The International Business Courts saga continued: NCC First Judgment – BIBC Proposal unplugged

Written by Georgia Antonopoulou and Xandra Kramer, Erasmus University Rotterdam (PhD candidate and PI ERC consolidator project Building EU Civil Justice)

1. Mushrooming International Business Courts on the Eve of Brexit

Readers of this blog will have followed the developments on the international business courts and international commercial chambers being established around Europe and elsewhere. While many of the initiatives to set up such a court or special chamber date from before the Brexit vote, it is clear that the UK leaving the EU has boosted these and is considered to be a big game changer. It remains to be seen whether it really is, but in any case the creation of courts and procedures designed to deal with international commercial disputes efficiently is very interesting!

The Netherlands was one of the countries where, after the Senate came close to torpedoing the proposal (see our earlier blogpost), such an international commercial court (chamber) was created. The Netherlands Commercial Court (NCC) opened its doors on 1 January 2019, and it gave its first judgment on 8 March 2019 (see 2). Meanwhile, in Belgium the proposal for the Brussels International Business Court (BIBC) seems to be effectively unplugged due to lack of political support (see 3).

2. The First NCC Judgment

As reported earlier on this blog, on 18 February 2019 the Netherlands Commercial Court (NCC) held its first hearing (see here). The NCC' s first case *Elavon Financial Services DAC* v. *IPS Holding B.V. and others* was held in summary proceedings and concerned an application for court permission to privately sell pledged shares under Article 3:251 (1) Dutch Civil Code. The NCC

scheduled a second hearing on 25 February 2019, offering the interested parties that did not appear before court the opportunity to be heard. However, these notified the court about their intention not to attend the hearing and leave the application uncontested. As a result, the NCC cancelled the planned hearing and gave its first judgment granting the requested permission on 8 March 2019 (see here). Our discussion will focus on the NCC's judgment regarding the four main jurisdictional requirements and aims at offering a sneak preview on the Court's future case law on the matter.

(a) Jurisdiction of the Amsterdam District Court

Unlike what the name suggests, the NCC is not a self-standing court but a chamber of the Amsterdam District Court (see the new Article 30r (1) Dutch Code of Civil Procedure (DCCP) and Article 1.1.1. NCC Rules). Therefore, the jurisdiction of the NCC depends on the jurisdiction of the Amsterdam District Court (Article 30r (1) DCCP and Article 1.3.1. (a) and (c) NCC Rules). The Court confirmed its international and territorial jurisdiction based on a contractual choice-of-court agreement in favour of the Amsterdam District Court (Article 25 (1) Brussels Regulation Recast). With regard to the interested parties that were not a party to the agreement, the Court based its jurisdiction on the fact that they either entered an appearance or sent a notice to the Court acknowledging its jurisdiction without raising any objections (Article 26 (1) Brussels Regulation Recast and Article 25 Lugano Convention). Regarding the subject-matter jurisdiction of the Amsterdam District Court, Article 3:251 (1) Dutch Civil Code explicitly places applications for the private sell of pledged assets under the jurisdiction of the provisional relief judge of the District Court.

(b) Civil or commercial matter within the parties' autonomy

Second, the dispute concerned a civil or commercial matter that lies within the parties' autonomy (Article 30r (1) Dutch Code of Civil Procedure and Article 1.3.1. (a) NCC Rules).

(c) Internationality

Third, the NCC solely deals with international, cross-border disputes. So as to define the notion of internationality, the Explanatory Notes to Article 1.3.1. (b) NCC Rules entail a list of alternative, broad criteria that gives the dispute the required internationality (see Annex I, Explanatory Notes). The application in

question was filed by Elavon Financial Services DAC, a company established in Ireland, and some of the interested parties are Dutch subsidiaries of a Swiss parent company (Explanatory Notes to Article 1.3.1. (b)). Although, pursuant to the Explanatory Notes, these circumstances were sufficient to establish the matter's international character, the court went on to address other cross-border elements present in the case. Based on a broad understanding of a dispute's international character, the court underlined that some of the interested parties are internationally active, operate or at least plan to operate business abroad (see also The Hague Court of Appeal, ECLI:NL:GHSGR:2011:BR1381). Similar to the rules of other countries' international commercial courts, the NCC Rules qualify a case as international when the dispute arises from an agreement prepared in a language other than Dutch. Since the documents related to the application were drafted in English, the NCC regarded the English language of the contract as another international element.

(d) NCC Agreement

The fourth requirement for the NCC's jurisdiction is that the parties should have expressly agreed in writing for the proceedings to be in English and according to the NCC Rules (Article 30r (1) Rv and Article 1.3.1. (d) NCC Rules). Since the NCC, unlike the rest of the Dutch courts, conducts proceedings entirely in English and applies its own rules of civil procedure the parties' agreement justifies such a deviation and ensures that the parties wilfully found themselves before the newly established chamber. In the present matter, the parties signed a pre-application agreement and expressly agreed on the NCC' s jurisdiction to hear their case. Although, two of the interested parties were not signatories to that agreement one of them appeared before the court leaving the NCC' s jurisdiction uncontested and the other did not raise any objections against the chamber' s jurisdiction in its communication with the court (see also Article 2.2.1 NCC Rules and the Explanatory Rules).

(3) The Fate of the Belgian BIBC Proposal

As reported on this blog, the proposal to create the Brussels International Business Court was brought before Parliament in May 2018. Interesting features of this proposal are that the rules of procedure are based on those of the UNCITRAL Model Law on International Commercial Arbitration and that cases are heard by three judges, including two lay judges. The proposal has been

criticized from the outset (see for some interesting initial thoughts Geert Van Calster's blogpost). As in the Netherlands, many discussions evolved around the fear for a two-tiered justice system, giving big commercial parties bringing high value claims a preferential treatment over ordinary court cases (see for the discussions in the Netherlands our earlier blogpost). The Belgian Ministry of Justice and Prime Minister presented the English language court as an asset in times of Brexit and efforts were made to adjust the proposal to get it through.

Over the last week it became clear that there is insufficient political backing for the proposal after one of the big parties withdrew its support (see De Standaard). Other – mostly left-wing parties – had expressed their concerns earlier and the proposed court has been referred to as a 'caviar court' and a 'court for the super rich'. But probably the most fierce opponent is the judiciary itself. Arguments range from principled two-tiered justice fears (including for instance by the First President of the Court of Cassation) to concerns about the feasibility to attract litigation in the Brussels courts and the costs involved in establishing this new 'vip court'. The message seems to be: we have enough problems as it is. Referring to the Dutch NCC and the French International Commercial Chamber, the Minister of Justice, Koen Geens, said that withdrawing the BIBC proposal would be a missed opportunity and that he can counter the arguments against the establishment of the BIBC. However, as it looks now it seems highly unlikely that Belgium will be among the countries that will have an international business court in the near future.

Traveling Judges and International Commercial Courts

Written by Alyssa S. King and Pamela K. Bookman

International commercial courts—domestic courts, chambers, and divisions dedicated to commercial or international commercial disputes such as the Netherlands Commercial Court and the never-implemented Brussels International

Business Court—are the topic of much discussion these days. The NCC is a division of the Dutch courts with Dutch judges. The BIBC proposal, however, envisioned judges who were mostly "part-timers" who may include specialists from outside Belgium. While the BIBC experiment did not pass Parliament, other commercial courts around the world have proliferated, and some hire judges from outside their jurisdictions.

In a new paper forthcoming in the American Journal of International Law, we set out to determine how many members of the Standing International Forum of Commercial Courts hire such "traveling judges," who they are, why they are hired, and why they serve.

Based on new empirical data and interviews with over 25 judges and court personnel, we find that traveling judges are found on commercially focused courts around the world. We identified nine jurisdictions with such courts, in Hong Kong, Singapore, Dubai, Abu Dhabi, Qatar, Kazakhstan, and the Caribbean (the Cayman Islands and the BVI), and The Gambia. These courts are designed to accommodate foreign litigants and transnational litigation—and inevitably, conflicts of laws.

One may assume that these judges largely resemble arbitrators (as was likely intended for the BIBC). But whereas studies show arbitrators are mostly white, male lawyers from "developed" countries that may be based in the common law or civil law tradition, traveling judges are even more likely to be white and male, vastly more likely to have prior judicial experience and common-law legal training, and are overwhelmingly from the UK and its former dominion colonies. In the subset of commercially focused courts in our study, just over half of the traveling judges were from England and Wales specifically. Nearly two-thirds had at least one law degree from a UK university.

Below is a chart showing the home jurisdiction of the judges in our study. This includes traveling judges sitting on the BVI commercial division, Hong Kong Court of Final Appeal, Dubai International Financial Centre (DIFC) Courts, Qatar International Court, Cayman Islands Financial Services Division, Singapore International Commercial Court, Abu Dhabi Global Market (ADGM) Courts, and Astana International Financial Centre (AIFC) Courts as of June 2021.

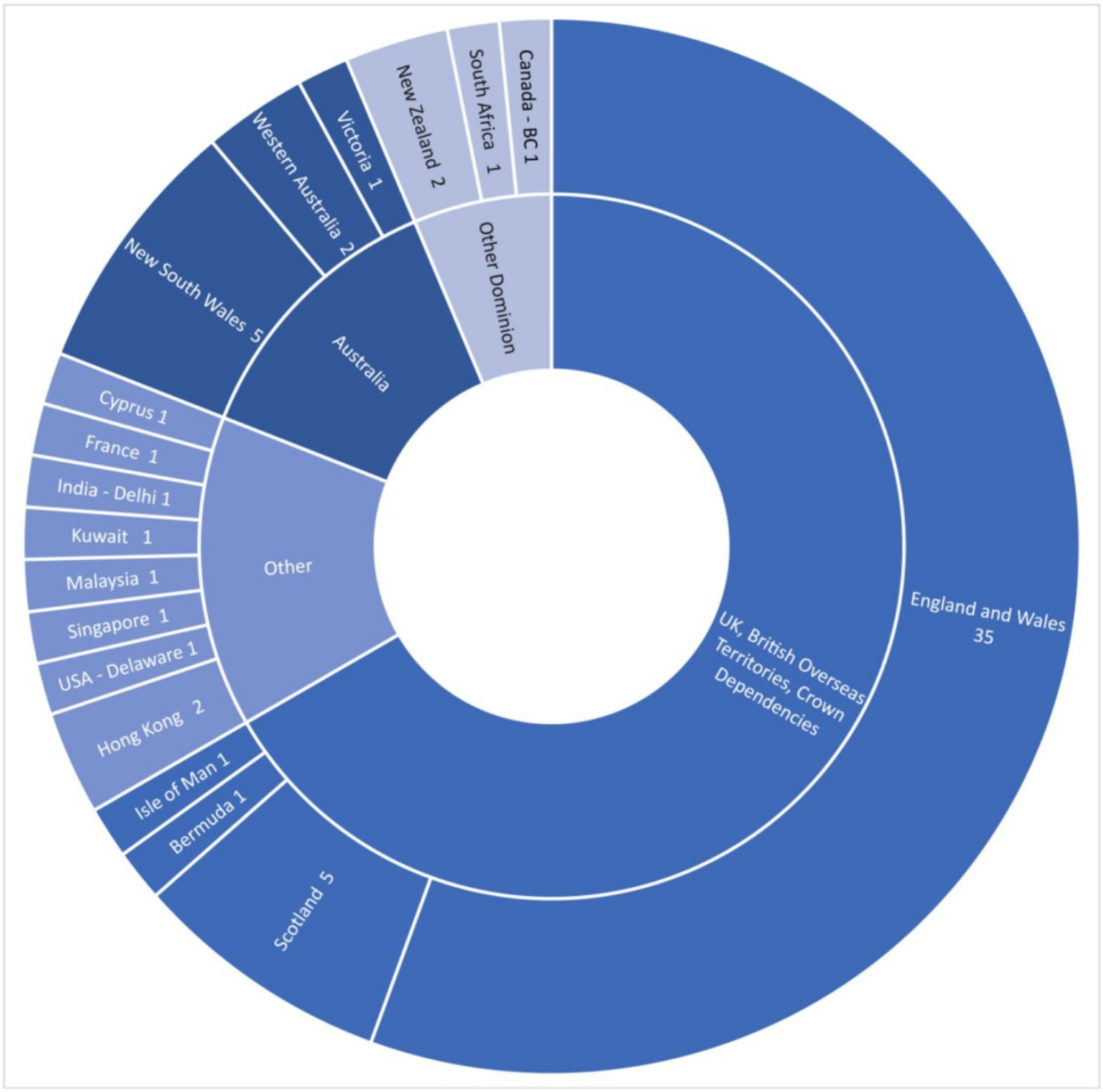

Figure 2. Traveling Judges by Home Jurisdiction Excluding Non-Commercial ECSC and The Gambia—June 2021

A look at traveling judges' backgrounds suggests that traveling judges might be a phenomenon limited to common-law countries, but only half of hiring jurisdictions are in common law states. Almost all hiring *jurisdictions*, however, are common law jurisdictions. Moreover, almost all are or aspire to be market-dominant small jurisdictions (MDSJ). For example, the DIFC Courts are located in a common law jurisdiction within a non-common-law state that has been identified as a MDSJ.

Traveling judges are a phenomenon rooted not only in the rise of international commercial arbitration, but also in the history of the British colonial judicial

service. Today, traveling judges may be said to bring their expertise and knowledge of best practices in international commercial dispute resolution. But traveling judges also offer hiring jurisdictions a method of transplanting well-respected courts, like London's commercial court, on their shores. In doing so, judges reveal these jurisdictions' efforts to harness business preferences for English common law into their domestic court systems. They also provide further opportunities for convergence on global civil procedure norms, or at least common law ones. Many courts have adopted some version of the English Civil Procedure Rules, looking for something international lawyers find familiar and reliable. Judges also report learning from each other's approaches.

Our article suggests that traveling judges are a nearly entirely common law phenomenon—only a handful of judges were from mixed jurisdictions and only one was a civil law judge. Common law courts may be especially amenable to traveling judges. In contrast to judges in continental civil law systems, common law judges are not career bureaucrats. They come to the judiciary late, usually after having built successful litigation practices. Moreover, the sociologist, and judge, Antoine Garapon observes that common law style-judging can be more personalized, with more room for individual authority rather than that of the office. All these differences are a matter of degree, with exceptions that come readily to mind. Still, as a result, common law judges are more likely have reputations independent of the office they serve. That reputation, in turn, is valuable to hiring governments eager to demonstrate their commercial law bona fides.

These efforts to harness English common law contrast with the efforts to build international commercial courts in the Netherlands or Belgium. The NCC advertises itself as an English-language court built on the foundation of the Dutch judiciary's strong reputation. As such, it has no need for foreign judges or common law experience. The BIBC likely also would not have relied as heavily on retired English judges, both because its designers envisioned more lay adjudicators (not retired judges) and likely a greater civil law influence. In that sense, its roster of judges might have more closely resembled that of the new international commercial court in Bahrain.

The Dutch, Belgian, and Bahraini examples do share something else in common with the network of courts profiled in *Traveling Judges*, however. Despite their apparent similarities to arbitration, these courts are domestic courts, and they

exist in significantly different political environments. The differences between Dutch and Belgian national politics influenced the NCC's success in being established and the BIBC's failure. In Belgium, for instance, the BIBC was maligned as a "caviar court" for foreign companies and the Belgian Parliament ultimately decided against the proposal. As one of us recounts in a related article on arbitration-court hybrids, similar arguments were raised in the Dutch Parliament, but they did not win the day. Several courts in our study, such as those established in the special economic zones in the UAE, did not face such constraints. But they may face others, such as how local courts will recognize and cooperate with a new court operating according to a different legal system and in a different language. The new court in Bahrain overcame local obstacles to its establishment, but it may face yet another set of political constraints and pressures as it proceeds to hear its first cases. Wherever traveling judges travel, local politics will affect both hiring jurisdictions' ability to achieve their goals and traveling judges' ability to judge in the way they are accustomed.