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Seminar Report: Innovating International Business Courts, 10 July 2018, Erasmus University Rotterdam*

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1. Introduction

The last decade has seen the rise of international business courts in Europe. In February 2018, the International Commercial Chamber within the Paris Court of Appeal was inaugurated. A few months later, the legislative proposal for the creation of the Brussels International Business Court (BIBC) was submitted to the Belgian parliament. At the same time, while in January 2019 the Netherlands Commercial Court (NCC) opened its doors, Germany has launched what it calls the 'Frankfurt Justice Initiative', aiming to attract international commercial litigation to Frankfurt. International business courts are currently mushrooming across Europe.

Against this background, the Erasmus School of Law – in particular the 'Building EU Civil Justice' team funded by the European Research Council (ERC) – and in collaboration with the Max Planck Institute for Procedural Law in Luxembourg and with Utrecht University's Montaigne Centre for Rule of Law and Judicial Administration, jointly organized the seminar 'Innovating International Business Courts'. The aim of this seminar was to present current national initiatives for the establishment of international business courts, and to spark discussions on the innovations they could bring to court administration and civil procedure law.

After welcoming seminar participants, Professor Xandra Kramer (Erasmus School of Law) introduced the ERC project 'Building EU Civil Justice', as part of which the seminar had been organized. The project covers four emerging trends in civil procedure – digitization, privatization (Alternative Dispute Resolution and Online Dispute Resolution), self-representation, and court specialization – and aims at exploring their impact on access to justice in Europe. Professor Burkhard Hess (Max Planck Institute Luxembourg) then took the floor. He provided a brief

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overview of the recently established European international business courts, and underlined their importance for the European litigation landscape.

The seminar was structured in three sessions. The first session was dedicated to the establishment of international business courts in three jurisdictions: the Netherlands, England and Wales, and France. The second session revolved around the international business courts in Germany and Belgium. Finally, the seminar concluded with a roundtable panel that led to a lively discussion among the participants and the judges representing the aforementioned jurisdictions.

2. Session I: Views from the Netherlands, England and Wales, and France

Professor Eddy Bauw (Utrecht University, Montaigne Centre for Rule of Law and Judicial Administration) introduced the NCC. Bauw began his presentation by explaining how the idea for the NCC first took root. Although Brexit and the uncertainty surrounding it may weaken the attractiveness of the London Commercial Court, Bauw stressed that plans for the creation of a Dutch international business court dated back to before Brexit. One of the incentives for the establishment of the NCC is the growing importance of international trade for the Netherlands, which in turn warrants a court with English-language court proceedings. Furthermore, fewer and fewer commercial disputes having an international element are being brought before the Dutch courts. The decline in international commercial disputes litigated in the Netherlands is undermining the expertise of the Dutch judiciary, and having a negative impact on the legal services sector. Bauw went on to refer to the two main legislative amendments necessary for the establishment of the NCC. Firstly, although there was no statutory provision mandating the use of the Dutch language before Dutch courts, a clear legal basis was necessary for the conducting of hearings and the pronouncement of judgements in English. Secondly, given that the NCC aspires to be a financially self-standing court financed by court-fee proceeds, a legislative amendment was necessary in that regard as well. Bauw then provided an overview of the main features of the NCC. Unlike what its name suggests, the NCC is a chamber of the Amsterdam District Court and the Amsterdam Court of Appeal. Cases are heard by a three-judge panel drawn from a pool of judges selected from the Dutch civil courts for their expertise in international commercial matters. Bauw explained that unlike the international business courts in Dubai and Singapore, the NCC consists exclusively of Dutch judges as foreseen in Dutch legislation. Although the first and second instance proceedings are entirely in English, the hearings and the judgements before the Dutch Supreme Court are in Dutch. The NCC bases its jurisdictions on choice of court agreements, where parties have expressly agreed to litigate before it in English and in accordance with NCC rules. The NCC rules are a special set of civil procedure rules that mostly clarify Dutch civil procedure law, although amending it in certain instances. According to Bauw, these rules – in combination with the active role of the Dutch

judge and an early case management conference – enhances the efficiency of the proceedings, and tailors them to the complexity and value of each case.

Bauw concluded by singling out three reasons arguing for the attractiveness of the NCC. First, although NCC court fees are high, the costs of legal services connected to litigation in the Netherlands are significantly lower than in other jurisdictions. In addition, NCC judgements would be more easily recognized and enforced in the EU compared to English judgements in a post-Brexit era. Finally, Bauw acknowledged that parties' choice of court is often driven by the choice of the substantive law of the forum. In this regard, he stressed that Dutch substantive law is as highly predictable and adaptable as common law.

The second presentation revolved around England and Wales, a popular litigation destination for international commercial disputes. After a brief exposé of his work as Chancellor of the High Court of England and Wales, Sir Geoffrey Vos emphasized that the independence of the judiciary is crucial for a well-functioning and attractive justice system. In his opinion, common law is more flexible compared to the civil law legal systems, since it relies on an established body of precedent. As such, it can better accommodate novel business situations and technological developments. Following up on the advantages of common law, Sir Geoffrey highlighted the fact that Brexit would not threaten the certainty and the predictability of common law, given that European law focuses mainly on sectors affecting the common market, thereby leaving private law in the hands of national legislators. Sir Geoffrey then singled out certain recent developments in the Business and Property Courts in England and Wales. He referred to a court reform project introducing, among others, online dispute resolution for small claims, as well as divorce, and predicted that commercial disputes would be likely to follow. He stated further that the Property and Business Courts would soon pilot the recommendations made by a Disclosure Working Group so as to provide a less costly and time-consuming process for the disclosure of documents. Finally, he mentioned the introduction of the Financial List that deals expeditiously with major market disputes, and also offers a procedure for determining market test cases. Sir Geoffrey then offered his insights regarding the most important features of a successful business court. In his opinion, the quality and integrity of the judiciary, the use of appropriate information technology, a limited right to appeal, a well-functioning court-based alternative dispute resolution, and cooperation with the arbitration community guarantee a successful business court. In concluding, Sir Geoffrey touched upon the enforcement of English judgements after Brexit, a point raised by many speakers. Except for the UK's intention to negotiate an agreement with the EU that sets forth the Brussels I (recast) Regulation, he emphasized that in any case it is important both to EU Member States and to the UK to have a mutual recognition and enforcement of judgements regime in place. In his opinion, this applies even more strongly in light of the recently established international business courts in Europe.

The third and last speaker of this session was Gerard Gardella (Haut Comité Juridique de la Place Financière de Paris – HCJP). He focused his presentation on factors that had influenced the creation of the International Commercial Chamber within the Paris Court of Appeal, the matters that this chamber hears, and the adjustments needed. As stated by Gardella, there are two main reasons that the international commercial chambers were created in France. One can be found in the expected difficulties in recognizing and enforcing English court decisions post Brexit. Additionally, the well-developed international financial industry in Paris requires a court with experienced judges and English-language proceedings. Secondly, Gardella stated that the subject matter jurisdiction of the International Commercial Chamber should be as broad as possible. Every dispute that is international and commercial in nature can be submitted to this court. However, he pointed out that certain adjustments are necessary. The French language is protected by the French Constitution, and is the only official language that can be used in France. Therefore, the commercial court is using English or other foreign languages in an informal way. In Gardella's opinion, a statutory basis for the use of a foreign language before French courts is necessary. Gardella further underlined certain points of improvement. Firstly, while interpreting contracts, French courts should focus on the wording of the contract rather than on its spirit. Secondly, hearings should spend more time on facts, as is common in England. Finally, judges should be selected on the basis of their experience and expertise. The same holds true for court staff, which interacts with the parties. Gardella concluded that the fundamental challenge for the French international business court is to earn the trust of economic operators.

3. Session II: Views from Germany and Belgium

Professor Burkhard Hess (Max Planck Institute Luxembourg) opened the second session with a presentation of the 'Frankfurt Justice Initiative'. In January 2018, the District Court of Frankfurt am Main implemented a new international chamber for commercial matters. A panel of three judges, composed of a professional judge and two lay judges, adjudicates the cases brought before the Chamber for International Commercial Disputes. In addition to having English language skills, the professional and lay judges are each specialized in the fields of business law, finance and banking, and auditing. The German Chamber for International Commercial Disputes makes comprehensive use of an electronic support system that enables an electronic process and case-file management system. Moreover, borrowing best practices from arbitration, the court registry – acting as a case manager – adopts active support functions. Hess highlighted the fact that the 'Frankfurt Justice Initiative' was not preceded by a legislative amendment, given that it does not follow English-language court proceedings per se. As such, the initiative is based on the broad interpretation of Articles 184 and 185 (2) of the German Court Organisation Act and Article 142 (3) of the German Civil

Procedure Code. The chamber delivers judgements in German, but formulated in a way that allows for their speedy translation into a foreign language. As far as the jurisdiction of this chamber is concerned, disputes falling under the jurisdiction of the Chamber for Commercial Disputes will be referred to the Chamber for International Commercial Disputes, as long as they present an international element and the parties agree expressly to plead in English, waiving their right to an interpreter. Furthermore, Hess introduced the legislative proposal submitted to the German parliament in early 2018. This proposal provides for the creation of a Chamber for International Commercial Disputes within the District Court of a Federal State. Alternatively, various Federal States may agree to establish a common centralized Chamber for International Commercial Disputes within a District Court. More importantly, these specialized chambers will conduct the proceedings entirely in English. Unlike the previous unsuccessful proposals, Hess emphasized that this time the proposal would probably be adopted, since it enjoys the wide support of the Ministry of Justice and several Federal States.

Phillipe Lambrecht (Federation of Enterprises in Belgium – FEB) presented the BIBC. Firstly, Lambrecht addressed the need for an English-language court. He stated that due to the growing globalization of legal relationships, English has become the *lingua franca* of our times. This development in combination with the benefits of court litigation strongly supports the use of English in public courts. Lambrecht stressed that the BIBC would reinforce Belgium's position as the *de facto* capital of the EU. He then added that the BIBC would contribute to Belgium's economy, further develop the legal sector, and ultimately open up more dispute settlement possibilities for companies. Having addressed motives for the establishment of the BIBC, Lambrecht focused on its main characteristics. The BIBC would be a semi-permanent state court litigating international commercial disputes entirely in English with a swift and flexible procedure, and adjudicated by a panel of three judges. The president of the panel would be a Belgian judge, while the other two could be Belgian or foreign experts appointed as lay judges by an independent selection committee. In addition, the BIBC would apply the UNCITRAL Model Law on International Commercial Arbitration, thereby following its own exhaustive set of civil procedure rules. Appeal would not be permitted and cassation would be limited. Like the NCC, the BIBC would be a self-financed court, and court fees would amount to approximately 20,000 € per application. It should be noted that in March 2019 the proposal for the establishment of the BIBC was withdrawn.

4. Session III: Panel discussion

The presentations on Germany and Belgium triggered an enthusiastic discussion, which was soon followed by a roundtable panel dedicated to the jurisdictions previously addressed. This roundtable aimed at facilitating a conversation between

guest judges and the audience. Diana Wallis (Universities of Hull and Oxford) hosted as speakers Duco Oranje (President of the NCC of Appeal), Sir Nicholas Hamblen (Lord Justice of Appeals, England and Wales), Ilse Couwenberg (Court of Cassation, Belgium), Ina Frost (District Court of Frankfurt, Germany), Jean Messinesi (President Paris Commercial Court, France), and Fabienne Schaller (Paris Court of Appeal, International Chamber, France). The panellists shared their working experience on diverse topics such as the selection of judges, the use of a foreign language before the court, and the importance of newly established courts to build up a good reputation. A common theme amongst the speakers was how to assess the expertise of the judges as well as their language proficiency.

Ilse Couwenberg emphasized the relationship between the BIBC and the rest of the domestic courts in Belgium. In her opinion, the establishment of the BIBC could create a two-tier justice system, shifting the government's focus on international commercial disputes while neglecting other kind of disputes such as family law cases. Furthermore, Couwenberg criticized the funding of the BIBC and the application of the UNCITRAL Model Law before this court: for example, the absence of provisions on res judicata in the Model Law as well as the wide discretion it grants to an arbitrator, while conducting arbitration proceedings challenges the judges and thus questions the suitability of these rules for public court proceedings. Additionally, participants questioned the ability of international commercial courts to compete successfully with arbitration, taking into consideration that arbitration allows for privacy and confidentiality. Seminar participants further intervened to question the hybrid nature of the emerging international business courts: for instance, are they courts or arbitral tribunals, and is there a risk that foreign courts would not recognize them as courts in the sense of Article 267 of the Treaty on the Functioning of the European Union.

At the end of the seminar, speakers and participants met in an informal setting, which created the background for an academic poster presentation by each of four young researchers: Georgia Antonopoulou (Erasmus School of Law), Nicole Grohmann (University of Freiburg), Maryam Salehijam (University of Gent), and Aygun Mammadzada (University of Southampton). The poster presentations offered their creators the chance to compete for the Best Poster Presentation Prize. The jury composed of Ilja Tillema (Erasmus School of Law) and Ianika Tzankova (Tilburg University) awarded the prize jointly to Georgia Antonopoulou and Maryam Salehijam.

5. Concluding Remarks

The large attendance at the seminar, with more than one hundred participants, shows that the concept of international business courts has already captured the interest of policy makers, scholars, and legal practitioners. In addition, the diversity of the questions raised reveals that the creation of these courts has given rise to multiple issues ranging from civil procedure law and court administration to public

and constitutional law. However, international business courts are not exclusively a European phenomenon. The Singapore International Commercial Court and the Dubai International Financial Centre Courts are two examples of international business courts beyond European borders. Triggered by this upsurge in international business courts, and following on from the seminar at Erasmus School of Law, in 2019 a special issue of *Erasmus Law Review* as well as a book (Eleven International Publishing, Eds. Xandra Kramer & John Sorabji) were published, dedicated to international business courts in and outside of Europe, including contributions from the conference speakers and scholars from around the globe.