Enforcement is also a straightforward process as in Germany, judgments are usually (provisionally) enforceable and are recognised automatically in other EU member states. Under Regulation (EU) No 1215/2012 (the Brussels I Regulation), German state judgments in civil and commercial matters can be enforced relatively quickly and easily. In accordance with Article 39 of the Brussels I Regulation, a judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required. Additionally, the 2007 Lugano Convention between the EU and Norway, Iceland and Switzerland facilitates the recognition and enforcement of judgments in civil and commercial matters in the European Economic Area and Switzerland.

¹¹⁰ Library of Congress, Germany: New English-Speaking Commercial Court Opened in the State of Baden-Württemberg, available at <https://www.loc.gov/item/global-legal-monitor/2021-01-15/germany-new-english-speaking-commercial-court-opened-in-the-state-of-baden-wrtemberg/>

¹¹¹ <https://www.commercial-court.de/en/commercial-court>

¹¹² <https://www.commercial-court.de/en/commercial-court>

3.3. Kazakhstan

3.3.1. Introduction

- *What are the main commercial courts in Kazakhstan?*

There are two types of first instance courts: general courts and specialised courts competent to review certain categories of disputes.¹¹³ In Kazakhstan there are no separate commercial courts, however, there is a network of specialised courts.¹¹⁴ Some of these specialised courts could be assimilated to a commercial court in its general sense, although their jurisdiction is usually wider. Most commercial disputes, including IP, competition, investment, and maritime disputes, are adjudicated by the specialised inter-district economic courts (such as the Special Financial Court of the City of Almaty).¹¹⁵ Herein below, when considering commercial courts, we will mainly refer to the specialised inter-district economic courts.

A recent addition to the dispute resolution framework is the Astana International Financial Centre (AIFC) Court.¹¹⁶ The AIFC Court is separate and independent from the courts of the Republic of Kazakhstan. It is the first Court to provide a common law judicial system in Eurasia on the resolution of civil and commercial disputes in the AIFC. It has exclusive jurisdiction over disputes arising out of the activities and operations of the AIFC and jurisdiction in the case of other disputes in which all parties agree in writing to give the AIFC Court jurisdiction. There is also a Court of Appeal whose decisions are final. The AIFC Court has its own procedural rules that have been modelled on English common law procedures and leading international practice.

¹¹³ Baker Mckenzie, *Dispute Resolution Around the World Kazakhstan*, 2009, available at https://www.bakermckenzie.com/-/media/files/insight/publications/2016/10/dratw/dratw_kazakhstan_2009.pdf?la=en

¹¹⁴ Andrey Anatolyevich Butyrsky, Lyudmila Nikolaevna Nikolenko, Natalya Valerievna Ivanyuta, Irina Anatolyevna Butyrskaya, Yulia Valerievna Kabenok, *Economic Disputes Resolving Models by Courts in the Post-Soviet Countries*, *Journal of Legal, Ethical and Regulatory Issues*, Vol. 24 Iss. 2, 2021. available at <https://www.abacademies.org/articles/economic-disputes-resolving-models-by-courts-in-the-postsoviet-countries-10505.html>

¹¹⁵ Andrey Anatolyevich Butyrsky, Lyudmila Nikolaevna Nikolenko, Natalya Valerievna Ivanyuta, Irina Anatolyevna Butyrskaya, Yulia Valerievna Kabenok, *Economic Disputes Resolving Models by Courts in the Post-Soviet Countries*, *Journal of Legal, Ethical and Regulatory Issues*, Vol. 24 Iss. 2, 2021. available at <https://www.abacademies.org/articles/economic-disputes-resolving-models-by-courts-in-the-postsoviet-countries-10505.html>

¹¹⁶ Astana International Financial Centre (AIFC) Court: <https://court.aifc.kz/>

- *When were commercial courts first established?*

The first inter-district economic courts were formed in 2001 as a result of the Presidential Decree No. 535 dated January 16, 2001 (Decree of the President of the Republic of Kazakhstan, 2001).¹¹⁷

These were located in the city of Almaty and the Karaganda region.

3.3.2. Jurisdiction

- *What differentiates a Commercial Court from other civil courts?*

The differentiating factors between ordinary courts and specialised inter-district economic courts are the jurisdiction and the composition of the courts, in terms of a higher degree of specialisation of judges in commercial law matters. Other than that, and the different competence in case of an appeal procedure, there are no major differences between Commercial and Civil Courts.

- *What is the basis of jurisdiction of Commercial Courts?*

Specialised inter-district economic courts hear and resolve civil cases in property and non-property disputes, cases where the parties are individuals engaged in individual entrepreneurial activities without forming a legal entity, cases between legal entities, as well as corporate disputes, with the exception of cases whose jurisdiction is determined by another court according to the procedural rules.¹¹⁸

They also consider cases on the restructuring of financial organisations and organisations included in the banking conglomerate as a parent organisation which are not financial organisations, cases

¹¹⁷ See Andrey Anatolyevich Butyrsky, Lyudmila Nikolaevna Nikolenko, Natalya Valerievna Ivanyuta, Irina Anatolyevna Butyrskaya, Yulia Valerievna Kabenok, Economic Disputes Resolving Models by Courts in the Post-Soviet Countries, Journal of Legal, Ethical and Regulatory Issues, Vol. 24 Iss. 2, 2021. Available at <https://www.abacademies.org/articles/economic-disputes-resolving-models-by-courts-in-the-postsoviet-countries-10505.html>. For legal acts of the Republic of Kazakhstan see: https://www.akorda.kz/en/legal_acts?page=10&category=decrees

¹¹⁸ Andrey Anatolyevich Butyrsky, Lyudmila Nikolaevna Nikolenko, Natalya Valerievna Ivanyuta, Irina Anatolyevna Butyrskaya, Yulia Valerievna Kabenok, Economic Disputes Resolving Models by Courts in the Post-Soviet Countries, Journal of Legal, Ethical and Regulatory Issues, Vol. 24 Iss. 2, 2021. Available at <https://www.abacademies.org/articles/economic-disputes-resolving-models-by-courts-in-the-postsoviet-countries-10505.html>

on debt restructuring, rehabilitation and bankruptcy of individual entrepreneurs and legal entities, as well as their liquidation without initiating bankruptcy proceedings.¹¹⁹

The Nur-Sultan City Specialised Inter-District Economic Court has exclusive jurisdiction when it comes to investment disputes involving foreign investors.¹²⁰

- What are the types of disputes that may not be considered by Commercial Courts?

Just as in the case of France and Germany, purely civil (such as matters of family law, succession, etc.) and criminal law related matters cannot be submitted to the jurisdiction of the inter-district economic courts. Moreover, employment disputes are reviewed by general courts.¹²¹

- *Can commercial courts hear international commercial disputes?*

Kazakhstan courts will either establish their jurisdiction based on a choice of jurisdiction clause or Kazakhstan procedural rules. A Kazakhstan inter-district economic court could hear an international commercial dispute if Kazakhstan courts were mandated through a choice of jurisdiction clause. Similarly, nothing excludes a Kazakhstan court from hearing an international commercial dispute, provided it was submitted to it according to the rules of Civil procedure. However, they will expressly reject a claim if the same proceeding is pending in a foreign court or if there is an enforceable judgment rendered in a foreign country. The Court would also respect the choice of governing law, as the Kazakhstan conflict of law rules gives its permission for a foreign law to be applied by Kazakhstan courts in cases with a foreign element.¹²²

¹¹⁹ Ibid.

¹²⁰ Ardak Idayatova and Farukh Iminov, *Litigation and Enforcement in Kazakhstan: Overview, Practical Law*, Available at [https://uk.practicallaw.thomsonreuters.com/w-019-2504?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-019-2504?transitionType=Default&contextData=(sc.Default)&firstPage=true)

¹²¹ Ibid.

¹²² Ibid.

3.3.3. Procedure, Function and Organisation

- *What are the distinguishing features of the procedural framework dealing with commercial disputes?*

Specialised inter-district economic courts decide cases under the applicable norms of the Civil Procedure Code of Kazakhstan (Law, 2015). Thus, there are no major procedural differences.

Court proceedings are generally public. Hearings can be closed to the public on a party's application if it is essential to ensure the protection of a commercial or any other secret protected by law. Additionally, hearings must be closed to the public if this is necessary to protect state secrets.¹²³

An interesting procedural aspect is that Kazakhstan legislation imposes a mandatory pre-trial settlement procedure for certain categories of disputes (for example, claims for amendment and cancellation of contracts and claims against transporters). A claimant can apply to court on receipt of the other party's refusal to satisfy the reclamation or on expiration of a certain period for providing a response. A court will return or dismiss a claim if the claimant fails to comply with any applicable pre-trial settlement procedure. Currently, there are no penalties for failing to comply with pre-action conduct requirements. However, a court can recover litigation costs from the party who failed to comply with the pre-trial settlement procedure, regardless of the outcome of the case.¹²⁴

- *What are the key aspects of case management for commercial disputes?*

There is no record of any specific aspect of case management for commercial disputes, different from a civil case. The quality and style of legal proceedings may vary greatly from judge to judge even in the same court.¹²⁵

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ KAZAKHSTAN: An Introduction to Dispute Resolution, available at <https://chambers.com/content/item/4382>

3.3.4. Review of Court Decisions

- *Is there any recourse available against a decision rendered by the Commercial Court?*

There is a possibility to appeal the judgments of first instance Courts before the courts of appeal.¹²⁶ In case of commercial disputes, the competent courts of appeal are oblast courts (regional courts), the Nur-Sultan City Court or the Almaty City Court. Similarly, a second appeal can be launched against the decision of the court of appeal, which will be considered by the Supreme Court of the Republic of Kazakhstan. Nevertheless, there is a limitation in value (USD 183,780, as of 1 January 2022) below which parties are not allowed to refer to the Supreme Court.¹²⁷

- *What are the grounds available for an appeal against a decision rendered by the Commercial Court?*

Similar to Germany, the first appeal might be based on an error of law or an error of fact.¹²⁸ The most common grounds for revocation or amendment of a first instance judgment are the following:

1. Violation or misapplication of substantive or procedural law.
2. Incorrect identification and clarification of circumstances that are of importance to the case.
3. Failure to prove circumstances that are of importance to the case.
4. Inconsistency between the court conclusions and the circumstances of the case.
5. There is no court protocol in the court materials in cases where conducting of the protocol is mandatory.

The Supreme Court can only revoke or amend a decision of an inferior court if a material violation of substantive or procedural law is found.

¹²⁶ Baker McKenzie, *Dispute Resolution Around the World Kazakhstan, 2009*, available at https://www.bakermckenzie.com/-/media/files/insight/publications/2016/10/dratw/dratw_kazakhstan_2009.pdf?la=en

¹²⁷ Ardak Idayatova and Farukh Iminov, *Litigation and Enforcement in Kazakhstan: Overview*, Practical Law, available at [https://uk.practicallaw.thomsonreuters.com/w-019-2504?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-019-2504?transitionType=Default&contextData=(sc.Default)&firstPage=true)

¹²⁸ Baker McKenzie, *Dispute Resolution Around the World Kazakhstan, 2009*, available at https://www.bakermckenzie.com/-/media/files/insight/publications/2016/10/dratw/dratw_kazakhstan_2009.pdf?la=en

3.3.5. Practical Considerations

- *What are the practical considerations to be mindful of in pursuing a case before the Commercial Court?*

A strong practical consideration is the lack of a framework tailored to commercial cases and the lack of available data on the flexibility of the specialised courts.¹²⁹ There is also possibility to conduct proceedings in English at the Special Financial Court of the City of Almaty.

Another practical consideration, especially in terms of commercial secrets, is that Kazakhstan legislation does not recognise the concept of “privileged documents”. Kazakhstan legislation protects commercial, banking, and tax secrets and other types of information. However, a court can request the submission of such documents on a party's application, even if they would be considered confidential in other jurisdictions, in which case the court normally examines the documents behind closed doors.¹³⁰ This may be quite discouraging for international parties who may not be comfortable with risking privileged documents becoming public.

- *What are the typical costs associated with pursuing a claim before Commercial Courts?*

In case of Commercial Chambers there is no difference in terms of costs associated with pursuing a claim through civil court proceedings. The court collects litigation costs incurred by the successful party from the unsuccessful party. If only part of the claim is successful, costs are apportioned between the claimant and the defendant.¹³¹

Interestingly, costs are used as an incentive to parties to resort to the amicable settlement of the dispute. Kazakhstan legislation provides for repayment of any paid state duty to a claimant as follows:

- In full if the parties enter into an amicable or mediation agreement during first instance or appellate proceedings.

¹²⁹ EBRD, Commercial laws of Kazakhstan. An assessment by the EBRD, 2014, p. 4.

¹³⁰ Practical Law, Litigation and Enforcement in Kazakhstan: Overview available at [https://uk.practicallaw.thomsonreuters.com/w-0192504?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#co_anchor_a607109](https://uk.practicallaw.thomsonreuters.com/w-0192504?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a607109).

¹³¹ Ibid.

- 50% of the paid duty if a dispute is settled during cassation proceedings.

- *What is the average time taken to adjudicate a commercial dispute?*

The average time required in case of a commercial dispute is three months for the first instance.¹³²

- *Expertise of Judges*

Based on an EBRD Judicial Decisions Assessment, the quality of court judgments in commercial law matters in Kazakhstan differed based on whether they are judgments of higher and specialised courts or judgments of first instance general courts.¹³³ The quality of specialised court division judgments was scored higher, mainly due to lack of experience with commercial law and practice in general first instance courts. As a factor affecting the quality of judgments, lower court judges tended to apply general principles of laws and civil code provisions with which they are more familiar, rather than relevant provisions of commercial law. Despite the existence of a well-developed system of judicial education in Kazakhstan, as well as modern resources available to support judicial training, a high number of judges have not been trained in commercial law areas, a factor contributing to a lower quality of judicial decision-making at the lower instance courts.

- *Strong features and Main challenges*

The three notable strong features of the system are the better quality of judgments in case of specialised inter-district courts, the speed when rendering a first instance decision and the possibility to conduct some of the proceedings in English, in case of the Special Financial Court of the City of Almaty. It should also be mentioned that Kazakhstan has recently been working with the Organisation for Security and Co-operation in Europe (OSCE) on the implementation of the Aarhus Convention (UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters) which was signed by Kazakhstan in 2000.

¹³² Ardak Idayatova and Farukh Iminov, *Litigation and Enforcement in Kazakhstan: Overview*, Practical Law, Available at [https://uk.practicallaw.thomsonreuters.com/w-019-2504?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-019-2504?transitionType=Default&contextData=(sc.Default)&firstPage=true)

¹³³ EBRD, *Commercial laws of Kazakhstan*. An assessment by the EBRD, 2014, p. 4.

On the contrary, the main challenges are the development of a framework tailored to the needs of the businesses while preserving speed, as well as the enhancement of the specialisation of judges in case of inter-district courts. Another challenge is the impartiality of courts in Kazakhstan which is considered questionable. Scrutiny of judicial decision-making is limited by the restrictive access by lawyers and the general public to judicial decisions. Further, courts are believed to show particular deference to the government and public entities. Despite the above, it is surprising that courts continue to constitute a preferred forum for the resolution of disputes as compared to ADR, which shows general confidence in the system.¹³⁴

¹³⁴ Ibid.

3.4. South Africa¹³⁵

3.4.1. Introduction

- *What are the main commercial courts?*

There is currently just one dedicated Commercial Court in South Africa, situated in Gauteng Province (including cities such as Johannesburg, Tshwane, Ekurhuleni), the most populous area of South Africa and the main economic hub of the country.¹³⁶ It falls under the jurisdiction of the Gauteng Division of the High Court of South Africa. The establishment of the Commercial Court, as part of the High Court of South Africa, has provided litigants with a specialised forum whose stated objective is to promote the efficient conduct of litigation and to resolve disputes quickly, cost efficiently and fairly.

- *When were commercial courts first established in South Africa's jurisdiction?*

The Commercial Court was first established in 1996, however it was very little used by legal practitioners.¹³⁷ In October 2018, the Gauteng Local Division High Court in Johannesburg revived the Commercial Court through the publication of the 2018 Commercial Court Practice Directive. It was re-launched in 2018.¹³⁸ with limited to date evidenced on how successful the re-launch was.¹³⁹

¹³⁵ South Africa is a hybrid law country with roots in both Roman Dutch civilian law and English common law. Substantive rules are more influenced by civil law traditions while the procedure has the footprint of English common law in it. For the purposes of this Report, it will be analysed under the civil law countries.

¹³⁶ A commercial court? A blessing or a curse?, Available at <https://www.cliffedekkerhofmeyr.com/en/news/publications/2018/Dispute/dispute-resolution-alert-10-october-a-commercial-court-a-blessing-or-a-curse.html>

¹³⁷ Practice Note No. 1 of 1996: Commercial Court Practice Direction

¹³⁸ Tanya Pollak and Nikhil Lawton-Misra, Commercial Court Practice Directive, Available at <https://www.golegal.co.za/commercial-court-practice-directive/>

¹³⁹ A commercial court? A blessing or a curse?, Available at <https://www.cliffedekkerhofmeyr.com/en/news/publications/2018/Dispute/dispute-resolution-alert-10-october-a-commercial-court-a-blessing-or-a-curse.html>

3.4.2. Jurisdiction

- *What differentiates a Commercial Court from other civil courts?*

The South African Commercial Court can only hear matters that are commercial in nature. A “Commercial Court case” is defined as a substantial case that has as its foundation a broadly commercial transaction or commercial relationship.¹⁴⁰ The Schedule provides a non-exhaustive list of claims arising out of trade and commerce transactions. These include, inter alia:¹⁴¹

- a. The export and import of goods
- b. The carriage of goods by land, sea, air or pipeline
- c. Insurance and reinsurance
- d. Banking and financial services
- e. The operation of markets and exchanges
- f. The purchase and sale of commodities
- g. Commercial matters arising out of business rescue and insolvency cases
- h. All commercial matters affecting companies arising out of the Companies Act 2008 and its interpretation
- i. Tort cases that take place in a commercial context e.g. unlawful competition cases
- j. Generally, appropriate contractual matters
- k. Intellectual property cases

- *What is the basis of jurisdiction of Commercial Courts?*

South Africa is a hybrid law country with roots in both Roman Dutch civilian law and English common law. Substantive rules are more influenced by civil law traditions while the procedure has the footprint of English common law in it.¹⁴²

¹⁴⁰ Commercial Court Practice Directive, Schedule 1 available at < https://www.johannesburgbar.co.za/wp-content/uploads/Commercial-Court-Practice-Directive_-final.pdf>.

¹⁴¹ Fast-tracking Commercial Litigation in the South African High Court, Available at <https://www.clydeco.com/en/insights/2021/01/fast-tracking-commercial-litigation-in-the-south-a>

¹⁴² The University of Melbourne, The South African Legal System, Available at < <https://unimelb.libguides.com/c.php?g=929734&p=6718215>>.

The High Court of South Africa is the superior Court of law. It is divided into nine provincial divisions, some of which sit in more than one location.¹⁴³ Each High Court division has general jurisdiction over a defined geographical area in which it is situated. The decisions of a division are binding on magistrates' courts within its area of jurisdiction. The High Court has jurisdiction over all matters, but it usually only hears civil matters involving more than Euro 25,000, and serious criminal cases.¹⁴⁴ It also hears any appeals or reviews from magistrates' courts and other lower courts.¹⁴⁵

- *Types of disputes that may not be considered by Commercial Courts?*

Commercial Courts do not have the competence to hear disputes pertaining to criminal prosecutions, appeals, divorce and related Family Law matters, which are cases that do not have a commercial transaction as a foundation.¹⁴⁶

- *Can commercial courts hear international commercial disputes?*

In a cross-border claim, it would first be necessary for the South African courts to have international jurisdiction over the matter. Generally speaking, this will depend on service of process, for which the rules are somewhat complex (although, broadly speaking, a jurisdiction agreement in their favour will provide a basis upon which the South African courts can act).¹⁴⁷ Once a summons or application has been served, any party to the suit may apply for a matter to be allocated as a Commercial Court case by delivering a letter to the Judge President or Deputy Judge President of the Commercial Court in Gauteng Province, which must set out: (i) a broad and uncontroversial description of the case; (ii) the motivation for the allocation of the case as a Commercial Court case; and (iii) the motivation for the case warranting treatment under the

¹⁴³ For an overview of the Courts in South Africa, see: <<https://www.justice.gov.za/about/sa-courts.html>>.

¹⁴⁴ Corlett Manaka and Faith Sikhavhakhavha, Litigation and enforcement in South Africa: overview, available at [https://uk.practicallaw.thomsonreuters.com/0-502-0205?transitionType=Default&contextData=\(sc.Default\)#co_anchor_a360202](https://uk.practicallaw.thomsonreuters.com/0-502-0205?transitionType=Default&contextData=(sc.Default)#co_anchor_a360202)

¹⁴⁵ Ibid.

¹⁴⁶ Janine Hollesen, New Commercial Courts to Include Intellectual Property Matters, available at https://www.werksmans.com/wp-content/uploads/2018/12/18394_November_Legal_Brief_06.pdf

¹⁴⁷ 'International Commercial Courts Review 2022', Linklaters, p.29 <<https://lpscdn.linklaters.com/-/media/files/document-store/pdfs/2022/may/iccr2022final.ashx?rev=ca8e6e99-5d90-43a4-ad14-9426ed35249e&extension=pdf>>.

Commercial Court Practice Directives.¹⁴⁸ Thereafter, the Judge President or Deputy Judge President will determine whether the case should be allocated as a Commercial Court case. If the case is allocated to the Commercial Court, the Judge President or Deputy Judge President allocates a judge or two judges to case manage the matter.¹⁴⁹ Similar to the German legal system, the parties can enter into a jurisdiction agreement to submit a cross-border dispute to the Commercial Court, and this agreement will provide a basis upon which the South African courts will assume international jurisdiction. At present only cases filed in the Gauteng High Court jurisdiction are heard by the Commercial Court.¹⁵⁰

3.4.3. Procedure, Function and Organisation

- *What are the distinguishing features of the procedural framework dealing with commercial disputes?*

The Commercial Court Practice Directive provides that matters heard in the Commercial Court will be dealt with in line with broad principles of fairness, efficiency and cost-effectiveness.¹⁵¹ It is provided by the Directive that the plaintiff has to file a statement of case containing its cause of action and relief claimed. The defendant, in its turn, has to file a statement of defence or responsive statement of case, which contains any counterclaim, outside of any defences. The parties shall also provide essential documents and a summary of the evidence they intend to rely on.¹⁵² No request for further particulars may be sought in the Commercial Court.

An early-stage disclosure of all essential documents enhances a more cost-effective exchange of documents and allows for an in-depth assessment of the parties' litigation strategy from the outset. Similarly, the disclosure of witnesses and expert evidence upfront provides the parties with the

¹⁴⁸ Commercial Court Practice Directive, Chapter 2 available at < https://www.johannesburgbar.co.za/wp-content/uploads/Commercial-Court-Practice-Directive_-final.pdf>.

¹⁴⁹ Commercial Court Practice Directive, Chapter 7 available at < https://www.johannesburgbar.co.za/wp-content/uploads/Commercial-Court-Practice-Directive_-final.pdf>.

¹⁵⁰ Corlett Manaka and Faith Sikhavhakhavha, Litigation and enforcement in South Africa: overview, available at [https://uk.practicallaw.thomsonreuters.com/0-502-0205?transitionType=Default&contextData=\(sc.Default\)#co_anchor_a360202](https://uk.practicallaw.thomsonreuters.com/0-502-0205?transitionType=Default&contextData=(sc.Default)#co_anchor_a360202)

¹⁵¹ Commercial Court Practice Directive, Chapter 1, available at < https://www.johannesburgbar.co.za/wp-content/uploads/Commercial-Court-Practice-Directive_-final.pdf>.

¹⁵² Commercial Court Practice Directive, Chapter 51, available at < https://www.johannesburgbar.co.za/wp-content/uploads/Commercial-Court-Practice-Directive_-final.pdf>.

opportunity to review the other party's witness evidence pre-trial which may lead to time efficiency and a shorter trial.¹⁵³

- *What are the key aspects of case management for commercial disputes?*

Each case has one or two judges allocated as case managers¹⁵⁴. Thereafter, the case manager(s) organise(s) the first case management conference, where the parties decide upon the following¹⁵⁵:

- a) A general sense of what the matter is about;
- b) What needs to be done to bring the matter to trial;
- c) A timetable for getting the matter expeditiously to trial;
- d) A potential trial date;
- e) The number of witnesses likely to be called, including expert witnesses; and
- f) The probable length of the trial;
- g) Creating an appropriate electronic means for communications and exchange and filing of documents

A second Case Management Conference must be held at which the parties will present either an agreed list of triable issues or, absent agreement, each party's identification of the triable issues.¹⁵⁶ The dates for filing of full witness statements by the parties will be fixed at the second Case Management Conference. Except with leave of the court, the witness statements will constitute the evidence in chief of a particular witness.

Commercial Court cases generally do not require discovery. However, targeted disclosure of documents might be allowed by the Court at the second Case Management Conference. If disclosure is granted by the Court, a request for disclosure may be made concerning specific documents or classes of documents which are relevant to the issues in dispute between the

¹⁵³ Clyde&Co, Fast-tracking Commercial Litigation in the South African High Court, available at <https://www.clydeco.com/en/insights/2021/01/fast-tracking-commercial-litigation-in-the-south-a>

¹⁵⁴ Chapter 4., Commercial Court Practice Directive

¹⁵⁵ Clyde&Co, Fast-tracking Commercial Litigation in the South African High Court, available at <https://www.clydeco.com/en/insights/2021/01/fast-tracking-commercial-litigation-in-the-south-a>

¹⁵⁶ Commercial Court Practice Directive, Chapter 5 available at < https://www.johannesburgbar.co.za/wp-content/uploads/Commercial-Court-Practice-Directive_-final.pdf>.

parties.¹⁵⁷ Should further conferences be required, parties may approach the allocated Judge or Judges to convene a conference upon good cause; the allocated Judge or Judges will determine whether to convene such a conference and dispose of any further matters arising.¹⁵⁸

3.4.4. Review of Court Decisions

- *Is there any recourse available against a decision rendered by the Commercial Court?*

An appeal can be lodged to a full bench of the High Court (consisting of three judges if the initial case was heard by one judge)¹⁵⁹ or to the Supreme Court of Appeal¹⁶⁰ (typically where there was more than one judge presiding over the initial hearing), as regulated by sections 16 to 19 of the Superior Courts Act 10 of 2013.

- *What are the grounds available for an appeal against a decision rendered by the Commercial Court?*

Appeals are based on the grounds that the decision by the trial court was wrong in fact or law. An appeal relates to the substantive correctness of a decision: that is, to findings of both fact and law.¹⁶¹

3.4.5. Practical Considerations

- *What are the practical considerations to be mindful of in pursuing a case before the Commercial Court?*

¹⁵⁷ Clyde&Co, Fast-tracking Commercial Litigation in the South African High Court, available at <https://www.clydeco.com/en/insights/2021/01/fast-tracking-commercial-litigation-in-the-south-a>

¹⁵⁸ Ibid.

¹⁵⁹ Further information on the High Court can be found here: <<https://www.judiciary.org.za/index.php>>

¹⁶⁰ Further information on the Court of Appeal can be found here: <<https://www.supremecourtofappeal.org.za/index.php>>

¹⁶¹ Corlett Manaka and Faith Sikhavhakhavha, Litigation and enforcement in South Africa: overview, available at [https://uk.practicallaw.thomsonreuters.com/0-502-0205?transitionType=Default&contextData=\(sc.Default\)#co_anchor_a360202](https://uk.practicallaw.thomsonreuters.com/0-502-0205?transitionType=Default&contextData=(sc.Default)#co_anchor_a360202)

In deciding whether a matter is appropriate to be submitted to the Commercial Court, a party will have to carefully consider some interesting aspects of the procedure. An example is the need for early document disclosure and filing of witness statements strategy.¹⁶²

- *What are the typical costs associated with pursuing a claim before Commercial Courts?*

There is limited data available. However, a commentator has estimated that a full-fledged trial will cost about R 25,000 (around 1500 Euro) per day in legal costs. That figure is made up of the following: a case on a trial day will usually have a minimum of two Advocates (one for each plaintiff and defendant) – Advocates' fees in South Africa average are about R 10,800 (around 600 Euro) each per day, while advocates are usually assisted by a team of lawyers and assisting personnel, which also contributes to the costs involved.¹⁶³

- *What is the average time taken to adjudicate a commercial dispute?*

Although there is no conclusive data on the length of a commercial dispute, it is widely acknowledged by lawyers that the average duration is 12 months.¹⁶⁴

- *Expertise of Judges*

High Court judges with a strong commercial and economic background are allocated to hear cases in the Commercial Court in Gauteng Province. This allocation is left to the discretion of the Judge President or the Deputy Judge President of the High Court. There are about 37 judges appointed at the Gauteng Division of the Commercial Court, while 43 judges are appointed to the Gauteng Division of the High Court.¹⁶⁵

¹⁶² Fast-tracking Commercial Litigation in the South African High Court, available at <https://www.clydeco.com/en/insights/2021/01/fast-tracking-commercial-litigation-in-the-south-a>

¹⁶³ The Cost Of A Lawyer In South Africa, available at <https://www.myggsa.co.za/how-much-does-a-lawyer-cost-in-south-africa/>

¹⁶⁴ Data based on interviews with practitioners in South Africa.

¹⁶⁵ <https://www.judiciary.org.za/index.php/judiciary/superior-courts/judgeship/gauteng-division-judges>

- *Strong features and Main challenges*

As mentioned above, the Commercial Court operates as part of the overall High Court structure without a separate physical location for the hearing of commercial disputes. However, with the advent of the COVID-19 pandemic, the Office of the Chief Justice (OCJ) developed the Court Online system which was introduced with Directive 1 of 2022.¹⁶⁶ Court Online is an end-to-end E-Filing solution for the Superior Courts of South Africa. It is aimed at providing a platform for counsel and parties to file pleadings and documents to the Courts electronically. It also affords ease of managing court appearance diaries and court evidence online. Case management and witness management are also components that are covered by the Court Online System.

The Court online system in the Pretoria and Johannesburg High Courts has not been without its difficulties. Challenges include users' lack of trust in online services as compared to physical, in person, engagement between legal practitioners, court registrars and the Judge.¹⁶⁷ Other concerns relate to cyber-attacks and the protection of confidential client information, as well as constraints on accessibility for people, especially lay persons without ready access to electronic devices.

Another strong feature of the Commercial Court which reflects modern commercial practices and needs is its competence to hear applications brought on an urgent basis. Where a party seeks to bring an application on an urgent basis, the applicant ought to make a written or telephonic request to request that the matter be allocated as an urgent Commercial Matter. The party making the request must set out a) A broad and uncontroversial description of the case; b) The justification for the designation of the case as a commercial case; and c) The justification for the case warranting treatment under the Commercial Court Directives; d) The reason why the applicant contends that the matter is urgent.¹⁶⁸

¹⁶⁶ DIRECTIVE 1 OF 2022 Re: Piloting of the Court Online system in Gauteng available at <<https://www.judiciary.org.za/index.php/court-online/about-court-online>>.

¹⁶⁷ Feinstein Robin, Sithole Vusani, "Caselines: The future of the Judicial System" available at <<https://tgrattorneys.co.za/2022/02/14/caselines-the-future-of-the-judicial-system/>>.

¹⁶⁸ Commercial Court Practice Directive, Chapter 'Applications Brought on an Urgent Basis' available at <https://www.johannesburgbar.co.za/wp-content/uploads/Commercial-Court-Practice-Directive_-final.pdf>.

4. Commercial Courts in Common Law Systems

4.1. England and Wales

4.1.1. Introduction

- *What are the main Commercial Courts?*

The High Court of England and Wales has three divisions: the King's Bench Division, the Chancery Division and the Family Division.¹⁶⁹ The Commercial Court forms part of the King's Bench Division.¹⁷⁰ The work of the Commercial Court is divided into three categories, namely commercial cases, admiralty cases and arbitration cases.¹⁷¹ There are a number of specialised courts and specialised lists of judges¹⁷² under the Commercial Court umbrella that deal with commercial disputes. These include Business and Property Courts, Admiralty Court, and the Circuit Commercial Court.¹⁷³ Specialized lists include the Financial List.¹⁷⁴

- *When were Commercial Courts first established?*

Commercial Courts were first established in England and Wales in 1895 with the introduction of the "Commercial list" by judges of the King's Bench Division of the High Court.¹⁷⁵

4.1.2. Jurisdiction

- *What differentiates a Commercial Court from other civil courts?*

There are various procedural differences in the conduct of a trial in a Commercial Court and other divisions of the High Court in England and Wales. This includes provisions related to pre-action conduct. In the commercial court, there are special measures aimed at reducing pre-action

¹⁶⁹ Courts and Tribunals Judiciary, 'High Court' < <https://www.judiciary.uk/courts-and-tribunals/high-court/>>.

¹⁷⁰ Ibid.

¹⁷¹ ¹⁷¹ The Commercial Court of England and Wales, 'The Work of the Commercial Court' <<https://www.commercialcourt.london/work>>.

¹⁷² Courts and Tribunals Judiciary, 'Financial List: Context' < <https://www.judiciary.uk/courts-and-tribunals/business-and-property-courts/financial-list/financial-list-context/>>.

¹⁷³ Courts and Tribunals Judiciary, 'Commercial Court' < <https://www.judiciary.uk/courts-and-tribunals/business-and-property-courts/commercial-court/>>.

¹⁷⁴ Ibid.

¹⁷⁵ The Commercial Court of England and Wales, 'About the Court' < <https://www.commercialcourt.london/the-court/>>.

protocol,¹⁷⁶ whereas pre-action protocol guided by Practice Directions¹⁷⁷ need to be complied with in all other civil cases.

Further, cases in other divisions of the High Court are allocated one of the three procedural tracks,¹⁷⁸ i.e. multi-track, fast-track and small claims track. On the other hand, cases before the Commercial Court are automatically allocated to the multi-track.¹⁷⁹ Claims worth more than 25000£ are ordinarily allocated to multi-track. Commercial Court cases are often complex, of high-value and require specialised case management techniques which are procedurally addressed in the multi-track allocation under Civil Procedure Rules (CPR) of England and Wales. Case management conferences are mandatory for commercial cases,¹⁸⁰ while they may not be necessary for multi-track cases before other divisions of the High Court.¹⁸¹

- *What is the basis of jurisdiction of Commercial Courts?*

Pre-Brexit, the rules of the Brussels Regulation¹⁸² and Brussels Recast¹⁸³ were applicable to disputes in the UK commenced before 31st December 2020 (the implementation period for the EU-UK Trade and Cooperation Agreement).

Post-Brexit, the Brussels Regulation and Brussels Recast ceased to apply to the UK after 31st December 2021. As the UK is a contracting party to the 2005 Hague Convention, its rules continue to apply for exclusive jurisdiction clauses. Where the rules of the Hague Convention are silent, common law rules for determining jurisdiction are generally applied by English courts, namely: (a) proceedings can be served on the defendant (within or outside England), or (b) the defendant submits to the jurisdiction of the relevant court.

¹⁷⁶ The Judges of the Commercial Court of England and Wales, *The Commercial Court Guide*, s B3.1 – B3.4 <<https://www.judiciary.uk/wp-content/uploads/2022/06/Commercial-Court-Guide-11th-edition-1.pdf>> (The Commercial Court Guide).

¹⁷⁷ Practice Direction, Pre-Action Conduct and Protocol, <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct>.

¹⁷⁸ CPR 26.1(2).

¹⁷⁹ CPR 58.13(1).

¹⁸⁰ CPR 58.13.

¹⁸¹ CPR 29.

¹⁸² Regulation (EC) No 44/2001

¹⁸³ Regulation (EU) No 1215/2012

In cross-border disputes, it will be necessary for the English courts to have international jurisdiction over the dispute. Broadly, the rules which determine this are laid out by common law but, as a principle, where the parties have chosen the English courts to hear their dispute effect will be given to that choice.

- *What are the types of disputes that may not be considered by Commercial Courts?*

The Commercial Court deals with commercial disputes arising out of transactions of trade and commerce, such as those related to buying and selling commodities, banking and financial services, and export and import of goods.¹⁸⁴ Commercial claims can also be listed under a specialist financial list of the Commercial Court such as disputes which require expertise in the financial markets, disputes which raise issues of general importance to financial markets, or disputes relating to loans, project finance, banking transactions, etc. the value of which is equal to or more than £50 million.¹⁸⁵ Ordinary civil disputes that do not fulfill the requirements of a commercial claim as enumerated above, may not be considered by commercial courts in England and Wales. These include insolvency disputes, family disputes, intellectual property disputes or competition disputes.

- *Can Commercial Courts hear international commercial disputes?*

The Commercial Court in England and Wales frequently hears international commercial disputes.¹⁸⁶ The Business and Property Courts of England and Wales (“BPC”) is the “flagship” group of courts for handling international disputes in the UK. The Commercial Court (KBD) deals with complex, primarily international, commercial disputes with particular emphasis on areas such as commodities, insurance, aviation/shipping. In 2020-21, 74% of the overall cases heard before the Commercial Court, were international commercial disputes.¹⁸⁷

¹⁸⁴ CPR 58.1.

¹⁸⁵ CPR 63A.1.

¹⁸⁶ Courts and Tribunals Judiciary, ‘Commercial Court’ < <https://www.judiciary.uk/courts-and-tribunals/business-and-property-courts/commercial-court/>>.

¹⁸⁷ The Commercial Court Report 2020-2021, 21 < <https://static1.squarespace.com/static/5ba510e3c46f6d304aaada90/t/62248bf1668d3a46429100a6/1646562291079/Annual+Report+2020-2021.pdf>>.

4.1.3. Procedure, Function and Organisation

- *What are the distinguishing features of the procedural framework dealing with commercial disputes?*

Broadly, civil procedure rules for civil cases apply equally to commercial cases; however there are modifications and enhancements for certain procedures. Also, since all cases before the Commercial Court are automatically allocated to the multi-track, the rules for fast-track and small-claims track do not apply.

Additionally, it must be noted that different procedural rules apply for specific kinds of interim applications. If the hearing for an application is likely to take half a day or less, it is regarded as an “ordinary” application.¹⁸⁸ All other applications are regarded as “heavy” applications.¹⁸⁹ In this context, different timetables for service of evidence apply for “ordinary” applications¹⁹⁰ and “heavy” applications.¹⁹¹ Further, due to the specialized nature of claims before commercial courts, amendments to statements of the case require the original text to also be shown unless otherwise ordered by the relevant court.¹⁹²

- *What are the key aspects of case management for commercial disputes?*

A mandatory case management conference must be held after the statements of case have been served.¹⁹³ There are strict timelines of up to two weeks for applying for a case management conference.¹⁹⁴ A completed case management information sheet needs to be filed and served by both parties in advance of each case management conference.¹⁹⁵ As part of case management, parties are required to prepare¹⁹⁶ in consultation: (a) a case management bundle, (b) a list of the issues to be decided in the case, and (c) a case memorandum containing a summary of the case.

¹⁸⁸ The Commercial Court Guide (n 7), s F6.

¹⁸⁹ Ibid s F7.

¹⁹⁰ PD 58.13.1.

¹⁹¹ PD 58.13.2.

¹⁹² PD 58.8

¹⁹³ CPR 58.13.

¹⁹⁴ PD 58.10.2.

¹⁹⁵ PD 58.10.7

¹⁹⁶ PD 58.10.8.

4.1.4. Review of Court Decisions

- *Is there any recourse available against a decision rendered by Commercial Courts?*

An order passed by the Commercial Court can be appealed after seeking permission to appeal. Appeals are heard at the first instance before the Court of Appeal. A further appeal can be heard at the last instance before the United Kingdom Supreme Court ('UKSC').

- What are the grounds available for an appeal against a decision rendered by Commercial Courts in England and Wales?

Permission to appeal¹⁹⁷ is given at the first instance if the relevant court finds that: (a) the appeal has a real prospect of success,¹⁹⁸ or (b) there is some compelling reason for the appeal to be heard.¹⁹⁹ Similarly, permission to appeal is necessary for appealing an order passed by the Court of Appeal before UKSC. Permission to appeal before the UKSC is usually only granted when there is a point of law or matter of general public importance involved.²⁰⁰

4.1.5. Practical Considerations

- *What are the practical considerations to be mindful of in pursuing a case before Commercial Courts?*

Disclosure is an important and necessary part of the process of litigation in England and Wales. Parties should therefore be mindful of and consider the implications of any extensive disclosure of documents that could be required or made necessary during the process of litigation.

The differences in procedure for commercial courts and other divisions of the High Court in England and Wales is another important aspect that must be carefully considered. This includes procedural considerations such as for case management, applicable special rules for interim applications, and pre-action conduct, among others.

¹⁹⁷ CPR 52.3.

¹⁹⁸ CPR 52.6(1)(a).

¹⁹⁹ CPR 52.6(1)(b).

²⁰⁰ Martin Partington, *Introduction to the English Legal System* (15th edn, OUP 2021) 244.

- *What are the typical costs associated with pursuing a claim before Commercial Courts?*

Litigation in England and Wales is often considered expensive. The costs incurred in pursuing a claim or defending a case include court fees, law firm fees, barristers' fees and incidental expenses. Typically, court fees depend on the value of the claim. The court fees incurred for claims between £10,000 to £20,000 are 5% of the claim amount.²⁰¹ For claims valued more than £200,000, a capped fixed fee of £10,000²⁰² is payable. Additional fees are payable for court hearings that may take place at a later date than the hearings originally anticipated in the case management order. Costs incurred in engaging lawyers are difficult to calculate as lawyers' rates and staffing of cases vary widely.

- *What is the average time taken to adjudicate a commercial dispute?*

The Commercial Court Report 2020-2021²⁰³ indicates that most trials (including the Commercial, Admiralty, and London Circuit Commercial jurisdiction) between 2020-21 were completed within two weeks.²⁰⁴ The Report also shows that the average length of a commercial trial in the year 2018-19 was nine days,²⁰⁵ followed by six days in the year 2019-20,²⁰⁶ and nine days in the year 2020-21.²⁰⁷ Only two commercial trials throughout the three-year period lasted for as long as six weeks. The longest trial lasted forty days. At the same time, as per Civil Justice Statistics, the average time taken for claims (including civil and purely commercial cases) to go to trial in this jurisdiction is between 50-75 weeks.²⁰⁸

²⁰¹ 'Take a business dispute to the Commercial Court', HM Courts and Tribunal Services <<https://www.gov.uk/guidance/take-a-business-dispute-to-the-commercial-court#pay-the-court-fee>>.

²⁰² Ibid.

²⁰³ 'The Commercial Court Report 2020-2021', Judiciary of England and Wales <https://www.judiciary.uk/wp-content/uploads/2022/02/14.50_Commercial_Court_Annual_Report_2020_21_WEB.pdf>.

²⁰⁴ Ibid 38.

²⁰⁵ Ibid 39.

²⁰⁶ Ibid.

²⁰⁷ Ibid.

²⁰⁸ Source: <https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-january-to-march-2021/civil-justice-statistics-quarterly-january-to-march-2021>.

- *Expertise of judges*

Appointment of UK Judges to the Commercial Court is handled by the Judicial Appointments Commission.²⁰⁹ At the time of drafting this chapter, the roster of the Commercial Court includes thirteen specialist judges, each with an extensive background in commercial disputes.²¹⁰ Due to the specialist nature of the Commercial Court, it is not surprising that appointed judges have specialised training and experience to handle complex and high-value disputes. They are known to come from the ranks of senior practicing lawyers, including barristers, partners of law firms, and government lawyers.²¹¹

- *Strong features and Main Challenges*

The specialist practice directions and guides used in practice by commercial courts in England and Wales to effectively and efficiently deal with aspects of procedure and management of claims is a strong feature of commercial dispute resolution in this jurisdiction. Additionally, the average length of trials, expertise of judges and refined case management features make it an attractive forum for commercial parties.

With regard to the court facilities where commercial disputes are dealt with, the courts are set up to facilitate the use of electronic trial aids, video conferencing, and electronic court filings. An example is the Rolls Building in London which is a specialist centre for the resolution of business disputes, including multi-party and complex international cases.²¹²

²⁰⁹ ‘About Us’, Judicial Appointments Commission <<https://judicialappointments.gov.uk/about-the-jac/>>.

²¹⁰ ‘Commercial Court’, HM Courts and Tribunals Services <<https://www.gov.uk/courts-tribunals/commercial-court>>.

²¹¹ ‘International Commercial Courts Review 2022’, Linklaters < <https://lpscdn.linklaters.com/-/media/files/document-store/pdfs/2022/may/iccr2022final.ashx?rev=ca8e6e99-5d90-43a4-ad14-9426ed35249e&extension=pdf>>.

²¹² The Commercial Court of England and Wales, available at <https://www.commercialcourt.london/the-rolls-building>

4.2. The United States of America

4.2.1. Introduction

- *What are the main Commercial Courts?*

The main commercial courts in the USA include the United States District Court for the Southern District of New York (“SDNY”) and the Commercial Division of the Supreme Court of the State of New York (“the NY Commercial Division”). SDNY is a federal court whereas the NY Commercial Division is a state court. There are various other commercial courts in the USA such as the United States District Court for the Northern District of California, the Delaware Court of Chancery and the Philadelphia Court of Common Pleas.

- *When were Commercial Courts first established?*

The SDNY was first established in 1789.²¹³ The NY Commercial Division was first established in 1995.²¹⁴

4.2.2. Jurisdiction

- *What differentiates a Commercial Court from other civil courts ?*

Commercial Courts enact specific provisions and rules in order to achieve efficiency in the adjudication process of business disputes. The enactment of such provisions in the conduct of trials differentiates the functioning of a commercial court from that of civil courts.²¹⁵ Due to the nature of commercial disputes, some commercial courts such as the NY Commercial Division observe more extensive steps during trial such as streamlining the discovery of documents process²¹⁶, encouraging the use of experts and disclosure by experts, and imposing time limits on trials.²¹⁷

²¹³ ‘About the District’ United States District Court Southern District of New York, <<https://www.nysd.uscourts.gov/>>.

²¹⁴ ‘Commercial Division – NY Supreme Court’, New York State Unified Court System <[²¹⁵ Uniform Rules for the Supreme and County Courts \(Rules of Practice for the Commercial Division\), Preamble.](https://ww2.nycourts.gov/courts/comdiv/history.shtml#:~:text=In%20November%201995%2C%20the%20Commercial,and%20in%20New%20York%20County.>.</p></div><div data-bbox=)

²¹⁶ Ibid s 202.20-e.

²¹⁷ Ibid Rule 13.

Further, commercial courts often implement initiatives aimed at cost-effective, predictable and fair adjudication of commercial disputes. The “Pilot Project”²¹⁸ in the NY Commercial Division, which automatically refers certain commercial cases to mediation in the ADR Program of the Commercial Division, is one such example.

- *What is the basis of jurisdiction of Commercial Courts?*

Commercial disputes can be filed in either the federal courts or the state courts. Federal courts can hear cases that arise under federal law,²¹⁹ or in which there is diversity in citizenship of the parties (i.e. from different US states or from the US party and a foreign country) and the claim amount exceeds \$75,000.²²⁰ State courts can hear all claims except those where the federal courts have exclusive jurisdiction.

- *What are the types of disputes that may not be considered by Commercial Courts?*

The SDNY and the NY Commercial Division are often the chosen courts for financial disputes mainly due to their proximity to New York’s major financial centres and because of the resulting experience and expertise in financial matters of their judges. The rules of the NY Commercial Division provide a list of the types of commercial disputes that may be submitted to its jurisdiction.²²¹ It may hear cases arising out of breach of contract claims, the state’s business corporation law, or the state’s partnership law. Moreover, it can hear claims concerning commercial loans, bank transactions, letters of credit, and claims involving business torts.²²²

Federal courts have exclusive jurisdiction over certain disputes such as federal copyright and patent claims²²³, and federal antitrust claims²²⁴. As a result, such claims cannot be heard before

²¹⁸ ‘Administrative Order’, New York State Unified Court System < <https://www.nycourts.gov/LegacyPDFS/courts/1jd/suptctmanh/AO-12219-MAND-MED.pdf>>.

²¹⁹ U.S. Const. Art. III, § 2; 28 U.S.C. § 1331.

²²⁰ 28 U.S.C. § 1332.

²²¹ Rules of Practice for the Commercial Division (n 34).

²²² ‘International Commercial Courts Review 2022’, Linklaters p.38 < <https://lpscdn.linklaters.com/-/media/files/document-store/pdfs/2022/may/iccr2022final.ashx?rev=ca8e6e99-5d90-43a4-ad14-9426ed35249e&extension=pdf>>.

²²³ 28 U.S.C. § 1338.

²²⁴ 15 U.S.C. § 15.

state courts that are otherwise generally suited to hear commercial disputes. Certain disputes may not be considered by the NY Commercial Division even when the monetary threshold is met.²²⁵ These include: (a) suits to collect professional fees, (b) cases seeking declaratory judgment in some circumstances, (c) residential real estate disputes, (d) home improvement contracts, (e) proceedings to enforce a judgment regardless of the nature of the underlying case, (f) first party insurance claims, and (g) attorney malpractice actions.

- *Can Commercial Courts hear international commercial disputes?*

Commercial courts such as the SDNY and the NY Commercial Division frequently hear international commercial disputes. The well developed New York commercial law has persuaded many contracting parties (including those not based in New York) to choose to have their contracts governed by New York law, with forum selection clauses designating New York courts. The New York General Obligation Law codifies the right of parties involved in commercial disputes valued at a minimum of \$250,000 to select New York as the governing law of the contract.²²⁶

4.2.3. Procedure, Function and Organisation

- *What are the distinguishing features of the procedural framework dealing with commercial disputes ?*

As mentioned above, certain rules and procedures have been adopted by the NY Commercial Division to efficiently deal with issues that arise in commercial disputes. These measures include streamlining the discovery process,²²⁷ imposing time limits on trials,²²⁸ and encouraging early case disposition through alternative dispute resolution.²²⁹

Further, the parties can opt for accelerated adjudication mechanisms allowing greater judicial efficiency. In cases where parties choose accelerated provisions, the rules provide for the case to reach trial within 9 months from the date of filing of a request for judicial intervention.²³⁰

²²⁵ Rules of Practice for the Commercial Division (n 34), s 202.70(c).

²²⁶ New York General Obligation Law ("GOL") § 5-1401.

²²⁷ Rules of Practice for the Commercial Division (n 34), Rule 11.

²²⁸ Ibid, Rule 26.

²²⁹ Ibid, Rule 11.

²³⁰ Ibid, Rule 9(b).

- *What are the key aspects of case management for commercial disputes?*

The NY Commercial Division uses a system of differentiated case management for cases designated by the Chief Administrator of the Courts.²³¹ For such cases, it is mandatory for the court to hold a preliminary conference within 45 days from the filing of a request for judicial intervention.²³² During the preliminary conference, the relevant court shall also designate a track to the case. Cases can be allocated to an expedited, standard, or complex track based on the facts and circumstances.²³³ Other provisions include those for holding a compliance conference²³⁴ and pretrial conference²³⁵ to monitor the progress of the case.

4.2.4. Review of Court Decisions

- *Is there any recourse available against a decision rendered by Commercial Courts?*

A party can appeal a decision rendered by federal or state courts.²³⁶ Decisions from federal courts are appealed before the federal appellate circuit courts and then the court of appeals. Appeals from state courts follow a similar mechanism. Appeals from the NY Commercial Division are heard before the New York Supreme Court Appellate Division at the first instance and before the New York Court of Appeals at the last instance.

Finally, parties can file a petition before the Supreme Court requesting to hear a case by granting a writ of certiorari. Such requests, however, are only granted when the case involves federal law on a matter of national importance or when there is a split amongst federal circuit courts.

²³¹ Ibid Rule 202.19.

²³² Ibid Rule 202.19(b).

²³³ Ibid.

²³⁴ Ibid.

²³⁵ Ibid 202.19(c).

²³⁶ For further information on the US Court Appeals, see < <https://www.uscourts.gov/about-federal-courts/court-role-and-structure/about-us-courts-appeals>>.

- *What are the grounds available for an appeal against a decision rendered by Commercial Courts?*

Appeal is generally available on most issues. The standard of review varies depending on whether the appeal concerns a question of law, of fact, or a matter within the court's discretion. Questions of law are reviewed *de novo* without deference to the lower court. Determinations of fact made by a judge are reviewed under the significantly deferential clear error standard, while those made by a jury (whose deliberations are secret) are afforded additional deference and are upheld if supported by substantial evidence. Discretionary judicial decisions are afforded more deference and are only reviewed for abuses of discretion.²³⁷ Violations of the US Constitution or State Constitution can also qualify as a ground for appeal.

4.2.5. Practical Considerations

- *What are the practical considerations to be mindful of in pursuing a case before Commercial Courts?*

The extensive discovery process allowed by courts in the USA, as well as the obligation to preserve documents when litigation becomes foreseeable, is an important consideration that should be kept in mind by parties before commencing litigation in the USA. Since litigation can be commenced before federal or state courts in the USA, several factors should be considered before choosing an appropriate forum including the specialised set of rules governing procedure and evidence, or the likelihood of obtaining relief from a particular court.²³⁸

- *What are the typical costs associated with pursuing a claim before Commercial Courts ?*

The costs associated with pursuing a claim before courts in the USA include court filing fees, fees for the serving process, transcription fees, witness fees and transportation, copying fees, and fees for court-appointed experts or interpreters, and attorney's fees. While there is no clear estimate, a survey conducted for presentation to the Committee on Rules of Practice and Procedure Judicial

²³⁷ Ibid.

²³⁸ 'Avoiding and Managing Commercial Disputes in the US: Overview' Practical Law <https://www.hoganlovells.com/-/media/hogan-lovells/pdf/avoiding_and_managing_commercial_disputes_in_the_us_overview.pdf>.

Conference of the United States,²³⁹ indicates that in simple cases the overall costs go up to a few thousand dollars. Consequently, in complex high value disputes, costs could range around a million dollars or more.

- *What is the average time taken to adjudicate a commercial dispute ?*

In federal courts, the time taken for a case to reach trial was about 32 months in 2021.²⁴⁰ In contrast, the time taken by state courts may be different for different jurisdictions.

- *Expertise of judges*

Judges of the NY Commercial Division serve for indefinite terms and are usually experienced members of the New York State Supreme Court.²⁴¹ These judges have a blended experience of commercial, real estate, and litigation cases, through practice as commercial lawyers.²⁴²

- *Strong features and Main Challenges*

The application of specialised rules during commercial trials to allow efficient and proper conduct of proceedings is one of the strongest features of commercial courts in the USA, such as the NY Commercial Division. The frequent use and employment of modern technology allowing electronic trial aids and video conferencing is also a key feature of commercial courts in the USA.

Some commercial courts in the USA such as the New York Commercial Division allow international parties to include New York law as the applicable law in certain circumstances. The predictable and stable legal framework under New York Law also adds to the preference of the international business community in choosing this as a forum for resolving complex commercial disputes. On the other hand, the complex trial court structure in states such as New York requiring

²³⁹ ‘Litigation Cost Survey of Major Companies’ Lawyers for Civil Justice < https://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies_0.pdf>.

²⁴⁰ ‘United States: Litigation’ The Legal 500 < <https://www.legal500.com/guides/chapter/united-states-litigation/>>.

²⁴¹ International Commercial Courts Review 2022 (n 41).

²⁴² Ibid.

certain claims to be filed before multiple courts, makes it burdensome and often time consuming for litigants to pursue a claim.²⁴³

²⁴³ ‘Chief Judge DiFiore, Senate and Assembly Judiciary Chairs Hoylman and Lavine Announce Introduction of Constitutional Amendment for Court Reform and Simplification’ New York State: Unified Court System < https://www.nycourts.gov/LegacyPDFS/press/pdfs/PR22_03.pdf>.

4.3. Singapore

4.3.1. Introduction

- *What are the main commercial courts?*

Commercial disputes in Singapore can be heard before the General Division of the Singapore High Court (which forms part of the Supreme Court of Singapore) or State Courts depending on the quantum of the claim.²⁴⁴ The General Division of the Singapore High Court has an international division called the Singapore International Commercial Court which hears cases that are international and commercial in nature.²⁴⁵ The Singapore International Commercial Court (SICC) is one of the main commercial courts in Singapore.

- *When were Commercial Courts first established?*

In 1969, the Supreme Court of Judicature Act established the Supreme Court of Singapore which comprised of the High Court, Court of Appeal and Court of Criminal Appeal.²⁴⁶ The SICC was established in 2015.²⁴⁷

4.3.2. Jurisdiction

- *What differentiates a Commercial Court from other civil courts?*

Proceedings commenced before the SICC function differently from those commenced before other civil courts in Singapore. SICC cases are governed by ‘SICC Rules’ aimed at expeditious and efficient administration of justice,²⁴⁸ while other civil cases are bound by the rules of civil procedure. Another distinguishing feature of proceedings before the SICC is that the parties are free to choose the governing law of a contract and are not strictly bound by Singaporean law. In

²⁴⁴ ‘Role and structure of the Supreme Court’, Singapore Courts < <https://www.judiciary.gov.sg/who-we-are/role-structure-supreme-court/role>>.

²⁴⁵ Ibid.

²⁴⁶ ‘History of the courts’, Singapore Courts <<https://www.judiciary.gov.sg/who-we-are/history-courts>>.

²⁴⁷ ‘Establishment of the SICC’, Singapore Courts <<https://www.sicc.gov.sg/about-the-sicc/establishment-of-the-sicc>>.

²⁴⁸ ‘Singapore International Commercial Court’, Singapore Courts < <https://www.judiciary.gov.sg/news-and-resources/news/news-details/media-release-singapore-international-commercial-court-introduces-standalone-sicc-rules-2021-to-incorporate-international-best-practices-and-facilitate-international-dispute-resolution>>.

contrast, civil courts hearing commercial disputes are bound, in principle, by Singaporean law. Additionally, the SICC differs from other civil courts by having a separate Technology, Infrastructure and Construction list tailored for technical and complex disputes. As will be mentioned below, cases placed on that list benefit from additional features pertaining to case management and technical infrastructure.

- *What is the basis of jurisdiction of Commercial Courts?*

Generally, the Commercial Courts in Singapore have jurisdiction over the entire range of commercial matters, including banking, insurance, companies, construction, shipping, intellectual property, and international arbitration.²⁴⁹

Specifically, the SICC has jurisdiction to hear a case if:

- a. The claim is of an international and commercial nature;²⁵⁰
- b. The parties have submitted to the jurisdiction of SICC by way of a written jurisdiction agreement;²⁵¹ and
- c. The relief sought by the parties is not prerogative in nature (i.e. including a mandatory order or a quashing order, a prohibitory order or an order for review of detention).²⁵²

- *What are the types of disputes that may not be considered by Commercial Courts?*

Large commercial disputes are usually brought in the General Division of the Singapore High Court, which is part of the Singapore Supreme Court. The jurisdiction of the Singapore High Court has no monetary limits. However, it generally hears cases where the claim amount exceeds SGD250,000. This is because the Singapore State Courts have jurisdiction to hear cases where the claim amount does not exceed SGD250,000.²⁵³

²⁴⁹ 'Role and structure of the Supreme Court', Singapore Courts < <https://www.judiciary.gov.sg/who-we-are/role-structure-supreme-court/role>>.

²⁵⁰ Singapore International Commercial Court Rules 2021, Order 2 Rule 1.

²⁵¹ Ibid.

²⁵² Ibid.

²⁵³ Loong Tse Chuan, Melissa Mak and Tan Xeauewei, Allen & Gledhill LLP, 'Litigation and Enforcement in Singapore: Overview' Practical Law, available at [https://ca.practicallaw.thomsonreuters.com/9-575-0765?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://ca.practicallaw.thomsonreuters.com/9-575-0765?transitionType=Default&contextData=(sc.Default)&firstPage=true)

With regard to international jurisdiction, if any of the parties is not “international” (i.e. does not have a place of business outside of Singapore or if the place where the substantial commercial obligations to be performed is within Singapore, the place where the subject matter of the action is most closely connected to, is Singapore), such a dispute will not fall within the jurisdiction of the SICC. Additionally, the SICC may also decline jurisdiction of the case if it considers the case to be an abuse of the process of the Court.²⁵⁴ Lastly, the SICC may decline jurisdiction if it considers that the General Division has jurisdiction over the case and the parties consent to the case being heard in the General Division.²⁵⁵

- *Can Commercial Courts in Singapore hear international commercial disputes?*

The SICC can hear international disputes if the case falls under the jurisdiction of the Court as described above.

4.3.3. Procedure, Function and Organisation

- *What are the distinguishing features of the procedural framework dealing with commercial disputes ?*

Various aspects of the dispute such as filing of court documents, managing and scheduling of court hearings, service of documents, etc. are handled by an integrated electronic litigation system called eLitigation.²⁵⁶

Another interesting aspect, relates to the different disclosure rules for domestic and international commercial law matters. In the State Courts and the Singapore High Court, under the Singapore Rules of Court, each party is required to disclose to the other the existence of all relevant documents which are, or have been, in its possession or control.²⁵⁷ On the contrary, for proceedings in the SICC, the rules relating to discovery are simplified and the parties' disclosure obligations are more limited. For SICC proceedings, a party only needs to produce documents in its possession or control on which that party relies.

²⁵⁴ Ibid Order 2 Rule 3(2).

²⁵⁵ Ibid Order 2 Rule 3(5).

²⁵⁶ ‘About eLitigation’, eLitigation <[https://www.elitigation.sg/ layouts/IELS/HomePage/Pages/AboutElit.aspx](https://www.elitigation.sg/layouts/IELS/HomePage/Pages/AboutElit.aspx)>.

²⁵⁷ Singapore International Commercial Court Rules 2021, Order 9 Rule 3.

In cases that do not have a connection to Singapore, the SICC Rules allow parties to be represented by a registered foreign lawyer who is also permitted to make submissions before the Court²⁵⁸ instead of being brought in as an expert witness. The SICC Rules also allow parties to choose the rules of evidence that apply to the case at hand.²⁵⁹ These may be rules other than those found in Singaporean law.²⁶⁰

- *What are the key aspects of case management for commercial disputes?*

Case management conferences play a key role in commercial dispute proceedings. The Court may hold as many case management conferences as the Court finds appropriate and at any stage of the proceedings, including at the appeal stage.²⁶¹ As a general rule, the Registrar conducts the case management conference but the Registrar may refer any matter at any time to the assigned Judge.²⁶² The intent is for the Case Conference to be presided over by the Judges or Registrars in consultation with the Judges. The Judge will be actively involved from the outset and as cases progress, working with the parties to find the best way to resolve each case, and eliminating extraneous issues. At a case conference, the Court is to take control of and set the timelines and give directions for the proceedings.²⁶³ This will ensure that the Judges have close control over the manner in which a case progresses.²⁶⁴

Cases placed on the Technology, Infrastructure and Construction list benefit from additional case management features including giving the judge flexible powers relating to the management of expert evidence, the exchange of affidavits of evidence-in-chief prior to disclosure of documents, and the presentation of the parties' cases using Scott Schedules (a table summarising each parties' positions and evidence relied on).²⁶⁵ With the consent of parties, cases under this list also have the option of adopting a simplified adjudication process protocol.

²⁵⁸ Singapore International Commercial Court Rules 2021, Order 3 Rule 1.

²⁵⁹ Ibid, Order 13 Rule 15.

²⁶⁰ Ibid.

²⁶¹ Singapore International Commercial Court Rules 2021, Order 9 Rule 3.

²⁶² Ibid.

²⁶³ Ibid.

²⁶⁴ Paragraph 13, Report of the Civil Justice Review Committee.

²⁶⁵ 'The Technology, Infrastructure and Construction List', Singapore Courts <<https://www.sicc.gov.sg/the-technology-infrastructure-and-construction-list>>.

The specialised rules and practice directions that apply to the SICC are tailored to adopt international best practices for the resolution of commercial disputes. For example, the parties may opt to apply internationally recognised standards to matters of evidence in place of the Singapore rules of evidence; and the procedure for document production is streamlined to focus primarily on documents on which the parties rely – which can result in a more efficient litigation process.

The SICC Rules direct that before the first case management conference takes place, parties must attempt to agree on certain matters such as the adjudication track for the determination of the dispute, the conduct of proceedings including the use of technology in the management and disclosure of documents, the conduct of trial, etc.²⁶⁶ These features are aimed towards the smooth and efficient conduct of trials. Further, several rules under the procedure governing SICC proceedings promote the exploration of alternative dispute resolution mechanisms such as settlement as part of the case management protocols.²⁶⁷ Lastly, non-compliance with any directions aimed at the efficient conduct of the proceedings, allows the SICC to impose costs or other sanctions on the defaulting party.²⁶⁸

4.3.4. Review of Court Decisions

- *Is there any recourse available against a decision rendered by Commercial Courts?*

First instance decisions of the General Division of the High Court can be appealed by the parties to the Appellate Division of the High Court. No permission is required to appeal a judgment on the merits. However, if the amount in dispute at the hearing before the General Division of the High Court does not exceed SGD250,000, permission to appeal is required.²⁶⁹

For international commercial disputes, an appeal can be made against a decision of the SICC to the Court of Appeal. Unlike the General Division of the High Court of Singapore which has a

²⁶⁶ Singapore International Commercial Court Rules 2021, Order 9 Rule 3.

²⁶⁷ Ibid Order 9 Rule 5.

²⁶⁸ Ibid Order 9 Rule 6(4).

²⁶⁹ Supreme Court of Judicature Act 1969, s 29A.

separate division for the SICC, the Court of Appeal has no separate SICC-like division. The Court of Appeal is the highest court for challenging decisions of the SICC.²⁷⁰

- *What are the grounds available for an appeal against a decision rendered by Commercial Courts?*

Permission to appeal may only be granted if the appeal raises a point of law of public importance.²⁷¹ There are limited grounds to appeal on findings of fact, whereas an appeal on a point of law is more likely to be readily considered.

4.3.5. Practical Considerations

- *What are the practical considerations to be mindful of in pursuing a case before Commercial Courts?*

For complex financial disputes situated in Asia, commercial courts in Singapore might be a more practical and cost-effective option in comparison to European or US. Additionally, for certain subject matters that cannot be subject to arbitration according to the national law, the SICC might be a more effective and determinative forum for resolving international commercial disputes, as it bypasses issues of jurisdiction. Litigating before the commercial courts in Singapore can also be more cost efficient in comparison to other similar dispute resolution methods in Singapore.

Finally, Parties should be mindful that the law requires the party to make an offer of amicable resolution before commencing proceedings unless the party has reasonable grounds not to do so. An offer of amicable resolution refers to making an offer to settle the proceedings or to resolve the dispute other than by litigation, whether in whole or in part. In case parties do not attempt to resolve the dispute by amicable resolution, the Rules of Court 2021 empower the court to issue an order that they must attend ADR in appropriate cases. The efforts made by the parties at amicable

²⁷⁰ SICC Procedural Guide Section 15 available at [https://www.sicc.gov.sg/docs/default-source/legislation-rules-pd/2022-09-26---sicc-procedural-guide-\(wef-1oct2022\).pdf](https://www.sicc.gov.sg/docs/default-source/legislation-rules-pd/2022-09-26---sicc-procedural-guide-(wef-1oct2022).pdf)

²⁷¹ Ibid s 47.

resolution will be taken into account by the court when dealing with costs (after it has determined the merits of the action or appeal).²⁷²

- *What are the typical costs associated with pursuing a claim before Commercial Courts?*

The award of costs (including the quantum awarded) is at the court's discretion. The general rule is that costs follow the event (that is, the successful party recovers its legal costs from the unsuccessful party). Nevertheless, a successful party may be deprived of some or all of its legal costs if its conduct of the matter has caused a significant increase in the length of the proceedings, or if it has raised issues or made allegations improperly or unreasonably.²⁷³

In addition to lawyers' fees and miscellaneous charges that are subjective, pursuing a commercial claim before the SICC entails payment of court fees. Court fees include milestone fees, hearing fees, and miscellaneous fees payable for SICC proceedings and appeals.²⁷⁴ The applicable fees and charges are governed by the SICC Rules 2021.²⁷⁵ Typically, a milestone fee of 3740 SGD²⁷⁶ is payable on the filing of a statement of claim where the main action is to be heard by a single judge whereas a fee of 5390 SGD²⁷⁷ is payable on the filing of a statement of claim where the main action is to be heard by three judges. Similarly, fees are payable by the defendant on the filing of a statement of defense - 3740 SGD²⁷⁸ (single judge) and 5390 SGD²⁷⁹ (three judges).

Additional fees are payable when a third party is joined to the proceedings or when a hearing for case management is set to take place or if a party files for an interlocutory application. Hearing fees for a trial lasting up to four days and heard by a single judge is 4500 SGD²⁸⁰ whereas it is 13,500 SGD²⁸¹ for a trial lasting up to 4 days and heard by three judges.

²⁷² Loong Tse Chuan, Melissa Mak and Tan Xeauwei, Allen & Gledhill LLP, 'Litigation and Enforcement in Singapore: Overview' Practical Law, available at [https://ca.practicallaw.thomsonreuters.com/9-575-0765?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://ca.practicallaw.thomsonreuters.com/9-575-0765?transitionType=Default&contextData=(sc.Default)&firstPage=true)

²⁷³ Ibid.

²⁷⁴ 'Fees and Charges' Singapore International Commercial Court < <https://www.sicc.gov.sg/forms-and-services/fees-and-charges>>.

²⁷⁵ Ibid.

²⁷⁶ SICC Rules 2021 (n 75), Order 26 rule 3.

²⁷⁷ Ibid.

²⁷⁸ Ibid.

²⁷⁹ Ibid.

²⁸⁰ Ibid Order 26 rule 4.

²⁸¹ Ibid.

Similarly, the SICC Rules contain a detailed schedule of fees applicable for other contexts such as the hearing of an interlocutory application,²⁸² a trial lasting longer than four days,²⁸³ other applications,²⁸⁴ etc. The SICC Rules also contain a detailed schedule for miscellaneous items such as fees applicable for requesting a true copy of a document,²⁸⁵ for inspecting a court file,²⁸⁶ certified translation by an inspector of the Court,²⁸⁷ etc.

- *What is the average time taken to adjudicate a commercial dispute?*

Legal proceedings in Singapore may take 12 to 18 months at the State Courts, and 12 to 24 months or more at the High Court, although the actual duration will depend on the unique issues in each case and how aggressive the defendant is in defending the case.²⁸⁸

Expertise of judges

Judges in the SICC are usually highly regarded international jurists with extensive experience in commercial matters. They have a minimum of 10 years' post qualification experience.²⁸⁹ Due to the international nature of the court, the judges appointed to the court come from a mix of civil and common law jurisdictions including the United Kingdom, United States, Australia, France, Hong Kong and Japan. Sometimes judges are appointed to hear a particular case. More often, judges are appointed for a fixed term.

- *Strong features and Main Challenges*

The SICC has several advantages for international users over the domestic courts. For example, key distinguishing features include a panel of international judges, the possibility of having foreign legal representation, the determination of foreign law on the basis of submissions rather than expert

²⁸² Ibid.

²⁸³ Ibid.

²⁸⁴ Ibid.

²⁸⁵ Ibid Order 26 rule 5.

²⁸⁶ Ibid.

²⁸⁷ Ibid.

²⁸⁸ Civil Litigation: How to Sue in Singapore (Step-by-Step Guide) available at <<https://singaporelegaladvice.com/law-articles/civil-litigation-in-singapore>>.

²⁸⁹ International Commercial Courts Review 2022 (n 41).

evidence, the exclusion of Singapore's laws of evidence and the ability to limit or vary the right of appeal. Additionally, the possibility of having foreign legal representation, the option to exclude the laws of Singapore for evidentiary purposes and the limited grounds of appeal are other advantages.

In the field of civil and commercial justice, Singapore is party to the 2005 Hague Choice of Court Convention which, in cases within its scope, can assist with the recognition and enforcement of the judgment of a Singapore Court (including the SICC) in other states party to that instrument.

4.4. India

4.4.1. Introduction

- *What are the main Commercial Courts?*

In 2015, the upper house of the Indian parliament passed the Commercial Courts Act, 2015²⁹⁰ (“the Commercial Courts Act”), allowing the establishment of commercial divisions in High Courts having ordinary civil jurisdiction.²⁹¹ Consequently, Commercial Courts were established in Delhi, Bombay, Calcutta, Madras and Himachal Pradesh,²⁹² which are considered to be the main commercial courts in the country.

- *When were Commercial Courts first established?*

Commercial courts were first established in 2015 when the Commercial Courts Act came into force.²⁹³

4.4.2. Jurisdiction

- *What differentiates a Commercial Court from other civil courts?*

The 253rd Law Commission Report²⁹⁴ that provided recommendations on the establishment of commercial courts before the Commercial Courts Act came into force, highlighted the need for a mechanism that provides a fair, expeditious, and effective disposal of cases. Consequently, numerous procedural provisions for speedy disposal of cases were introduced through the Commercial Courts Act which differentiates the functioning of commercial courts from other civil

²⁹⁰ The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 <https://prsindia.org/files/bills_acts/acts_parliament/2015/commercial-courts-act,-2015.pdf> (The Commercial Courts Act 2015).

²⁹¹ Ibid s 4.

²⁹² ‘The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Bill, 2018’ <<https://prsindia.org/billtrack/the-commercial-courts-commercial-division-and-commercial-appellate-division-of-high-courts-amendment-bill-2018>> (Commercial Courts (Amendment) Act 2018).

²⁹³ The Commercial Courts Act 2015 (n 1).

²⁹⁴ Law Commission of India, Commercial Division and Appellate Division of the High Courts and Commercial Courts Bill, 2015 (253rd Report, January 2015) <<https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081674.pdf>>.

courts. These provisions include measures for case management,²⁹⁵ timely filing of pleadings,²⁹⁶ and limited filing of documents.²⁹⁷

- *What is the basis of jurisdiction of Commercial Courts?*

Section 7 of the Commercial Courts Act²⁹⁸, establishes the jurisdiction of commercial courts in India. It lays down that all claims and applications relating to commercial disputes need to fulfill a “specified value”²⁹⁹ requirement. Consequently, such cases can be heard before the commercial division of the High Court having territorial jurisdiction over the subject matter.³⁰⁰ Currently, the specified value of commercial disputes in India is INR 300,000 (approx. USD 3600).³⁰¹

- *What are the types of disputes that may not be considered by Commercial Courts?*

The Commercial Courts Act contains an elaborate and exhaustive list of disputes that qualify as commercial disputes.³⁰² This includes disputes that arise out of construction contracts, licensing agreements, joint venture agreements, transactions of merchants, bankers, financiers, traders, etc., shareholders agreements, and technology development agreements, among others.³⁰³ Due to the exhaustive nature of the list, any dispute that does not form part of the list may not be considered to be a commercial dispute by the relevant court.

In *Ambalal Sarabhai v. K. S. Infraspace*,³⁰⁴ the Indian Supreme Court held that for an immovable property dispute to qualify as a commercial dispute, the immovable property must be used exclusively or be considered to be used exclusively, in trade and commerce. As a result, disputes

²⁹⁵ The Commercial Courts Act, 2015 (n 1), Schedule.

²⁹⁶ Ibid.

²⁹⁷ Ibid.

²⁹⁸ Herewith as amended by the The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018.

²⁹⁹ Ibid s 1(i).

³⁰⁰ Ibid s 7.

³⁰¹ The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018, s 4 <[https://prsindia.org/files/bills_acts/bills_parliament/2018/Commercial%20Courts%20\(Amendment\)%20Act,%202018.pdf](https://prsindia.org/files/bills_acts/bills_parliament/2018/Commercial%20Courts%20(Amendment)%20Act,%202018.pdf)> (The Commercial Courts (Amendment) Act 2018).

³⁰² Commercial Courts Act 2015 (n 1), s 2(c).

³⁰³ Ibid.

³⁰⁴ *Ambalal Sarabhai Enterprises Ltd. v. K.S. Infraspace LLP & Anr* Civil Appeal No 7843/19 (Supreme Court of India, 4 October 2019).

not having a link to substantial commercial activity may not be considered as a commercial dispute by Indian courts.

- *Can Commercial Courts in India hear international commercial disputes?*

Under the Commercial Courts Act, there is no bar on hearing international commercial disputes as long as the dispute falls under the territorial and pecuniary jurisdiction of the relevant commercial court, as specified above.

4.4.3. Procedure, Function and Organisation

- *What are the distinguishing features of the procedural framework dealing with commercial disputes?*

Certain nuanced procedural provisions were introduced under the Commercial Courts Act, aimed at resolving commercial disputes in an efficient and timely manner. Those are as follows: Firstly, the time allowed to a party to file a written statement in a commercial dispute is severely limited in comparison to a civil dispute. While extensions may be granted by the relevant commercial court for reasons recorded in writing and on the payment of costs as such court deems fit, the Commercial Courts Act, specifies that under no circumstances can the time to file a written statement be extended beyond 120 days from the date of service of the summons.³⁰⁵

Secondly, the Commercial Courts Act sets out that all relevant documents in the dispute need to be listed along with the first set of pleadings and disallows any additional documents to be filed except in urgent circumstances necessitating the grant of such a request by the relevant court.³⁰⁶ Thirdly, the Commercial Courts Act allows the relevant court to decide cases in a summary manner, i.e. without recording oral evidence.³⁰⁷

³⁰⁵ The Commercial Courts Act, 2015 (n 1), Schedule.

³⁰⁶ Ibid.

³⁰⁷ Ibid.

- *What are the key aspects of case management for commercial disputes?*

The Commercial Courts Act introduced a new feature of case management for commercial disputes,³⁰⁸ to the Code of Civil Procedure (1908). The new Order XV-A stipulates that the first case management hearing should be held within four weeks from the date of filing the statement of admission and denial of documents.

Further, the relevant court is encouraged to pass an order fixing key dates and issues such as the witnesses to be examined, dates for filing affidavits by parties, dates for recording evidence, dates by which written arguments are to be filed before the relevant court, etc.³⁰⁹

Additionally, this Order stipulates that the relevant court should ensure that closing arguments in the trial are concluded within six months from the date of the first case management hearing.³¹⁰

4.4.4. Review of Court Decisions

- *Is there any recourse available against a decision rendered by Commercial Courts?*

An appeal against a decision rendered by a commercial court can be filed before the commercial appellate court.³¹¹ The Commercial Courts Act establishes commercial appellate courts that deal with appeals arising from a decision of the commercial court.³¹² A further (second) appeal can be filed before the Supreme Court after seeking special leave under Article 136 of the Constitution.³¹³

- *What are the grounds available for an appeal against a decision rendered by Commercial Courts?*

The Commercial Courts Act specifies that only those orders specified under Order XLIII of the Code of Civil Procedure, 1908 or Section 37 of the Arbitration and Conciliation Act, 1996, are appealable.³¹⁴ A first appeal can be made on the grounds of error in appreciation of the facts and the law. A further (second) appeal before the Supreme Court requires leave to appeal to be granted which is discretionary and granted when there is a dispute on a substantial question of law.

³⁰⁸ The Code of Civil Procedure 1908, Order XV-A.

³⁰⁹ Ibid.

³¹⁰ Ibid.

³¹¹ The Commercial Courts Act, 2015 (n 1), s 13(1).

³¹² Ibid, s 5(1).

³¹³ The Constitution of India, art 136 <<https://legislative.gov.in/sites/default/files/COI-updated-as-31072018.pdf>>.

³¹⁴ Ibid s 13(1).

4.4.5. Practical Considerations

- *What are the practical considerations to be mindful of in pursuing a case before Commercial Courts?*

Courts with original jurisdiction such as Delhi or Mumbai have specialist judges that are trained to resolve complex high-value commercial claims. In contrast, district judges may not have equivalent experience or expertise. Therefore, while bringing a claim, parties should be mindful of the specific court jurisdiction that they submit their dispute to. Gradual but slow development of case management techniques as well as the already pending backlog of cases before courts, is an important consideration to keep in mind before litigating in India.

The judge can refer parties to certain forms of ADR (mediation, judicial settlement and Lok Adalat³¹⁵) at any time during the proceeding, even at the appellate stage and without the consent of the parties. However, parties can be referred to arbitration and conciliation only with their consent. The 2018 amendment to the Commercial Courts Act mandates mediation before the institution of the case, in instances where no urgent interim reliefs are sought. In addition, after the admissions and denials of the parties to a suit are recorded, courts usually conduct a hearing to determine whether the case is suitable for settlement through mediation and will only proceed if it is found not suitable.³¹⁶

- *What are the typical costs associated with pursuing a claim before Commercial Courts?*

The provisions for awarding costs in civil litigation in India are enshrined in the Code of Civil Procedure (1908) under Sections 35, 35A, and 35B, and Orders XX-A, and XXV. Sections 35, 35A, and 35B of the Code of Civil Procedure stipulate provisions relating to the award of "general costs", "compensatory costs" for false/vexatious claims, and "costs for delay", respectively. Order

³¹⁵ Lok Adalat is one of the alternative dispute redress mechanisms, it is a forum where disputes/cases pending in the court of law or at pre-litigation stage are settled/ compromised amicably. National Legal Services Authority, 'Lok Adalat' < <https://nalsa.gov.in/lok-adalat#:~:text=Lok%20Adalat%20is%20one%20of,Legal%20Services%20Authorities%20Act%2C%201987>>.

³¹⁶ Practical law, "Litigation and enforcement in India: overview" available at <[https://uk.practicallaw.thomsonreuters.com/5-502-0726?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#co_anchor_a205459](https://uk.practicallaw.thomsonreuters.com/5-502-0726?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a205459)>

XX-A of the Code of Civil Procedure envisages costs in relation to certain specific expenditures, such as costs incurred for issuing notices, and the printing of pleadings.

Regulations differ for commercial matters under the Commercial Courts Act based on which the courts have the discretion to determine, *inter alia*, (a) the quantum of such costs; and (b) when such costs are to be paid.³¹⁷ Moreover, the applicability of Section 35A(2) of the Code mandating courts to levy costs not exceeding INR 3000 has been omitted from the Act.

- *What is the average time taken to adjudicate a commercial dispute?*

The World Bank's 2016 'Ease of Doing Business' Report provides that on average, the time consumed in resolving civil disputes in India (including commercial disputes) is 1,420 days.³¹⁸

- *Expertise of judges*

Section 3 of the Commercial Courts Act,³¹⁹ allows the government of each State, after consultation with the Chief Justice of the relevant High Court, to appoint judges having experience in dealing with commercial disputes. Accordingly, appointments of judges to commercial courts are made on the basis of practice and experience in the commercial sector,³²⁰

- *Strong features and Main Challenges*

While the legislation and the legislative history reiterate a commitment to promote the effective resolution of commercial disputes, the practice does not always conform to this reiteration. A review of the roster on the Bombay High Court shows that the same judges are seen alternating between their civil court duties and duties on the commercial division/commercial appellate division.³²¹ This has increased the workload on an over-burdened judiciary.

³¹⁷ Section 16, The Commercial Courts Act, 2015.

³¹⁸ World Bank's Report on 'Ease of Doing Business', World Bank < www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB16-Full-Report.pdf>.

³¹⁹ The Commercial Courts (Amendment) Act 2018 (n 115), s 3(3).

³²⁰ Ibid.

³²¹ See the roster list of the Bombay High Court, available at: <http://bombayhighcourt.nic.in/sittinglist/PDF/sitlistbomos20170605182929.pdf>>.

Similarly, there have been suggestions that the Commercial Courts Act in India needs to adopt competitive practices such as e-filing, cross-examination of witnesses through video-conferencing, as well as digital transcription services.³²² It is encouraging to note that few courts in India, on their own initiative, have adopted the e-filing procedures. Lastly, the discovery procedures, envisaged within the legislation raise concern for dilatory and protracted procedures related to document production requests before the courts, thus not contributing to expeditious and efficacious dispute resolution.³²³

³²² Sai Ramani Garimella, M.Z. Ashraful “The Emergence of International Commercial Courts in India: A Narrative for Ease of Doing Business?” (2019) Erasmus Law Review, Issue 1.

³²³ Commercial Courts Act, 2015 –Order XI Disclosure, Discovery and Inspection of Documents in Suits before the Commercial Division of a High Court or a Commercial Court.

5. Comparative Assessment of Civil Law and Common Law Commercial Courts

A review of leading commercial courts demonstrates that there is no “secret recipe” for the development of an efficient system of commercial courts. Each system is different, and the actual success of a jurisdiction in the “Global competition for justice” comes down to much more than just the composition of a court and its procedure. However, there are certain elements which could contribute to a legal system’s success. More than that, with some fine-tuning and drawing the necessary conclusions, a commercial court system can be improved and inspire certainty and trust in the eyes of commercial parties.

Hereinbelow, civil and commercial courts will be held under closer scrutiny through a comparative assessment, which will analyse common features (such as the expertise of judges, procedures, etc.) as well as material differences (such as the creation of stand-alone commercial courts). It is worth adding that there are some elements (for example, the extent of discovery), which could be idiosyncratic in one system and completely ignored in another due to the legal system’s legal culture and/or legal history. The aim of this analysis is to consider issues that could transcend the boundaries of civil or common law and increase the overall efficiency of commercial justice irrespective of the jurisdiction.

5.1. Types of Commercial Courts

The approach to the resolution of commercial disputes varies from jurisdiction to jurisdiction. Some countries have chosen to create autonomous commercial courts, whilst others have developed commercial divisions within first instance courts.

In the common law tradition, England and Wales has created an autonomous Commercial Court which forms part of the King’s Bench Division of The High Court of England and Wales but operates solely on commercial law cases.³²⁴ On the other hand, the US, has adapted the resolution of commercial disputes to its federal type of governance introducing a federal commercial court (the United States District Court for the Southern District of New York) and multiple Commercial

³²⁴ Courts and Tribunals Judiciary, ‘High Court’ < <https://www.judiciary.uk/courts-and-tribunals/high-court/>>.

Divisions within district courts of different cities that constitute state courts (e.g. Delaware, California, Philadelphia).³²⁵ Similarly, in Singapore, commercial disputes can be heard before the General Division of the Singapore High Court (which forms part of the Supreme Court of Singapore) or State Courts. The same pattern is followed by India through the establishment of commercial divisions in High Courts (e.g. in Delhi, Bombay, Calcutta, Madras and Himachal Pradesh)³²⁶ which are considered to be the main commercial courts in the country.

The civil law systems have followed a similar approach to common law countries in this respect. Commercial disputes are mainly submitted to courts that form part of either Supreme Court divisions or district court divisions. In Germany, competence in case of commercial disputes is usually allocated to Regional Courts (“Landgericht”).³²⁷ Despite the lack of a specific statutory obligation, some of the Regional Courts, which are courts of first instance, have also established Commercial Chambers (“Kammer für Handelssachen”) such as the Hamburg Court, Stuttgart, Mannheim, and Frankfurt am Main.³²⁸ In Kazakhstan there are no separate Commercial Courts as most commercial disputes are heard by the specialised inter-district economic courts.³²⁹ As such, there are no independent standing commercial courts at the level of Oblast courts (regional courts), however, these courts can operate specialised divisions. Kazakhstan has also created its first private court specialising in financial and commercial disputes, the Astana International Financial Centre (AIFC) Court,³³⁰ which constitutes a very promising addition to the country’s dispute resolution framework. South Africa, on the other hand, has followed the well beaten track of creating one dedicated Commercial Court, in its case a court that falls under the Gauteng Division

³²⁵ ‘Commercial Division – NY Supreme Court’, New York State Unified Court System <<https://ww2.nycourts.gov/courts/comdiv/history.shtml#:~:text=In%20November%201995%2C%20the%20Commercial,and%20in%20New%20York%20County>>.

³²⁶ ‘The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Bill, 2018’ <<https://prsindia.org/billtrack/the-commercial-courts-commercial-division-and-commercial-appellate-division-of-high-courts-amendment-bill-2018>> (Commercial Courts (Amendment) Act 2018).

³²⁷ Rüdiger Harms and Patrick Gerardy, Litigation: Germany, Available at <https://globalarbitrationreview.com/insight/know-how/litigation/report/germany>. Litigation and Enforcement in Germany: Overview Court Structure, Practical Law, Available at [https://uk.practicallaw.thomsonreuters.com/1-502-0728?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#co_anchor_a237668](https://uk.practicallaw.thomsonreuters.com/1-502-0728?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a237668)

³²⁸

³²⁹ Andrey Anatolyevich Butyrsky, Lyudmila Nikolaevna Nikolenko, Natalya Valerievna Ivanyuta, Irina Anatolyevna Butyrskaya, Yulia Valerievna Kabenok, Economic Disputes Resolving Models by Courts in the Post-Soviet Countries, Journal of Legal, Ethical and Regulatory Issues, Vol. 24 Iss. 2, 2021. Available at <https://www.abacademies.org/articles/economic-disputes-resolving-models-by-courts-in-the-postsoviet-countries-10505.html>

³³⁰ Astana International Financial Centre (AIFC) Court: <https://court.aifc.kz/>

of the High Court of South Africa. Last but not least, France has an impressive and strong system of specialised commercial courts, with 134 commercial courts located all over the country.³³¹ By far the most important and most significant court is the Paris Commercial Court (“Le Tribunal de Commerce de Paris”). Of all jurisdictions analysed, the French Commercial Courts constitute the only autonomous commercial courts that do not form a division or sub-division of another court. However, it must be noted that the Commercial Courts operate only on the level of first instance: appeals are decided upon by commercial divisions of general Appeal Courts.

Most countries, then, have chosen to keep their commercial courts within the framework of the general court structure. This ensures that judicial safeguards applied to all courts are also applied to commercial divisions. These safeguards are reflected in such features as the possibility to appeal decisions of commercial courts, time limits for determination, efficient case management of the dispute, and interim relief requests, which constitute the minimum framework for the resolution of any dispute. Building on this, the resolution of commercial disputes can provide further benefits such as specialised judges, streamlined submission of documents, sometimes hearings in English, and special rules on document disclosure as further discussed below.

5.2. Jurisdiction of Commercial Courts

A common denominator for jurisdiction which can be identified across civil and commercial-law countries is conferring jurisdiction to commercial courts when a dispute relates to merchants or companies involved in commercial transactions. This is frequently coupled by competence in banking and finance disputes, M&A, IP, shipping, and construction. For instance, South-African law generally refers to jurisdiction based on a “broadly commercial transaction or commercial relationship”.³³² However, it also enumerates, in a non-restrictive way, specific types of disputes that can be submitted to commercial courts referring to, inter alia, insolvency and insurance disputes.³³³ Despite the large area of overlap among jurisdictions, there is some variations from jurisdiction to jurisdiction as whether certain cases, such as property or construction disputes, fall

³³¹ Le tribunal de Commerce, available at

³³² Commercial Court Practice Directive, Schedule 1 available at < https://www.johannesburgbar.co.za/wp-content/uploads/Commercial-Court-Practice-Directive_-final.pdf>.

³³³ Fast-tracking Commercial Litigation in the South African High Court, Available at <https://www.clydeco.com/en/insights/2021/01/fast-tracking-commercial-litigation-in-the-south-a>

under the jurisdiction of a commercial court. For example, property matters, and contracts between non-merchants do not fall under the competence of French Commercial Courts.³³⁴

There are further variations in the jurisdiction of commercial courts from country to country. Certain legal systems operate specialised courts for certain categories of commercial disputes. At the level of first-instance, the German Commercial Courts of Mannheim and Stuttgart are specialised in corporate, M&A, banking and finance disputes.³³⁵ Similarly, the Nur-Sultan City Specialised Inter-District Economic Court of Kazakhstan is the sole competent court to decide foreign investment disputes.

Taking the discussion a step further, certain legal systems have employed different ways to filter cases or to prevent a situation of a “floodgate” into commercial courts. Some jurisdictions have introduced a monetary threshold for commercial claims. India for example, has imposed a value requirement of INR 300,000 (approx. USD 3,600) on claims submitted to the commercial court.³³⁶ Similarly, the US has a threshold of 75,000 USD for federal courts’ jurisdiction.³³⁷ Generally, a “*de minimis*” value for domestic commercial cases should be established taking into consideration the overall performance of commercial entities and other data such as minimum wages and wider commercial practices in the jurisdiction. On the other hand, a monetary threshold for international disputes should further take into consideration the general popularity of a given jurisdiction’s courts. In general terms, if a value is set too low compared to the added value produced by a given court system, this can overburden the commercial court with an increased caseload.

Last but not least, jurisdiction might vary depending on the international character of a dispute. In general terms, all jurisdictions analysed require an international element in order to confer to courts competence over an international dispute. Whether a dispute is international in character and how it influences jurisdiction is a matter of private international law and civil procedure. Usually, a choice of forum agreement between foreign or domestic parties will be given effect by the courts, in both domestic and international disputes.

³³⁴ Article L 721-3 and L721-4 of the French Commercial Code (“Code de Commerce”).

³³⁵ Commercial Court, Stuttgart/Mannheim available at <https://www.commercial-court.de/en/commercial-court>

³³⁶ The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018, s 4 <[https://prsindia.org/files/bills_acts/bills_parliament/2018/Commercial%20Courts%20\(Amendment\)%20Act,%202018.pdf](https://prsindia.org/files/bills_acts/bills_parliament/2018/Commercial%20Courts%20(Amendment)%20Act,%202018.pdf)> (The Commercial Courts (Amendment) Act 2018).

³³⁷ 28 U.S.C. § 1332.

As a conclusion, when analysing the jurisdiction of commercial courts, one has to keep in mind several factors that pertain not only to the materiality of the dispute but also to filtering cases through a monetary threshold, operating specialised courts for certain types of commercial disputes, as well as approaching international commercial disputes from a broad spectrum rather than a narrow jurisdictional lens.

5.3. International Commercial Disputes

All of the commercial courts analysed have competence to hear international commercial disputes depending on the national provisions on international jurisdiction. Further, all jurisdictions analysed are likely to give effect to the parties' jurisdiction agreement to submit their international disputes to domestic Commercial courts. Some jurisdictions such as the UK and France are more popular in hearing international commercial disputes due to the quality of the courts, the high rule of law standards and the specialisation of judges in international commercial law matters. Other jurisdictions such as India and South Africa, have not invested in developing a specialised framework for the resolution of international commercial disputes. Kazakhstan is an interesting case as, despite being a civil law country, it has developed a common law private court for the resolution of international commercial disputes.

From a common law perspective, the Commercial Court in England and Wales frequently hears international commercial disputes dealing with complex international, commercial cases with particular emphasis on areas such as commodities, insurance, aviation/shipping.³³⁸ In 2020-21, 74% of the overall cases heard before the Commercial Court, were international commercial disputes.³³⁹ A similar success can be found in the US where commercial courts such as the SDNY and the NY Commercial Division frequently hear international commercial disputes. The well developed New York commercial law has encouraged many foreign parties to choose New York law as the governing law of their contracts. In Singapore, the General Division of the Singapore High Court has an international division called the Singapore International Commercial Court

³³⁸ Courts and Tribunals Judiciary, 'Commercial Court' < <https://www.judiciary.uk/courts-and-tribunals/business-and-property-courts/commercial-court/>>.

³³⁹ The Commercial Court Report 2020-2021, 21 < <https://static1.squarespace.com/static/5ba510e3c46f6d304aaada90/t/62248bf1668d3a46429100a6/1646562291079/Annual+Report+2020-2021.pdf>>.

which hears cases that are international and commercial in nature. In India, the framework for the resolution of international disputes is rather vague with no specific international division. Commercial Courts are competent to hear international commercial disputes as long as the dispute falls under their territorial jurisdiction and the monetary threshold.

Civil law jurisdictions have followed an analogous approach. The French legal system is generally positioned favourably towards the resolution of international disputes. There are specific International commercial chambers to which parties can submit their dispute such as the Paris Commercial Court and Court of Appeal (“Chambre Commerciale Internationale”) (ICCP-CA), the Nanterre Commercial Court³⁴⁰ and the Versailles Court of Appeal. In Germany, in addition to general commercial chambers, certain regional courts have established, in recent years, special chambers for international matters with the aim to attract cross-border disputes. Such Regional courts are namely in Berlin, Bonn, Bremen, Cologne, Düsseldorf, Frankfurt, Hamburg, Mannheim and Stuttgart. Special procedural rules apply, although these and the extent to which proceedings are conducted in English vary from court to court. Kazakhstan has a similar approach to India in the sense that the resolution of international disputes depends on the international jurisdiction of the national procedural laws without a special legal framework put in place for international disputes. However, the recent creation of the Astana International Financial Centre (AIFC) Court has put the country on the map for the resolution of cross-border commercial disputes. The AIFC Court is separate and independent from the national courts. What is interesting to highlight is that despite Kazakhstan being a civil law country, the AIFC Court provides a common law judicial system in Eurasia for the resolution of civil and commercial disputes. It has its own procedural rules that have been modelled on English common law procedures and leading international practice. Lastly, South Africa follows an approach analogous to India. As a general rule, in cross-border disputes, the Courts will hear the dispute if they have international jurisdiction under South African law.

International commercial disputes can also be submitted to the jurisdiction of International Commercial Courts. Whilst these courts perform functions similar to a domestic court (such as

³⁴⁰ <https://www.grefe-tc-nanterre.fr/>

reviewing the validity of administrative orders) their functions, procedure and structure, approach those of other international courts.

5.4. Specialisation of Judges

When it comes to deciding commercial disputes, the expertise of judges is a vital factor. There are two strong currents within the countries analysed. The first, which might seem a more conservative approach, is the use of professional judges possessing experience in commercial matters. A sterling example is England and Wales where the roster of the Commercial Court includes thirteen specialist judges, each with an extensive background in commercial disputes. Due to the specialist nature of the Commercial Court, appointed judges have continuous specialised training on handling complex and high-value commercial disputes. Similarly, in the US, the New York Commercial Division judges serve for indefinite terms and are usually experienced commercial law practitioners and members of the NY State Supreme Court. These judges have a blended specialised experience in commercial law, real estate, and litigation. Another jurisdiction that equips commercial courts with professional judges is Singapore. As is the case in the UK, Singapore puts emphasis on continuing training and development for judges. In India, each State's government after consultation with the Chief Justice of the relevant High Court, appoints judges having experience in dealing with commercial disputes. Similarly, in South Africa, High Court judges with a strong commercial and economic background are allocated to hear commercial law cases.

The second approach that courts have followed is to appoint to commercial courts both professional and lay judges who are usually businessmen or executives. The ratio between professional and lay judges can vary from legal system to legal system. However, it can generate different outcomes. Consequently, embracing this mixed system would require an impact assessment. Germany falls under this category as the Commercial Chambers consist of a senior professional judge and two lay judges, who serve as honorary judges. The two practitioners/lay judges are members of the business community (generally they are senior managers or executives with significant experience). Parties can decide, however, to have the case adjudicated by three professional judges without the involvement of lay judges. An example of a jurisdiction which appoints only lay judges to commercial courts is the French legal system. These lay judges

constitute merchants and professionals usually with considerable business expertise, such as directors or executives.

The more conservative model, which pertains to the use of professional judges possessing experience in commercial matters, is widespread both in civil and common law jurisdictions. In this case, the commercial judges come from the rank of senior judges (or, in case of the UK, senior practicing lawyers, which can include barristers, law-firm partners or government lawyers), who have and will receive specialised training to build on their already-existing experience. This model is widely relied-upon, and certainly comes with a lower risk.

In models that use lay judges, there is a need to ensure that the lay judges are correctly trained to handle judicial tasks. The advantage of lay judges is to bring a practical perspective and, in some cases, specialised industry knowledge, to the resolution of disputes. The practice may, if carefully structured, reduce the need to train professional judges in commercial matters.

However, there are some disadvantages that are linked to the effectiveness of handling court procedures. For instance, in Germany the involvement of lay judges has been criticised in terms of their lack of experience in handling legal disputes or interpreting the law. This could slow down procedures and undermine the legitimacy of the court's decision. In the German case it may have resulted in the case-load of German Commercial Chambers constantly decreasing.³⁴¹ In response to such decrease, commercial chambers of courts designed for international cases have rejected the involvement of lay businesspeople and embraced the model of appointing judges with strong expertise in commercial law.³⁴² This model requires judges to be trained, or otherwise to gain experience, in commercial matters such as trade and finance.

On the other end of the spectrum, it should be noted that French Commercial Courts' caseload also shows a decreasing trend while the overall number of cases going to French civil courts has not declined.³⁴³ Yet these courts, consisting of peer-elected lay judges only, are perceived as just and efficient, more so than their German counterparts.³⁴⁴ This is well illustrated by the low rate of

³⁴¹ Statistisches Bundesamt, 2018, p. 42 f. See also Gerhard Wagner and Arvid Arntz, Commercial Courts in Germany in Lei Chen and André Janssen (eds.), *Dispute Resolution in China, Europe and World*, Springer, 2020, p. 11.

³⁴² Marta Requejo Isidro, *New Courts for International Commercial Disputes in Germany*, Available at <https://capil.org/2020/11/23/new-courts-for-international-commercial-disputes-in-germany/>

³⁴³ Gerhard Wagner and Arvid Arntz, Commercial Courts in Germany in Lei Chen and André Janssen (eds.), *Dispute Resolution in China, Europe and World*, Springer, 2020, p. 12.

³⁴⁴ *Ibid* pp. 11-12.

French Commercial Court cases being appealed.³⁴⁵ French commercial courts present features such as additional speed or a better understanding of commercial cases and decisions tailored to business reality. Yet, there is a caveat which seems hard to counter, the relatively high average age (61 Years) of lay judges. This is somehow a natural consequence of the system, which relies on recognised executives and business people.³⁴⁶

Two connected factors are the terms of the judges' appointment and their nationality. In relation to the duration of their appointment, there are sharp contrasts between jurisdictions such as the USA, where judges are appointed for an indefinite term in line with the American legal tradition. On the other end, there are jurisdictions such as Singapore, where a judge could be appointed for a fixed-term or to hear a particular case.

The approach to nationality seems to be quite uniform, as, in principle, judges are nationals of the country where the court is located. An example is the commercial chambers of specialised courts in Germany hearing international cases where all of the judges appointed are nationals of Germany. A different and probably more international-oriented model can be found in Singapore's SICCC, the Astana IFC Court and other courts on a similar model, where judges do not necessarily come from the host country, but from either common law (Astana) or a mix of civil and common law (Singapore) jurisdictions. This approach has often been successful in attracting international commercial disputes.

5.5. Procedural Framework for Commercial Disputes

The question that arises is whether most commercial courts have a procedural framework specifically tailored for commercial cases. Generally, most commercial courts in civil law jurisdictions employ the procedures that are already in place for the resolution of civil disputes. Common law jurisdictions, however, have gone a step further by tailoring the procedures to the needs of commercial parties.

³⁴⁵ Nicole Stolowy, How France's Commercial Courts Stay Relevant Through the Centuries, Available at <https://www.hec.edu/en/knowledge/articles/how-france-s-commercial-courts-stay-relevant-through-centuries>

³⁴⁶ Assemblée Nationale, Rapport Fait au Nom De La Commission D'enquête (1) Sur L'activite Et Le Fonctionnement Des Tribunaux De Commerce, available at <https://www.assemblee-nationale.fr/11/dossiers/tribunaux-de-commerce/rap1pl.asp>.

In the case of France, the framework for civil and commercial cases is nearly identical, with the exception of the international chambers where special opt-in rules for procedure are stipulated (e.g. the production of exhibits in English) based on the consent of the parties. The same trend is followed in Germany where there is no distinct procedural framework designated for Commercial Chambers, and disputes are governed by the rules of Civil Procedure. Nonetheless, some international chambers in Germany, such as the Mannheim and Stuttgart Commercial Courts, offer additional advantages such as conducting proceedings and submitting documents in English. Similarly, in Kazakhstan, there are no major procedural differences in commercial cases since the specialised inter-district economic courts apply the Civil Procedure Code of Kazakhstan (2015). South Africa has captured the need to adapt the procedural framework to the needs of commercial parties through its Commercial Court Practice Directive which provides that matters heard in the Commercial Court will be dealt with in line with broad principles of fairness, efficiency and cost-effectiveness.³⁴⁷ The specialised procedural framework focuses on efficiency and solutions aiming to reduce costs, such as early-stage disclosure of all relevant documents and the opportunity to review the other party's witness evidence pre-trial.³⁴⁸

In the common law realm, the UK may broadly apply civil procedure rules to commercial cases, albeit with modifications and enhancements for certain procedures. An example is the introduction of a special procedure that categorises cases based on their complexity and the length of a potential hearing. Similarly, in the US, rules have been adopted specifically for commercial cases to introduce a streamlined discovery process, the use of time limits, and the encouragement of amicable dispute settlement. Along the same lines, Singapore has put emphasis on the resolution of the international commercial disputes through the SICC by simplifying rules relating to discovery from those applied in the general courts and limiting parties' disclosure obligations. Lastly, India has followed an approach similar to South Africa by introducing procedural aspects that aim at cost- and time-efficiency in the dispute resolution process. As such, the Indian Commercial Courts Act sets out that all relevant documents in the dispute need to be listed along

³⁴⁷ Commercial Court Practice Directive, Chapter 1, available at < https://www.johannesburgbar.co.za/wp-content/uploads/Commercial-Court-Practice-Directive_-final.pdf>.

³⁴⁸ Clyde&Co, Fast-tracking Commercial Litigation in the South African High Court, Available at <https://www.clydeco.com/en/insights/2021/01/fast-tracking-commercial-litigation-in-the-south-a>

with the first set of pleadings and disallows any additional document filings except in urgent circumstances as determined by the court.³⁴⁹

5.6. Case Management

Case management is crucial for the efficient dispute resolution of commercial cases. Generally, civil law countries follow for commercial disputes the same case management proceedings that they have already set in place for civil law disputes. Case management conferences are not always mandatory. In the common law countries examined here, case management conferences are in principle mandatory as is the case in the UK and the US.³⁵⁰

Three of the four civil law countries emphasise case management, with South Africa being the latest to introduce significant changes in how cases are managed.³⁵¹ The only exception is Kazakhstan, where there is no evidence of specialised case management solutions employed. In France, judges are active in case management, as they can, for instance, bifurcate procedural or admissibility objections, which could put an end to the process, or they could be more involved in monitoring the progress of the case setting out a procedural agenda.³⁵² In both civil and commercial cases in France, there is a pre-trial phase which consists of a series of procedural conferences presided by one judge of the court. In Germany, the same case management proceedings apply to both civil and commercial law disputes. The judge can choose to host a case management conference. In this context, a pre-hearing meeting can be held in advance in order to structure the later stages of the proceedings.³⁵³ Kazakhstan has the least specialised case management framework, as the quality and style of legal proceedings may vary greatly from judge to judge even in the same court. South Africa has a very interesting case management approach different from the other civil law countries examined as it is closer to a common law approach. Each case has one

³⁴⁹ Ibid.

³⁵⁰ See CPR 58.13. and Rules of Practice for the Commercial Division, Rule 202.19(b).

³⁵¹ See Tanya Pollak and Nikhil Lawton-Misra, Commercial Court Practice Directive, Available at <https://www.golegal.co.za/commercial-court-practice-directive/>

³⁵² Anne-Claire Hans, Jean-Luc Larribau and Julie Spinelli, Litigation: France, GAR, Available at <https://globalarbitrationreview.com/insight/know-how/litigation/report/france>

³⁵³ Commercial Court, Stuttgart/Mannheim available at <https://www.commercial-court.de/en/commercial-court>

or two judges allocated as case managers³⁵⁴ who organise not one but two case management conferences.³⁵⁵

From a common law perspective, the UK legal framework provides for a mandatory case management conference to be held after the statements of case have been served.³⁵⁶ Similarly, in the US, the NY Commercial Division calls for a mandatory preliminary conference within 45 days from the filing of a request for judicial intervention.³⁵⁷ Other proceedings include holding a compliance conference as well as a pretrial conference to monitor the progress of the case. In Singapore, the case management approach is very interesting with the Commercial Court having the discretion to hold as many case conferences as it considers appropriate and at any stage of the proceedings, including at the appeal stage.³⁵⁸ Finally, India has introduced a case management hearing that should be held within four weeks from the date of filing the statement of admission and denial of documents.³⁵⁹

5.7. Technical Facilities

Although there are some differences in terms of numbers of courtrooms and the specific services and technology available, the majority of commercial courts we considered have been modernised to allow for electronic trial aids and video conferencing. Most commercial courts examined in this paper employ a system for electronic filings and e-access to court decisions. Certain jurisdictions have long emphasized technological enhancements and have created high standard technical court facilities (eg US, UK, Singapore). For other countries, such as India, increased attention to technology may have been prompted very recently due to the COVID-19 pandemic. All these developments in the various jurisdictions have either been fully implemented or are still in a pilot phase. Nonetheless, they certainly are a well received improvement in dispute resolution frameworks.

³⁵⁴ See Chapter 4. of the Commercial Court Practice Directive

³⁵⁵ Clyde&Co, Fast-tracking Commercial Litigation in the South African High Court, Available at <https://www.clydeco.com/en/insights/2021/01/fast-tracking-commercial-litigation-in-the-south-a>

³⁵⁶ See CPR 58.13.

³⁵⁷ See Rules of Practice for the Commercial Division, Rule 202.19(b).

³⁵⁸ Singapore International Commercial Court Rules 2021, Order 9 Rule 3.

³⁵⁹ The Code of Civil Procedure 1908, Order XV-A.

From the civil law jurisdictions examined, in France the Minister of Justice unveiled on March 2018, the main lines of the upcoming reform regarding the radical digital transformation of the French judicial system focusing on the development of an e-filing and document-exchange system.³⁶⁰ Similarly, Germany has developed a special infrastructure with certain courts such as the ones in Mannheim and Stuttgart equipped with technical support staff and equipment that allows for video-conferences and video testimonies of witnesses and experts.³⁶¹ Similarly, in Kazakhstan, according to the Strategy for Digitalizing the Judicial System of the Republic by 2022, the civil procedure code has been supplemented with a chapter on the distinctive features of electronic court proceedings. To date, more than 90% of civil claims are filed electronically.³⁶² From a South-African perspective, the Department of Justice and Correctional Services has recently introduced a policy for four digital pilot projects in 2022 with the aim to digitise and modernise South Africa's judiciary.³⁶³ It introduced a Court Online system, which involves elements such as e-filing, but the system is not without pitfalls, as it is considered insecure, with counsel and clients often lacking confidence in the system.

In the common law spectrum, the UK has developed a state-of-the-art system of e-filing and video conferencing. The USA is also a jurisdiction which promotes the use of modern technologies, as it allows for video conferencing and e-filing. Similarly, Singapore is following the same trend, as it uses a centralised electronic litigation system (eLitigation) to handle documents, schedule hearings and manage the case. Germany imposed a special mailbox for lawyers (beA), effective of the 1st of January 2022, for communication and document submission. Digitalisation is also fostered by remote hearings. India, prompted by the pandemic, in 2020 passed an order that authorised court hearings to be held by video conferencing, and in 2021 the e-Committee of the Supreme Court of India released draft model rules for the live-streaming and recording of court

³⁶⁰ White and Case, "Toward e-justice with the transformation of the French legal system" available at <https://www.whitecase.com/insight-alert/toward-e-justice-transformation-french-legal-system>

³⁶¹ <https://www.commercial-court.de/en/commercial-court>

³⁶² Nail Akhmet Zakirov, "Digitalizing Kazakhstan's Courts: Keeping Up with the Times" (2020) Legal Issues in the Digital Era no 2, p.176.

³⁶³ [Staff Writer, "Plans to take South Africa's courts and legal services online" \(2022\) available at https://businesstech.co.za/news/technology/587706/plans-to-take-south-africas-courts-and-legal-services-online/.](https://businesstech.co.za/news/technology/587706/plans-to-take-south-africas-courts-and-legal-services-online/)

proceedings, which went out to public consultation.³⁶⁴

5.8. Language of the Proceedings

In terms of the procedural language used in commercial disputes, particularly in international commercial cases, the countries analysed present some variations depending on the general openness of the system to international disputes. In the common law jurisdictions, all four countries analysed use English as (one of) their official language(s), and thus offer the possibility to conduct proceedings in English. The use of English is also perceived relevant by the civil law countries analysed. In general terms, there is a strong trend or current shaping up for an enhanced use of English in commercial litigation.

France, as mentioned above, accepts exhibits in English, while also allowing cross-examination to be conducted in English, and at the level of the international chamber, there is an obligation to publish a translation of the decisions in English.³⁶⁵ That in itself might seem an appealing proposition, but the German system goes further in accepting English as a procedural language at the Commercial Chamber level.³⁶⁶ In that light, the decision of Kazakhstan to allow one of its courts, the Special Financial Court of the City of Almaty, to conduct proceedings in English, demonstrates the importance of the English language in international litigation.³⁶⁷

³⁶⁴ **Joanne Harris**, “Access to justice: India leads post-Covid shift in courts’ use of technology: International Bar Association (12 October 2022) available at <https://www.ibanet.org/Access-to-justice-India-virtual-courts>.

³⁶⁵ See Protocol Relating to The Procedure Before The International Chamber Of The Paris Commercial Court, Art. 2, available at https://www.shearman.com/-/media/files/perspectives/2018/04/protocol_relating_to_the_procedure_before_the_international_chamber_of_the_paris_commercial_court.pdf

³⁶⁶ Gesetz zur Stärkung der Gerichte in Wirtschaftsstreitigkeiten, Linklaters available at: <https://wissen.linklaters.de/publications/alerts-newsletters-and-guides/2020/november/11/germany---gesetz-zur-einfuhrung-von-kammern-fur-internationale-handelssachen-kfihg>

³⁶⁷ Nicolás Zambrana-Tévar, The Court of the Astana International Financial Center in the Wake of Its Predecessors, Erasmus Law Review, Issue 1, 2019, Available at <http://www.erasmuslawreview.nl/tijdschrift/ELR/2019/1/ELR-D-18-00027>

5.9. Review of Commercial Court Decisions

With regard to the review of the decisions rendered by Commercial Courts, the approach followed by both civil law and common law countries is very similar. All jurisdictions provide for an appeal against commercial court decisions. In some countries such as the UK and Singapore, the parties must obtain leave to appeal³⁶⁸ whilst in other countries such as France and Germany, there is no such requirement.

Courts vary somewhat on whether appeals on the basis of fact are permitted, reflecting the general approach to appeals in the country. In all countries appeals are permitted on questions of law, and frequently there is a possibility for a second appeal or further judicial review (e.g., cassation in case of France, second appeal in India, a further appeal in the UK, a second appeal in Germany and Kazakhstan). Interestingly, some common law jurisdictions (especially for second appeals), have extended the ground for may require an appeal so as to include broader public interest considerations. An example is the UK where a second appeal can be launched not only on a point of law but also in case a matter of general public importance is involved.³⁶⁹ In the US, violations of the US Constitution or State Constitution can also qualify as a ground for appeal. The same line is followed by Singapore where permission to appeal may only be granted if the appeal raises a point of law of public importance.³⁷⁰

The main difference which should be pointed out when setting up a system of commercial courts is the fact that the appeal will be heard either by a Court of Appeal division specialised in commercial law, or by the general chamber of the Court of Appeal. From that point of view, France is an example that falls in the first category where the Courts of Appeal (“Cour d’appel”) have divisions dedicated to Commercial matters.³⁷¹ Additionally, the Court of Cassation (“Cour de Cassation”) which is the supreme court in case of civil matters, has a chamber dedicated to commercial cases.³⁷² A similar approach is followed in Germany which has introduced specialised appellate bodies at the Higher Regional Court of Stuttgart and Karlsruhe, which decides on appeals

³⁶⁸ See CPR 52.3. and Supreme Court of Judicature Act 1969, s 29A.

³⁶⁹ (CPR 52.7(2)(a); *Brotherston v Commissioner for HM Revenue & Customs* [2014] EWCA Civ 219); Martin Partington, *Introduction to the English Legal System* (15th edn, OUP 2021) 244.

³⁷⁰ *Ibid* s 47.

³⁷¹ *Vie Publique*, Comment fonctionne une cour d'appel ?, Available at <https://www.vie-publique.fr/fiches/268757-comment-fonctionne-une-cour-dappel>

³⁷² *Cour de Cassation*, Les six chambres de la Cour de cassation, Available at <https://www.courdecassation.fr/la-cour/lorganisation-de-la-cour-de-cassation/les-six-chambres-de-la-cour-de-cassation>

and uses the same procedural framework just as the Commercial Courts of Stuttgart and Mannheim.³⁷³ The second approach – appeal to a non-specialised appellate body – is followed by South Africa where an appeal can be lodged to a full bench of the High Court³⁷⁴ or to the Supreme Court of Appeal.³⁷⁵ Similarly, in Kazakhstan, in case of commercial disputes, the competent courts of appeal are oblast courts (regional courts) and the Nur-Sultan City Court or the Almaty City Court, which are not specialised.³⁷⁶ Interestingly, the UK which has a specialised commercial court division for hearing first instance disputes, provides for appeals to be heard before the general Court of Appeal. A further appeal can be heard, if leave is granted, before the United Kingdom Supreme Court (‘UKSC’).³⁷⁷

As a general remark, the specialisation of judges at the different levels of jurisdiction might produce different results. One might assume that there is an inconsistency in resorting to a specialised lower court for the resolution of a dispute at first instance whilst the appeal of the decision is submitted to the general higher court. For instance, in France only a really low number of decisions are overturned pointing to the conclusion that not only the commercial dispute resolution system that has been developed is efficient and robust but also that the consistent approach of using specialised judges on both levels fosters stability and predictability.³⁷⁸

5.10. The Use of ADR in Commercial Disputes

The increasing popularity of ADR has pointed many jurisdictions, mainly common law, towards amending their laws to include attempts at out-of-court dispute settlement as a condition before resorting to litigation.

³⁷³ Marta Requejo Isidro, New Courts for International Commercial Disputes in Germany, Available at <https://eapil.org/2020/11/23/new-courts-for-international-commercial-disputes-in-germany/>

³⁷⁴ Further information on the High Court can be found here: <<https://www.judiciary.org.za/index.php>>

³⁷⁵ Further information on the Court of Appeal can be found here: <<https://www.supremecourtsofappeal.org.za/index.php>>

³⁷⁶ Baker McKenzie, Dispute Resolution Around the World Kazakhstan, 2009, Available at https://www.bakermckenzie.com/-/media/files/insight/publications/2016/10/dratw/dratw_kazakhstan_2009.pdf?la=en

³⁷⁷ Martin Partington, Introduction to the English Legal System (15th edn, OUP 2021) 244.

³⁷⁸ Nicole Stolowy, How France’s Commercial Courts Stay Relevant Through the Centuries, Available at <https://www.hec.edu/en/knowledge/articles/how-france-s-commercial-courts-stay-relevant-through-centuries>. See also Standing International Forum of Commercial Courts, France, available at <https://sifocc.org/countries/france/>

US courts encourage ADR during the early stages of proceedings and may even automatically refer certain cases to ADR mechanisms, such as mediation in case of the NY Commercial Division.³⁷⁹ Singapore follows a stricter approach with the law requiring the party to make an offer of amicable resolution before commencing proceedings, unless the party has reasonable grounds not to do so.³⁸⁰ Going a step further, in case parties do not attempt to resolve the dispute by amicable resolution, Singapore's Rules of Court 2021 empower the court to issue an order that the parties must attend ADR.³⁸¹ In India, parties can be referred to certain forms of ADR (mediation, judicial settlement and Lok Adalat)³⁸² at any time during the proceeding, even at the appellate stage and without the consent of the parties. However, arbitration and conciliation can be ordered only with the parties' consent.³⁸³ Interestingly, from the civil law countries examined, Kazakhstan is the only one imposing a mandatory pre-trial settlement procedure between the parties.³⁸⁴

6. Challenges

6.1. Specialisation of Judges and Lack of Judicial Training

In principle, judges should be capable of deciding cases in all fields. Their general knowledge of the law and its underlying principles, their common sense and familiarity with their judicial functions gives them an ability to apply the law in all fields, including specialist areas, with expert assistance if necessary. Whilst the role of the “generalist judge” can never be underestimated, the importance of having a judiciary well aware of their role in relation to the resolution of commercial disputes cannot be highlighted enough. The understanding and familiarity of judges with the

³⁷⁹ ‘Administrative Order’, New York State Unified Court System <<https://www.nycourts.gov/LegacyPDFS/courts/1jd/suptctmanh/AO-12219-MAND-MED.pdf>>.

³⁸⁰ Loong Tse Chuan, Melissa Mak and Tan Xeauewei, Allen & Gledhill LLP, ‘Litigation and Enforcement in Singapore: Overview’ Practical Law, available at [https://ca.practicallaw.thomsonreuters.com/9-575-0765?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://ca.practicallaw.thomsonreuters.com/9-575-0765?transitionType=Default&contextData=(sc.Default)&firstPage=true)

³⁸¹ Loong Tse Chuan, Melissa Mak and Tan Xeauewei, Allen & Gledhill LLP, ‘Litigation and Enforcement in Singapore: Overview’ Practical Law, available at [https://ca.practicallaw.thomsonreuters.com/9-575-0765?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://ca.practicallaw.thomsonreuters.com/9-575-0765?transitionType=Default&contextData=(sc.Default)&firstPage=true)

³⁸² For an analysis of these ADR forms see section 4.4.5 of the Report.

³⁸³ Practical law, “Litigation and enforcement in India: overview” available at <[https://uk.practicallaw.thomsonreuters.com/5-502-0726?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#co_anchor_a205459](https://uk.practicallaw.thomsonreuters.com/5-502-0726?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a205459)>

³⁸⁴ KAZAKHSTAN: An Introduction to Dispute Resolution, available at <https://chambers.com/content/item/4382>

particular nature of commercial disputes and the specialised needs of the parties constitutes the core of an effective commercial dispute resolution process.

An in-depth knowledge of the legal field in question can improve the quality of the decisions taken by a judge. Specialist judges demonstrate greater expertise in the field of commercial law, which can thereby enhance the parties' trust in the courts' decision making process and reduce the appeal rate offering stability and certainty. Especially with regard to procedure, commercial law cases by their nature require specialised approaches to matters such as document disclosure, confidentiality, case management, conducting online hearings and managing online witness depositions. A commercial case is multifaceted including components such as industry secrets, confidential documents, specialised commercial practices, and even industry jargon and terminology.

A very limited number of the countries analysed (mainly the UK and Singapore), has introduced regular trainings of judges with regard to commercial law matters and procedures. Training of not only regular judges but also lay judges, is important as it is specifically connected to the need to adapt to changes in the law and the procedure. The adoption of new legislation, procedures and technical equipment are turning the judicial functions into an increasingly complex task. This may result in overburdening public courts with cases they are not confident to deal with, may lead to poor quality decisions that are far from the reality of commercial practices and thus, will lead to a high number of challenges that will decrease the trust in the judicial system. Taking things a step further, a judicial system that does not inspire certainty and predictability discourages international parties from making business and investments in the specific jurisdiction. Keeping up with these challenges is essential in promoting commercial courts as an efficient dispute resolution provider not only in the domestic but also in the international scene.

6.2. International Parties

Some countries have established commercial courts in part to facilitate resolution of complex international commercial cases. From the point of view of foreign parties, there may be several reasons for a jurisdiction's limited attractiveness. For example, the role of experts is essential when issues of foreign law come to play. Some countries provide for court appointment of experts on the basis that courts can be sure of the expert's quality, but international dispute parties may prefer a system where they can appoint their own experts as they may not trust the expertise of court-

appointed experts.

Along the same lines, the use of the English language is often considered essential to ensure the access of multinational corporations to any given jurisdiction. A survey conducted in 2011 showed that while 81% of European judges speak English as a second language, only 36% of them are proficient in reading, and 20% are proficient in writing and speaking.³⁸⁵ The inability of many specialised commercial courts to offer a complete procedure in English, including for written submissions, communication exchange between the parties and the court, submission of documents, and hearing witness and expert testimony hinders the efficient delivery of justice especially in international disputes.³⁸⁶ Even if a legal framework generally embraces the English language, it is up to the discretion of the judge not to pose any practical challenges. As an example, although the French Code of Civil Procedure does not force judges to use interpreters (provided that they are familiar with the language spoken by the parties),³⁸⁷ with the use of foreign languages being limited to hearings and documents, the language of the rest of the proceedings, especially the decisions, is to remain French.³⁸⁸

6.3. Procedural Challenges

7.3.1. Case Management

A jurisdiction's approach to case management will have an impact on a commercial court's popularity in adjudicating commercial law disputes. In this context, limited involvement of the judge before hearings may surprise some litigants, especially multinational investors who see pre-trial case management as an important part of fair and efficient proceedings. HCJP noted that the 'minimalist approach to proceedings, [which] can be explained by the need to deal with a volume

³⁸⁵ John Coughlan, Jaroslav Opravil & Wolfgang Heusel, 'Judicial training in the European Union Member States' (2011) <[https://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453198/IPOL-JURI_ET\(2011\)453198_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453198/IPOL-JURI_ET(2011)453198_EN.pdf)>.

³⁸⁶ Ibid.

³⁸⁷ Article 23 of French Code of Civil Procedure.

³⁸⁸ C. Kern, 'English as a Court Language in Continental Courts', *Erasmus Law Review* (2012), at 187-209.

of litigation that exceeds the capacity of the courts, disconcerts foreign litigants who are used to more detailed case preparation and hearings in Common Law courts, and who may view our judging methods as superficial. In addition, [deadlines] that are not met and erratic hearing dates generate uncertainty about the foreseeable timeframe'.³⁸⁹

7.3.2. Cost and time Efficiency

The Oxford Civil Justice Study,³⁹⁰ found that lower costs of civil and commercial proceedings are an important factor for parties in choosing a particular dispute resolution mechanism. In the same study, 71% of parties considered low costs to be an advantage of court proceedings.³⁹¹ Similarly, the speed of dispute resolution is one of the top five factors influencing parties' choice of a particular justice system.³⁹² For example, in England, while it is agreed by many that English law and English courts are commercially attractive to domestic and foreign parties, the costs of litigating in England (such as before the Commercial Court) are extremely high.³⁹³

The vast majority of commercial disputes exist in a range of controversy that may make litigating unaffordable as a practical matter, unless a party succeeds in persuading the judge to grant a motion seeking early summary disposition of the dispute. As such, it is essential for any legal system to employ techniques that will reduce cost and time for parties such as compliance with the procedural timetable, managing requests for document production efficiently, and clarifying the approach to expert evidence. Similarly, a jurisdiction's approach to ADR is important in limiting costs and time as the possibility of a negotiated or mediated settlement early in the dispute phase will decrease substantial litigation costs and lead to a speedy final decision.

7.3.3. Evidence and Document Disclosure

³⁸⁹ HCJP, 'Report on the Implications of Brexit on Judicial Cooperation in Civil and Commercial Matters', 30 January 2017, p.19.

³⁹⁰ Stefan Vogenauer & Christopher Hodges, 'Civil Justice Systems in Europe: Implications for Choice of Law and Choice of Forum – A Business Survey (2008)' (Oxford Civil Justice Study), available at <https://www.fondation-droitcontinental.org/fr/wp-content/uploads/2013/12/oxford_civil_justice_survey_-_summary_of_results_final.pdf>.

³⁹¹ Ibid 36.

³⁹² Ibid 39.

³⁹³ Christopher Hodges, Stefan Vogenauer & Magdalena Tulibacka (eds), *The Costs and Funding of Civil Litigation: A Comparative Perspective* (Bloomsbury 2010).

Just as is the case with costs and time, the availability or absence of mechanisms for disclosure/discovery of documents is an important consideration for parties in their choice of a particular dispute resolution system.³⁹⁴ Each jurisdiction's Code of Civil Procedure clearly organises the proceedings in the resolution of disputes. However, especially in commercial cases, their implementation also depends on the actions of courts as well as the needs of the parties.³⁹⁵

For instance, in certain jurisdictions such as the UK, the stage of disclosure of documents is an extensive process. This also makes the overall proceedings more expensive and time consuming. The extensive disclosure is, therefore, often considered to be a notable criticism for commercial courts in certain jurisdictions.³⁹⁶ Another example of disclosure provisions which is less extensive is the Paris international chambers, where parties may request (from another party or from a third party) the production of "categories" of documents, provided that those categories are precisely identified. This is unusual under French procedural law, which normally limits document production requests to specific documents. Oral evidence may also need to be treated differently to standard civil procedure. For example, the court may order any of the parties to appear personally to be interviewed and may be invited by the court to respond to questions asked by the other party in a form of cross-examination.

6.4. Development of court facilities

Procedural rules of many international commercial courts make express references to the use of technology to enhance the efficiency of court proceedings and to save costs. For example, Art. 4.3.4 of the Regulations and Procedural Rules of the Qatar Financial Centre Civil and Commercial Court³⁹⁷ refers to making use of information technology wherever appropriate, as part of the duty of the Court to deal with cases in a just manner. While the newer international commercial courts dealing with high-value commercial disputes are equipped with sufficient infrastructure allowing

³⁹⁴ Oxford Civil Justice Study (n 2) 39.

³⁹⁵ HCJP, 'Recommendations for the creation of special tribunals for international business disputes', 3 May 2017, p.25, available at: https://publications.banque-france.fr/sites/default/files/rapport_07_a.pdf.

³⁹⁶ Sir Geoffrey Vos, 'A View from the Business and Property Courts in London' (2019) 1 *Erasmus Law Review* 10, 12.

³⁹⁷ 'Regulations and Procedural Rules of the Qatar Financial Centre Civil and Commercial Court' <<https://www.qicdrc.gov.qa/courts/court/regulations-and-procedural-rules/regulations-court>>.

the efficient use of technology, many international and domestic commercial courts do not possess such necessary infrastructure.

Technology can help introduce innovative practices in court litigation as well as offer a strategic advantage to parties through the quick and efficient disposal of proceedings. Commercial Courts aiming to attract domestic and international parties should gradually ensure that they be equipped with a multitude of facilities such as a video-conferencing system, facilities for multimedia presentation, an electronic documentation and exhibits handling system, closed-circuit television facilities, enhanced digital audio recording and transcription services, as well as enhanced interpretation facilities.

6.5. Enforcement of International Court Decisions

While issues with the enforcement of domestic commercial court judgments are less common, impediments relating to the enforcement of judgments issued by international commercial courts pose a significant challenge. Currently, there is no widely-recognised multilateral treaty in respect of litigation which eases the enforcement of court judgments. The closest attempts are the The Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters concluded on 2 July 2019, but has not entered into force, as well as the Hague Choice of Court Agreements Convention, 2005, which currently has less than ten signatories and has not been a popular choice among jurisdictions. Conversely, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (also referred to as ‘the New York Convention’), with more than 160 signatories, constitutes a considerable advantage for commercial disputes resolved through arbitration. For international commercial court judgments of EU Member state courts and which are intended to be enforced in other EU Member states, the Brussels I *bis* Regulation regulates issues of recognition and enforcement, and might thus, not pose a challenge in the enforcement context. However, for court judgments issued by other international commercial courts such as the Singapore International Commercial Court (SICC) or the Dubai International Financial Courts (DIFC), or for court judgments issued by international commercial courts in the EU member states but which are intended to be enforced in non-EU member states,

issues relating to enforcement of court judgments can be challenging. As a result, the effectiveness of the outcome of commercial court proceedings may also be challenged in practice.

7. Concluding Remarks and Practical Recommendations

7.1. Strengthening Public Confidence Towards the Judicial System

The efficiency and success of a court system requires public confidence towards the judicial system is one of them. A court system that meets the needs of commercial parties and ensures efficient procedures can enhance its efficiency and perceived fairness, which could, in turn, lead to a higher degree of confidence. One recommended objective for reform as will be further mentioned below, is to ensure that a country has a good quality judicial training system which continually trains all judges, especially in commercial law areas and in understanding commercial realities (where that aspect is not sufficiently addressed by lay judges). In addition, Reforms in the courts may need to be further enhanced by improvements to the enforcement framework, for example by ensuring bailiffs have an appropriate caseload and good access to information and tools necessary to effect enforcement. This has a particular importance in cases where the state is a party to the dispute or disposes of a substantial interest. To do this, a first and efficient step could be to promote wide access to court decisions or by making case materials available. Ultimately, any measure which has as an effect bolstering confidence in the impartiality of a court system and its judges could serve to a commercial court system's success on both a domestic and international level. Going a step further, the consistent publication of court decisions which are adequately reasoned fosters transparency and predictability of the decision-making process. Transparency and predictability further promote legal certainty which is an important element of the rule of law.

7.2. Stable and Predictable dispute resolution system

An overarching principle for creating a strong commercial court system is to create a framework that promotes an efficient and predictable dispute resolution process.

Certain common law jurisdictions have been at the centre of success of commercial court regimes. Along these lines, the UK is widely regarded as offering a stable and efficient dispute resolution system which offers predictability to the parties. The use of English, as the language of modern business and the way judges interpret commercial contracts and apply the law as well as

commercial practices, enhance the parties' confidence in the system. For instance, contract interpretation is a point of criticism often raised against civil law countries, where contractual terms could easily be interpreted much more subjectively than in comparison to English courts which do not depart easily from the contract terms between the parties.³⁹⁸ Accordingly, English commercial law and the judiciary are strong incentives for foreign businesses to bring their disputes to the UK. A 2015 study conducted by the Ministry of Justice in the UK³⁹⁹ identified the reasons influencing litigants to bring commercial claims to courts in London, and found that these included reputation and experience of the English judiciary and the use of English law.⁴⁰⁰

Successful dispute resolution systems can constitute a source of inspiration leading to cross-fertilization of existing procedural rules and combining the experience of other jurisdictions to maximize the procedural framework's effectiveness.⁴⁰¹ International commercial courts have been the pioneers of legal transplantation in the field of commercial law when introducing international standards to their legal framework whilst keeping strong links with the domestic systems they operate in. As such, it should be kept in mind that transposing commercial rules to a legal system requires not only a compatibility check but also adapting any changes to the receiving jurisdiction's legal tradition.

³⁹⁸ Alexandre Biard, 'International Commercial Courts in France: Innovation without Revolution?' (2019) *Erasmus Law Review*, 1 <<https://www.elevenjournals.com/tijdschrift/ELR/2019/1/ELR-D-18-00023.pdf>>.

³⁹⁹ Ministry of Justice, *Factors Influencing International Litigants' Decisions to Bring Commercial Claims to the London Based Courts* (Ministry of Justice Analytical Series, 2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/396343/factors-influencing-international-litigants-with-commercial-claims.pdf>.

⁴⁰⁰ *ibid* 43.

⁴⁰¹ Alexandre Biard, 'International Commercial Courts in France: Innovation without Revolution?' (2019) *Erasmus Law Review*, 1 <<https://www.elevenjournals.com/tijdschrift/ELR/2019/1/ELR-D-18-00023.pdf>>.

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Annex 1: Summarising Table of Jurisdictions

Country \ Feature	Specialised Commercial Courts	Specific rules for Case Management	Hearing International Commercial Disputes	Allowing appeals
France (Civil Law)	Yes	Yes	Yes	Yes
Germany (Civil Law)	Yes	No (existing flexibilities)	Yes	Yes
Kazakhstan (Civil Law)	Yes	No evidence	Yes	Yes
India (Common Law)	Yes	No	Ordinarily, yes	Yes
Singapore (Common Law)	Yes	Yes	Yes	Yes
South Africa (Civil Law)	Yes	Yes	Yes	Yes
United Kingdom (Common Law)	Yes	Yes	Yes	Yes
United States of America (Common Law)	Yes	Yes	Yes	Yes

Annex 2: International Commercial Courts

Overview of International Commercial Courts

International Commercial Courts (ICC's) have surfaced in a significant number of jurisdictions in the last decade. These courts perform functions of a domestic court (such as reviewing the validity of administrative orders) as well as functions of an international court (such as adjudicating commercial disputes between two foreign parties). While these courts are by design domestic institutions, their functions, procedure, structure, and the parties before it, point towards its vividly international nature. Examples include the Singapore International Commercial Court (SICC),⁴⁰² the China International Commercial Court (CICC),⁴⁰³ the Dubai International Financial Centre Courts (DIFC Courts),⁴⁰⁴ the Qatar International Court (QIC),⁴⁰⁵ Astana International Financial Centre,⁴⁰⁶ and the International Chambers of Paris Commercial Court (which include international divisions of the Paris Commercial Court⁴⁰⁷ and the Court of Appeal⁴⁰⁸).

A closer look at the structure of various international courts shows a common broad purpose behind their establishment – to improve the adjudication of commercial disputes in the relevant jurisdiction with a view to attract foreign investment in the region, which will eventually lead to the development of the region as an international legal centre with the court as the nucleus.⁴⁰⁹ These courts are primarily established to cater to international parties in the resolution of their commercial disputes by allowing them to avoid domestic law (which parties may be unfamiliar with or may consider underdeveloped) and instead have their disputes adjudicated under the law chosen by the parties. At the same time, ICCs generally are also accessible to domestic parties within the same region, if the dispute falls within the relevant court's jurisdiction. Some

⁴⁰² <<https://www.sicc.gov.sg/>>.

⁴⁰³ <<https://cicc.court.gov.cn/html/1/219/208/209/1316.html>>.

⁴⁰⁴ <<https://www.difccourts.ae/>>.

⁴⁰⁵ <<https://www.qicdrc.gov.qa/>>.

⁴⁰⁶ <<https://aifc.kz/>>.

⁴⁰⁷ <https://www.tribunal--de--commerce--de--paris-fr.translate.google/?x_tr_sl=fr&x_tr_tl=en&x_tr_hl=en&x_tr_pto=sc>.

⁴⁰⁸ <<https://www.cours-appel.justice.fr/paris/presentation-generale-ccip-ca-iccp-ca>>.

⁴⁰⁹ Christopher Grout and Sir William Blair, 'The Role of International Commercial Courts in Commercial Dispute Resolution' in Stavros Brekoulakis and Georgios Dimitropoulos (eds), *International Commercial Courts : The Future of Transnational Adjudication* (CUP 2022).

international courts such as the QIC and the DIFC courts deal with a wide range of disputes concerning sectors such as (i) banking and finance, (ii) immigration, (iii) insolvency, (iv) insurance and reinsurance, and (v) employment. The empanelment of specialist international bi-lingual judges to adjudicate the wide-ranging types of disputes demonstrates the importance of the role played by such international courts in the resolution of international commercial disputes.

The International Chamber of the Paris Court of Appeal (ICCP-CA) – France

Differences between Domestic Commercial Courts and International Commercial Courts

- *Differences in composition*

The Commercial Court of Paris is comprised of about 172 lay judges called the consular judges.⁴¹⁰ Commercial court judges are initially elected for a two-year period and then re-elected for three terms of four years each.⁴¹¹ Thus, the total possible duration of office for a judge is fourteen years.⁴¹² Each judge is assigned to a specific chamber at the beginning of the year by the President of the court, based on their area of expertise such as distribution law, transport law, competition law, etc. Judges in the commercial court are predominantly French-speaking and have an expertise in domestic commercial disputes.

In April 2018, a specialised chamber for international affairs was created which is now known as the International Chamber of the Paris Court of Appeal (ICCP-CA).⁴¹³ It comprises of bilingual magistrates who are familiar with international practices.⁴¹⁴ In contrast to the Commercial Court of Paris, judges in the ICCP-CA are bilingual i.e. French/English-speaking judges with a strong

⁴¹⁰ ‘The Consular Judge’ Tribunal De Commerce De Paris <<https://www.tribunal-de-commerce-de-paris.fr/fr/juge-consulaire>>.

⁴¹¹ Ibid.

⁴¹² Ibid.

⁴¹³ ‘The Appeal’ Tribunal De Commerce De Paris <https://www.tribunal-de-commerce-de-paris-fr.translate.google.fr/recours-tribunal-de-commerce-de-paris?_x_tr_sl=fr&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=sc>.

⁴¹⁴ Ibid.

experience in handling and monitoring international commercial disputes. The ICCP-CA elects two-three judges as part of its Chamber.⁴¹⁵ The Chamber is headed by the Chamber President.⁴¹⁶

- *Differences in jurisdiction*

ICCP-CA has jurisdiction to hear disputes that involve international commercial interests.⁴¹⁷ This includes disputes such as those related to commercial contracts or termination of commercial relationships, transport, unfair competition, financial instruments, financial contracts or products, framework agreements, or disputes related to damages incurred from anticompetitive practices.⁴¹⁸ ICCP-CA also has territorial jurisdiction over matters based on the parties' consent.⁴¹⁹ A clause within the contractual framework that confers jurisdiction to ICCP-CA ordinarily forms the basis of such territorial jurisdiction. Lastly, ICCP-CA has appellate jurisdiction over decisions rendered by the International Chamber of the Paris Commercial Court,⁴²⁰ actions against decisions rendered in international arbitration,⁴²¹ and appeals against decisions of an economic and commercial nature that has an international aspect.⁴²²

On the other hand, jurisdiction in domestic commercial courts is determined pursuant to Art. 42 of the French Civil Procedure Code. French courts usually have jurisdiction if the defendant is domiciled in France or if relevant international treaties have designated them as the competent jurisdiction. When there is no applicable European or international provision (whether in treaties or conventions or regulations), French courts will determine jurisdiction based on French choice of jurisdiction rules.

⁴¹⁵ 'The Litigation Chamber' Tribunal De Commerce De Paris <<https://www.tribunal-de-commerce-de-paris.fr/fr/chambres-de-contentieux>>.

⁴¹⁶ Ibid.

⁴¹⁷ Protocol on Procedural Rules Applicable to the International Chamber of the Paris Court of Appeal, art 1.1.

⁴¹⁸ Ibid.

⁴¹⁹ Ibid art 1.2.

⁴²⁰ Ibid art 1.3.

⁴²¹ Ibid 1.1

⁴²² Ibid.

- *Differences in procedural models*

Domestic commercial courts follow the procedure prescribed by the French Civil Procedure Code whereas the International Chambers including ICCP-CA follow a special set of procedural rules laid down by the Protocol on Procedural Rules⁴²³ (protocoles) in addition to following procedural rules under the French Civil Procedure Code.

Trial procedure for cases before the ICCP-CA include several nuanced procedural aspects such as the requirement of maintaining a special mandatory procedural calendar⁴²⁴ for cases; setting out the dates on which parties must exchange submissions, the dates of witness and expert testimony, the dates for hearing pleadings by counsel, etc, for efficient conduct of proceedings.

Additionally, the conduct of proceedings before the ICCP-CA (being an international court) in comparison to domestic commercial courts, is more flexible, bringing it closer to common law proceedings or international arbitration proceedings.⁴²⁵

Common practices of Domestic Commercial Courts and International Commercial Courts

- *Composition, Jurisdiction, and applicable law*

Similarities in composition include strong expertise of judges in handling complex commercial disputes involving international parties. Judges are often trained in specialised fields such as banking, distribution, franchising, construction, insurance, company law, and financial markets among others.

Consent of the parties in the choice of applicable law drives the common practices of domestic and international commercial courts. For example, the law applicable to cases heard before the International Chamber is the law of the contract and failing such a choice, the law chosen by the parties at the opening of the proceedings.⁴²⁶

⁴²³ Protocol (n 1).

⁴²⁴ Ibid art 4.3.

⁴²⁵ ‘International Commercial Courts of Paris: where are we?’ Osborne Clarke <<https://www.osborneclarke.com/insights/international-commercial-courts-paris>>.

⁴²⁶ ‘Applicable Law’ Tribunal De Commerce De Paris <<https://www.tribunal-de-commerce-de-paris.fr/fr/droit-applicable>>.

- *Procedure and common practices*

Common principles guiding the procedure for commercial disputes in international commercial courts and domestic commercial courts are the following: (a) proceedings are adversarial, (b) proceedings are public with some exceptions in special cases, and (c) judges make decisions in accordance with the rule of law and not the law of equity.

Procedural rules generally applicable under the French Civil Procedure Code relating to the conduct of proceedings, taking of evidence, coordination of pre-trial procedural matters, and filing of written submissions, are similar for both, the international commercial courts and the domestic commercial courts in France.

Dubai International Financial Centre Courts – United Arab Emirates

Differences between Domestic Commercial Courts and International Commercial Courts

- *Differences in composition*

Dubai's domestic courts have three levels: The Dubai Court of First Instance, The Dubai Court of Appeal and the Dubai Court of Cassation. Each court has a civil division that is competent to hear commercial claims.

The Dubai International Financial Centre Courts (DIFC Courts) function independently. They were established under two laws enacted in 2004 by the then ruler of Dubai,⁴²⁷ to attract financial investment and make Dubai an international hub for financial as well as commercial transactions. The DIFC Courts operate on a common law system with binding precedents⁴²⁸ as opposed to the onshore legal system of Dubai which functions on civil law principles.⁴²⁹

⁴²⁷ 'About DIFC Courts' DIFC Courts <<https://www.difccourts.ae/about/difc-courts>>.

⁴²⁸ Ibid.

⁴²⁹ Ibid.

- *Differences in jurisdiction*

DIFC Courts have exclusive jurisdiction to hear claims where DIFC is a party⁴³⁰ or when the dispute concerns an activity that was to be partly or wholly performed within DIFC,⁴³¹ or where the dispute involves a connection with DIFC activities,⁴³² or for appeals against a decision made by the DIFC,⁴³³ or any claims where the Court has jurisdiction in accordance to the DIFC Laws and Regulations.⁴³⁴ Additionally, jurisdiction is also conferred if parties consent in writing to the adjudication of the dispute before the DIFC Courts.⁴³⁵

Domestic civil or commercial claims that are valued at less than ten million dirhams are heard by a single judge at the lower courts of the Court of First Instance whereas claims for more than ten million dirhams are heard by three judges at the upper courts of the Court of First Instance. Appeals against decisions made by the Court of First Instance are heard before the Court of Appeal and further appealable to the Dubai Court of Cassation, provided that any decision by the Court of First Instance which is to be appealed before a higher court is of the value of more than 500,000 dirhams.

- *Differences in procedural models*

DIFC procedure is governed by the DIFC Court Rules. Parties before the DIFC are subject to the disclosure process commonly seen in the English system i.e. full and extensive disclosure of documents. Evidence is given by way of witness testimony or filing of a witness statement and a cross-examination may be conducted.

The procedure in the onshore legal system of Dubai is governed by UAE Civil Procedure Code.⁴³⁶ Since Dubai operates under a civil law system, after the filing of a statement of claim, supporting documents, issue of summons, the court appoints an expert to file a report and the parties are allowed to comment on the report. There is no process of disclosure. Documentary evidence is

⁴³⁰ Law No. 12 of 2004, art 5(A)(1)(a) <https://www.difccourts.ae/application/files/7515/9465/5050/Dubai12of2004_amended2011.pdf>

⁴³¹ Ibid art 5(A)(1)(b).

⁴³² Ibid art 5(A)(1)(c).

⁴³³ Ibid art 5(A)(1)(d).

⁴³⁴ Ibid art 5(A)(1)(e).

⁴³⁵ Ibid art 5(A)(2).

⁴³⁶ Federal Law No. 11 of 1992.

preferred and witness testimony is only relied upon in exceptional circumstances. Unlike the onshore legal system of Dubai, proceedings in the DIFC Courts are conducted in English⁴³⁷ rather than Arabic.

In case of conflicts between an onshore court judgment and DIFC Court judgment, the matter is forwarded to the Judicial Joint Committee which makes a decision on the judgment to be relied upon.

Common practices of Domestic Commercial Courts and International Commercial Courts

- *Composition, Jurisdiction, and applicable law*

Similarities exist in the composition of the court structure with both, the onshore legal system and the DIFC Courts being comprised of the Court of First Instance and the Court of Appeal.

Due to a civil law approach taken by onshore courts versus a common law approach taken by the DIFC courts, not many common practices exist in the approach to determining jurisdiction or the applicable law.

- *Procedure and common practices*

The procedure for filing a statement of claim and supporting documents requires similar documents under both, the onshore legal system and the DIFC Courts. Necessary information needed as part of the statement of claim includes the subject matter and grounds for dispute, cause of action, and documents relied upon to support the claim. The defendant under both, the onshore legal system and the DIFC Courts, is required to file an acknowledgment of service. Additionally, hearings are often public for both types of courts except for special circumstances when the judge may decide otherwise.

⁴³⁷ The DIFC Court Rules, part 2.1.