doi:10.1017/aju.2020.78

SYMPOSIUM ON GLOBAL LABS OF INTERNATIONAL COMMERCIAL DISPUTE RESOLUTION

EXPERIMENTING WITH INTERNATIONAL COMMERCIAL DISPUTE RESOLUTION

Pamela K. Bookman[*] *& Matthew S. Erie*[**]

In this essay, we describe the overlapping phenomena of new legal hubs (NLHs), international commercial courts, and arbitral courts. We survey their impact on the law and geopolitics of international commercial dispute resolution, identifying key issues these new dispute resolution institutions raise. While the rise of international commercial courts spans authoritarian and liberal states, Western and Asian states, common law and civil law traditions, it also highlights and builds upon regional differences. We question the assumption that the establishment of new courts is always consistent with an increase in the rule of law, particularly in non-democratic states. We close with thoughts about the potential influence and future role of these institutions. Some of the procedural innovations discussed here may lead to shifts in international commercial dispute resolution for years to come, but the question of whether there is sufficient demand for these new institutions lingers.

New Legal Hubs, International Commercial Courts, and Arbitral Courts

In the past few years, emergent Eurasian economies like the United Arab Emirates, Qatar, Singapore, and China have all created NLHs as domestic centers for international commercial dispute resolution. Governments establish NLHs to attract foreign direct investment, promote their legal services abroad, and raise the legitimacy of their respective states as facilitators of global commerce. Often established in "jurisdictional carve-outs," like special economic zones, these NLHs function as "one-stop shops" for cross-border commercial dispute resolution.[1] NLHs include legal service providers, who assist sophisticated commercial parties, and dispute resolution mechanisms that handle their disputes. The disputes involve all manner of corporate and commercial matters including, inter alia, construction, project finance, data protection, employment, insolvency, securities, and enforcement of arbitral agreements and awards. Importantly, these dispute resolution mechanisms feature a variety of hybridized approaches to dispute resolution, including international commercial courts, some of which we have called "arbitral courts" because of their flexible procedures, foreign judges, and other features that mimic arbitration.[2]

International commercial courts are state-created courts with specialized jurisdictional and procedural rules that aim to attract non-local parties to their forum and to promote cross-border transactions. Many are modeled after

* *Associate Professor, Fordham University School of Law, New York City, United States.*

** *Associate Professor, University of Oxford Oriental Institute and Associate Research Fellow of the University of Oxford Centre for Socio-Legal Studies, Oxford, United Kingdom.*

[1] Matthew S. Erie, *The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution*, 60 VA. J. INT'L LAW 225, 278 (2020).

[2] Pamela K. Bookman, *Arbitral Courts*, VA. J. INT'L LAW (forthcoming).

© Pamela K. Bookman, Matthew S. Erie 2021. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (http://creativecommons.org/licenses/by/4.0/), which permits unrestricted re-use, distribution, and reproduction in any medium, provided the original work is properly cited.

https://doi.org/10.1017/aju.2020.78 Published online by Cambridge University Press

the London Commercial Court, which has been a go-to court for transnational disputes, respected for its professional judges and efficient procedures. In addition to appearing in NLHs, international commercial courts have also been proliferating in Europe, especially after the Brexit vote, as English court judgments are no longer as easily enforceable throughout the EU. There are now special international commercial chambers of courts in Paris, Amsterdam, and multiple German cities, and there are efforts to create similar chambers in Brussels, Zurich, and beyond.[3]

NLHs offer parties a menu of dispute resolution mechanisms. This menu often includes an international commercial court as its centerpiece, but the NLH also offers parties a range of other options, including arbitration and mediation. China, for example, has established the Chinese International Commercial Court (CICC) in Shenzhen and Xi'an, which offers subject-matter expertise, some English-language capabilities, and an ancillary body of international experts to advise the court. Other NLHs include a longstanding common law court with expertise in international commercial issues, like in Hong Kong, or a new international commercial court—one that adopts the English language and the common law tradition and dedicates itself exclusively to cross-border commercial disputes—like the court in the Astana International Financial Centre. Still others are even more innovative with their central court. The Singapore International Commercial Court and the Dubai International Financial Centre (DIFC) Courts, for example, are international commercial courts that can also be considered "arbitral courts."[4]

Importantly, NLHs are "located mainly in nondemocratic or hybrid states . . . wherein power is concentrated in the hands of a few (or one) [actors or a political party] with the result that the system lacks true political pluralism, representation, and an electoral process."[5] Whereas some of the new international commercial courts are based in democratic states like France and the Netherlands, the NLHs, which combine different mechanisms for dispute resolution, are frequently found in non-democratic or hybrid states in Eurasia, including Dubai, Kazakhstan, Singapore, Hong Kong, and China.

These procedural and technological experiments across Europe and Eurasia illustrate important macro-regional trends and reveal both convergence and divergence. In both regions, these new English-language-friendly courts are dedicated to disputes with international and commercial dimensions. In Europe, the emergence of international commercial chambers of existing court systems is usually described as an effort to attract international commercial disputes away from arbitration and away from the London Commercial Court. In Asia, too, there seems to be an effort to onshore cross-border dispute resolution. While the international commercial courts in Europe appear to be competing with each other, heading towards a diversification of dispute resolution in Europe, there is greater institutional linking and coordination between Asian jurisdictions compared to their European counterparts. These links are necessary for recognition and enforcement of judgments in the absence of EU-like coordination. Further, some of the Asian courts—in contrast to their Continental counterparts—are common law courts, with the potential to promulgate common law decisions that may have influence beyond the home state.[6]

The emergence of these experimental venues occurs against the backdrop of several trends—including trade protectionism, nationalist politics, and the resurgence of sovereignty—which are shifting the tectonic plates of both private and public international law. Two of the most popular centers for international commercial dispute resolution and global governance since the post-World War II period—New York and London—belong to states

[3] Pamela K. Bookman, *The Adjudication Business*, 45 YALE J. INT'L L. 227, 250; *see also* Giesela Rühl, *The Resolution of International Commercial Disputes – What Role (if any) for Continental Europe?*, 115 AJIL UNBOUND 11 (2021).

[4] Bookman, *supra* note 2.

[5] Erie, *supra* note 1, at 229.

[6] *See* Bookman, *supra* note 2 (discussing the Singapore International Commercial Court's potential to develop influential transnational commercial law).

https://doi.org/10.1017/aju.2020.78 Published online by Cambridge University Press

that are, to varying degrees, currently captive to anti-globalization movements. Meanwhile, much of Eurasia is globalization hungry.

Thus, while the U.S. Supreme Court is limiting the availability of U.S. courts, and largely relying on arbitration to serve international commercial dispute resolution needs,[7] courts in these other jurisdictions are experimenting with legal reforms and institutional design in an effort to become world-recognized forums for international commercial dispute resolution. For example, the DIFC Courts have evolved their own jurisprudence on jurisdictional matters to increase their case intake.[8] China is building innovative pluralist models of dispute resolution, including "med-arb" and "arb-med-arb," judicial confirmation of mediation agreements, support for arbitration and enforcement of arbitral awards, appointing court-sanctioned mediators and arbitral institutions, establishing the CICC (which features "organically linked" mediation, arbitration, and litigation), and recognizing foreign arbitral institutions in free trade zones.[9]

Many European states, likewise, are repositioning themselves in a similar climate, and in a European Union without the United Kingdom. The Paris International Commercial Chamber, for example, has adopted many common law procedures that may have earlier seemed anathema to French legal culture; the Netherlands has attracted a half dozen cases so far to its new court,[10] which is the only English-language civil-law commercial court in Europe.[11] In short, countries across the globe are building legal environments "friendly" to international business, complete with dedicated and innovative dispute resolution institutions.

Legal and Geopolitical Significance

We would like to highlight the impact of these dispute resolution experiments on three areas: international commercial dispute resolution, international commercial law, and the geopolitics of disputes.

First, some (though not all) of these experiments may generate longer-term trends in international commercial dispute resolution. Arbitral courts like Singapore's try to represent the best of both the arbitration and judicial worlds, offering courts that resemble arbitration by providing confidentiality, customizable procedures, and international adjudicators with expertise in transnational commerce. Such courts have already attracted some cases.[12] Tiered dispute resolution methods such as arb-med and its variants seem successful, although some (e.g., arb-med-arb) may become redundant under the UN Convention on International Settlement Agreements Resulting from Mediation of 2018 (Singapore Mediation Convention), through which a mediation agreement agreed upon in one member state will receive recognition in other member states.[13]

Further, NLHs' embrace of "lawtech" in dispute resolution has garnered attention. Automated contracts, predictive artificial intelligence, and automated documentation and practice management tools may all reduce transaction costs and increase efficiency. The preference for digital technologies among NLHs and international

[7] Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081 (2015); Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 72 VAND. L. REV. 1119 (2019).

[8] Erie, *supra* note 1, at 269-71.

[9] ZHIQIONG JUNE WANG & JIANFU CHEN, DISPUTE RESOLUTION IN THE PEOPLE'S REPUBLIC OF CHINA: THE EVOLVING INSTITUTIONS AND MECHANISMS 10 (2019); Gu Weixia, *Hybrid Dispute Resolution Beyond the Belt and Road: Toward a New Design of Chinese Arb-Med(-Arb) and Its Global Implications*, 29 WASH. INT'L L. J. 117 (2019).

[10] *See Judgments*, NETHERLANDS COMMERCIAL COURT.

[11] Bookman, *supra* note 3, at 250–54.

[12] Bookman, *supra* note 2.

[13] Peter Corne & Matthew Erie, *China's Mediation Revolution? Opportunities and Challenges of the Singapore Mediation Convention*, OPINIOJURIS (Aug. 28, 2019).

https://doi.org/10.1017/aju.2020.78 Published online by Cambridge University Press

commercial courts makes them well disposed to weather major disruptions, including pandemics and international lockdowns. Whereas arbitrators have been scrambling to determine whether arbitration clauses permit virtual hearings and courts in many states have simply shut down, some of the forums described here have continued their work apace. In short, those innovations that find traction among parties may become trendsetters beyond the originating jurisdiction.

For other innovations, however, it is too soon to judge their efficacy and whether they will spread. The DIFC Courts have devised a mechanism for converting a court judgment into an arbitral award to enhance recognition and enforcement in other jurisdictions under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention).[14] But to date, no one has tried to use the mechanism.[15] The CICC has a similar as-yet-untested mechanism for converting a mediation settlement issued by International Commercial Expert Committee members into a CICC judgment.[16] Further, China and Singapore have been active proponents of the Singapore Mediation Convention, which is still in the early stages of trying to attract signatories. These innovations are worth watching.

Second, these forums may impact the development of international commercial law. For instance, to address judgment enforcement challenges, the courts in NLHs sign Memoranda of Understanding to promise mutual recognition and enforcement of each other's judgments, circumventing the traditional role of national treaties in this space. The success of such efforts raises questions about the role of soft law and non-executive bodies like international commercial courts in making international law. Some budding common law international commercial courts may also, over time, contribute to shaping the development of common law and transnational commercial law beyond their borders, especially in areas of the law that involve new technologies, like cryptocurrency, or that have seen a decline in case law, like contract disputes that have traditionally been resolved in arbitration.[17]

Third, many of these experimental venues are in non-democratic states. This fact may have broader implications for two trends in the shifting geopolitics of international disputes: the geographical shift toward Asian jurisdictions and the political shift, especially during the coronavirus pandemic, toward elevating the legitimacy of authoritarian states as governance models. Whereas liberal democracy and "rule of law" have been conventional pairings over the last half century for international dispute resolution forums, the Eurasian NLHs operate in states that otherwise score low on global indicators for open government. The fact that non-transparent regimes have established these venues warrants caution. Traditionally, establishing courts is thought to signify that a country is becoming more rule-of-law oriented. This result, however, is less clear with these courts, which to date do not have a strong record of holding public parties accountable and may suffer from state capture. Importantly, they appear to have limited positive spillover effects in terms of promoting rule of law outside of international commercial dispute resolution.

For example, China is increasingly active in international commercial dispute resolution by not only furthering its participation in established regimes (e.g., the World Trade Organization, International Centre for Settlement of Investment Disputes, or New York Convention), but also by building its own institutions to onshore conflicts arising out of overseas business, while also shaping transnational law.[18] Some have gone so far as to argue that China's increased profile may further "authoritarian international law."[19] Singapore's efforts to situate itself as a

[14] Erie, *supra* note 1, at 271 (citing DIFC Courts, Enforcement Guide 2018 13 (2018)).

[15] *Id.* at 275.

[16] Zuigao renmin fayuan guanyu sheli guoji shangshi fating ruogan wenti de guiding (最高人民法院关于设立国际商事法庭若干问题的规定) [Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court], issued by the Supreme People's Court, effective on July 1, 2018, art. 13.

[17] *See* Bookman, *supra* note 2.

[18] Matthew S. Erie, *Chinese Law and Development*, Harv. Int'l L.J. (forthcoming).

[19] Tom Ginsburg, *Authoritarian International Law*, 114 AJIL 221 (2020).

https://doi.org/10.1017/aju.2020.78 Published online by Cambridge University Press

dispute resolution hub—for all forms of dispute resolution, casting aside traditional distinctions between public and private adjudication and between democratic liberal and authoritarian governmental legitimacy—may lead to shifts in legal governance in Asia. In Europe, if the international commercial courts are successful, they may decentralize dispute resolution on the Continent, diminishing the influence of any one venue, such as London.

Together, NLHs and international commercial courts require adjustments to many traditional assumptions about courts, arbitration, and the role of Western liberal nations as providers of dispute resolution services for international commercial law. These experimental venues bring fresh attention to the primacy of geopolitics and geoeconomics, as they are both products of and contributors to those forces.

If You Build It, Will They Come?

In nations with all kinds of governments, NLHs and international commercial courts continue to proliferate. Most recently, India, Uzbekistan, and Saudi Arabia have either announced their own versions or are in the midst of planning them.[20] As noted, several European jurisdictions are considering establishing international commercial courts. Australia may also be considering the idea.[21]

But is there a demand for these institutions? This question is complicated by the way most parties include forum-selection clauses in their international commercial contracts: hastily and at the eleventh hour.[22] Whereas many of these courts intend to rely on parties to choose their forums in their respective forum-selection clauses, most such clauses are boilerplate. Moreover, parties rarely want to be the guinea pigs to experiment with new forums.[23] To address this problem, some courts try to be designated in boilerplate forum-selection clauses. For example, the Paris International Commercial Chamber is now the designated forum in a form agreement issued by the International Swaps and Derivatives Association, Inc. which may lead to more contracts selecting that court and, ultimately, more cases. In some places, the new courts are the default jurisdiction for certain kinds of disputes. For example, the DIFC courts have jurisdiction over suits with a connection to the DIFC or involving a DIFC-established party.[24]

It is ultimately too soon to evaluate the demand for these courts and institutions. These new forums have some cases—sometimes by referral from courts of more general jurisdiction and occasionally through forum-selection clauses. As initial but inconclusive evidence, between April 2019 and March 2020, the London Commercial Court saw a dip in its usual number of cases, while some Asian jurisdictions, such as Singapore, experienced an increase.[25] It will be important to map and trace parties' demands for these new courts and, insofar as such demand exists, to see what it reveals about preferences for jurisdictions (liberal vs. illiberal, traditional vs. emergent, common law vs. civil law, etc.) and dispute resolution mechanisms (courts vs. arbitration, some hybrid, or something that resembles neither such as mediation).

[20] *See, e.g.*, Sai Ramani Garimella & M.Z. Ashraful, *The Emergence of International Commercial Courts in India: A Narrative for Ease of Doing Business?*, 1 Erasmus L. Rev. 111 (2019); Kiran Nasir Gore, *Highlighting an Emerging Regional Hub with Ms. Diana Bayzakova, Director of the Tashkent International Arbitration Centre (TIAC)*, Kluwer Arb. Blog (Nov. 27, 2019); Gillian Hadfield, *Saudi Arabia's TechUtopia Neom Will Have to Reinvent the Rules to Succeed*, TechCrunch.com (Dec. 24, 2017).

[21] *See* Andrew Stephenson et al., *Australia: Is an International Commercial Court for Australia a Viable Option?*, Mondaq (June 27, 2016); S.I. Strong, *International Commercial Courts in the United States and Australia: Possible, Probable, Preferable?*, 115 AJIL Unbound 28 (2021).

[22] Bookman, *supra* note 3, at 269–70.

[23] *Id.*

[24] Law No. (16) of 2011 Amending Certain Provisions of Law No. (12) of 2004 Concerning Dubai International Financial Centre Courts, art. 5, Oct. 31, 2011.

[25] Portland Communications, *Commercial Courts Report 2020* 1, 5 (2020).

https://doi.org/10.1017/aju.2020.78 Published online by Cambridge University Press

These new venues raise more questions than they answer. Will they lead to a new ecosystem for legal enforcement, comprised of hubs linked by memoranda of understanding and digital tech rather than nation-states bound by treaties? Will NLHs based in non-democratic states exhibit independence from those states? Will their decisions affect the development of transnational commercial law? Will they be accountable to the public—either local or transnational—or only to the parties who choose them? Will they continue to proliferate or will they be consigned to the dustbin of international law history as failed experiments? Thus far, the coronavirus pandemic's effect on these new venues has cut two ways. On one hand, the pandemic has revealed the adaptability of NLHs and international commercial courts; on the other hand, a significant aspect of that adaptation has been to go online—potentially militating against the need for regions to establish their own dispute resolution centers. Observing the basic principles of these novel institutions, as we have done here, will establish a baseline for future study.

https://doi.org/10.1017/aju.2020.78 Published online by Cambridge University Press