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Visiting Judges

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VISITING JUDGES

going global

BY PAMELA K. BOOKMAN
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Federal judges within the United States travel to sit on other circuits, but are typically restricted from holding external office or visiting international courts.¹

After they leave the bench, however, federal (and state) judges are unrestricted in their career choices. Might they be interested in traveling to sit on other countries' courts? Would they be more or less inclined to do so if the court to which they travel is focused on commercial disputes? Commercial courts may be attractive because they offer judges the opportunity to function more like arbitrators — a popular career choice among retired judges — and commercial courts may also seem more removed or insulated from local politics.

In a recent article in the *American Journal of International Law*,² we examined commercially focused courts around the world to document which ones hire outsider judges from other jurisdictions and who those judges are. As of June 1, 2021, we identified nine jurisdictions that hire traveling judges,³ for a total of 72 sitting traveling judges on all courts identified through the study. Several judges sat on two or more courts.⁴ For example, the former Chief Justice of the Supreme Court of Canada sat on the Hong Kong Court of Final Appeal and the Singapore International Commercial Court (SICC), while the former Chief Justice of Australia sat on those courts and the Dubai International Financial Centre (DIFC) Courts.

Our research documented the phenomenon of internationally traveling judges, grounded its historical roots in ►

the colonial judicial service and the rise of international arbitration, and offered possible explanations for the use of traveling judges and the near absence of U.S. judges among their ranks. Unlike “visiting” judges, who sojourn domestically, “traveling” judges travel to sit on foreign courts. We defined “traveling judges” as individuals who, at the time of appointment, were not citizens of the host court’s jurisdiction, did not permanently reside there, and did not have their primary legal career there. Most live outside the hiring jurisdiction during their terms as well. As judges in a foreign jurisdiction, traveling judges may have the opportunity to shape international commercial law, define the community they seek to serve, and embrace the public nature of this service. There may be obstacles, however, both from home and in hiring jurisdictions. Civil society in traveling judges’ home jurisdictions have sometimes criticized them serving as traveling judges and lending legitimacy to regimes with questionable records. The hiring jurisdictions themselves, moreover, offer different, and potentially changing, environments in which to work.

The Colonial and Arbitration-Based Origins of Traveling Judges

Internationalized courts with international judges who adjudicate international disputes have a long history, dating back to the Middle Ages.⁵ The British Empire used colonial judges to help spread a shared common law tradition.⁶ In colonies like Hong Kong and the British Virgin Islands (BVI), the Empire established *colonial* courts — local common law courts intended to promote and protect commercial development.⁷ The British government

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lacked direct control of protectorates, like the Trucial States (now the UAE) and Qatar, and did not impose a common law system there.⁸ As the region developed with the discovery of oil in the 1940s, however, the British government required ruling sheiks to cede jurisdiction over British subjects, who did not trust local courts.⁹ The resulting *consular* courts¹⁰ heard disputes involving British citizens, other foreigners, and their property.¹¹

When former colonies and protectorates established independence in the 1960s and 1970s, some employed foreign judges in their courts, while others introduced these judges later.¹² Territories that did not become independent, including the Cayman Islands and the BVI,¹³ developed benches with a mix of local and traveling judges.¹⁴ In Hong Kong, for example, the 1997 transition to Chinese rule became the impetus for creating a Court of Final Appeal with a bench including “overseas non-permanent judges” serving three-year terms.¹⁵

Today, the array of common law judiciaries and the global legal profession — as well as modern traveling judges — reflect this history.¹⁶ Traveling judges also resemble international commercial arbitrators — well-respected adjudicators who travel the world to

resolve international commercial disputes on “neutral turf.” In the last few decades, arbitration has emerged as a leading dispute resolution forum for such disputes.¹⁷ Arbitrators are often private experts who are not officially affiliated with any state¹⁸; some are chosen in part because they are not co-nationals of the parties, which may lend neutrality and legitimacy to the arbitration. Unless there is a global pandemic, international arbitrators travel extensively.

Despite arbitration’s popularity, many cross-border disputes are litigated in domestic courts. Some, like the Southern District of New York, have broad jurisdiction over civil and criminal cases. Increasingly, however, states are establishing specialized commercial divisions to handle commercial disputes. For example, the New York Commercial Division, established in the 1990s, specializes in commercial disputes, whether domestic or transnational.¹⁹ The Cayman Islands and the BVI both have commercial divisions in this mold. In the last two decades, jurisdictions have established new courts or chambers dedicated to *international* commercial disputes. These include special international commercial court divisions in Paris, Frankfurt, and Amsterdam; courts associated with special economic zones (SEZs) in Dubai, Qatar, Abu Dhabi, and Kazakhstan; and dedicated “international commercial courts” in Singapore and China.²⁰

Many of these new courts have adopted procedures or structures that mimic either the London Commercial Court and/or conventions in international arbitration, trying to create courts that provide the “best of both worlds.”²¹ The SEZs’ courts, for example, all operate entirely in English, have procedural codes modeled on London’s, and have either received English com-

mon law into the local SEZ's law or based their statutes on English common law and statutes. They also have invited judges from other jurisdictions who seem to resemble arbitrators in certain respects.²²

Nearly 70 percent of traveling judges also act as arbitrators, often spending more time as arbitrators than as traveling judges. We had expected traveling judges to resemble arbitrators — and they do on some metrics. As a group, however, traveling judges are even less diverse than international commercial arbitrators in terms of race, gender, and nationality and far more likely to have previous judicial experience. Over 85 percent of traveling judges had been judges before taking their current positions. They often had served on specialized commercial courts or apex courts in their home jurisdictions. By contrast, few arbitrators were previously judges; a 2015 study found only 9 percent of arbitrators had previous judicial experience.²³

Traveling Judges Around the World

Traveling judges on commercial courts are an overwhelmingly common law phenomenon.²⁴ Almost all the traveling judges we identified as of June 1, 2021, spent their careers in a common law jurisdiction; all but one traveling judge holds at least one law degree from a common law country. About half of these traveling judges previously had practiced or served on the bench in England and Wales. The remainder come from other common law or hybrid jurisdictions, with no single jurisdiction providing more than five traveling judges, and most providing only one or two. These jurisdictions are mostly in the U.K. and its former dominion colonies (like Australia,

New Zealand, and Canada). Despite the prominence of New York and Delaware commercial law, we found only one U.S. traveling judge as of June 2021.²⁵ In July 2022, an additional U.S. judge — a former chief judge of the Delaware Bankruptcy Court — joined the SICC in Singapore.²⁶

Traveling judges thus reveal not just a common law influence but a starkly English one. About half are retired English judges. In addition to those who practiced in England and Wales or Scotland, an even larger number studied law in the U.K. The result of this heavy focus on hiring English judges is that the demographics of traveling judges, like the senior English judiciary and bar, is overwhelmingly white and male.²⁷ There are, however, differences among courts and geographic regions, both in terms of how many traveling judges the courts have, and in terms of who they are. For example, some courts have a mostly local bench or a near-even balance between traveling and local judges. Two courts, however, employ 100 percent traveling judges. In one of those courts, the traveling judges are all from the U.K.²⁸

The courts that hire traveling judges are not necessarily located in common law countries, although the courts themselves all follow the common law tradition. In recent years, several countries with civil or Islamic law court

systems have created SEZs where common law applies. Traveling judges sit on courts in these zones in Dubai, Abu Dhabi, Qatar, and Kazakhstan. Most recently, Bahrain set up an onshore English-language court with traveling judges, but following a different, non-common law model.²⁹

Courts that hire traveling judges include court divisions of common law states, like Singapore; court divisions of subnational common law jurisdictions within common law states, like the Cayman Islands and the BVI; and courts in common law jurisdictions within non-common law states, like Hong Kong and the SEZs.³⁰ The courts and divisions themselves may be trial courts, high courts, or appellate courts.

These hiring jurisdictions have certain similarities and other important differences. All but one are in former British colonies or protectorates.³¹ Either by way of colonial legacy or by recent legislation, these jurisdictions have adopted substantive law and procedures that mirror those in the London Commercial Court — widely regarded as the leading international commercial court — to varying degrees. A unifying characteristic among the courts we focus on in our study is that the hiring jurisdictions are or aspire to be “market-dominant small jurisdictions” with an outsized influence in global finance.³² In other words, they often aim to be the “Delaware” of their region.³³ And they have designed these courts for cross-border disputes, anticipating transnational parties.

Hiring Traveling Judges

The use of traveling judges thus has roots in two different traditions: colonial judicial service and international commercial arbitration. The first saw judges as emissaries of an Empire, and ▶



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the second conceived of dispute resolution by private individuals, empowered to provide neutral, expert adjudication detached from domestic courts.

Why Hire Traveling Judges?

Like visiting judges, traveling judges come as outsiders who offer the possibility of promoting consistency — in terms of procedural and substantive law as well as legal culture and norms — across multiple courts.³⁴ Also like visiting judges, traveling judges “might not have sufficient knowledge or training” in local traditions, but they also likely “transmit[] critical institutional knowledge” about their home jurisdictions, legal cultures, and laws that is at least one of the very reasons they were invited to serve.³⁵

Traveling judges are hired for their expertise in multiple areas.³⁶ They bring expertise in their home jurisdiction’s law, which they can easily apply in jurisdictions where the local law, or the law selected by the parties, closely resembles their home law.³⁷ They often bring expertise in particular areas of interest, such as construction or intellectual property, or extensive case-management skills honed while serving on a well-known court. It is no coincidence, for example, that the first American judge on the SICC was a former justice of the Delaware Supreme Court and former vice chancellor on the Delaware Court of Chancery, and the second is a former chief judge of the United States Bankruptcy Court, District of Delaware with expertise in cross-border insolvency.³⁸

One might assume a court focusing on transnational commercial disputes would seek out an international roster of judges, or that a diverse bench could attract parties from around the world.³⁹ Our study does not support these hypotheses, although Singapore’s

court comes the closest to providing a broadly international bench. Instead, our study shows that the top two home countries for traveling judges are the U.K. and Australia, accounting for approximately three-quarters of traveling judges. Moreover, many of these judges have experience on the commercial courts in London and Sydney.

Instead of internationalism, these traveling judges provide most of the hiring jurisdictions with a sort of transplantation shortcut for replicating a famously successful and well-regarded court and its legal system, a system that is familiar to the general counsel of the companies these jurisdictions are trying to attract.⁴⁰ English common law “is the most sought-after law for transnational commerce,”⁴¹ and English courts, procedure, and judges are central to the law’s appeal.⁴² The London Commercial court is seen as “contributing to the success of London as an international commercial and financial centre that has led to its emulation.” The London Commercial Court thus “has been described as the paradigm for the new international commercial courts, which are said to have been inspired in part by its success,”⁴³ although these courts all differ from the London court in various nuances and adaptations to local circumstances.⁴⁴

Striving for success like London’s, jurisdictions with traveling judges not only cater to parties’ preferences by recognizing their autonomy to choose their forum and the law that governs their contracts, but also replicate these private ordering preferences through the structure and personnel of their courts.⁴⁵ It becomes easier to credibly assert that parties will get the same justice they are used to in London when the same people are sitting on the court, especially in non-common

law jurisdictions. Those courts with entirely or mostly English benches seem to be replicating an English court. The SEZs did not previously have common law legal systems; the governments creating these SEZs chose to base the SEZ’s law in English law after consulting with English law firms who represent the investors they hoped to attract.⁴⁶ Their courts model their founding statutes and rules of procedure on English law as well.

Where Are the U.S. Judges?

Colonial history and the desire to transplant certain legal cultures help explain the presence of so many English judges, but not necessarily the absence of U.S. judges. At the turn of the 21st century, U.S. global legal influence seemed ascendant.⁴⁷ U.S. judges and other Americans were traveling the world, spreading the American legal model⁴⁸ and the rule of law,⁴⁹ and trying “to promote a U.S. product as the lingua franca for business and politics.”⁵⁰ U.S. courts were also seen as a magnet for transnational litigation,⁵¹ although some later empirical accounts questioned that claim.⁵² New York law is often chosen to govern international commercial contracts (especially those involving U.S. parties) and New York, unlike the federal courts and Delaware, also has a mandatory judicial retirement age. To our knowledge, however, no New York judges have served as traveling judges (although we believe some have been asked).

Several features may explain the U.S. absence. One is waning U.S. global influence overall; another is the structure of the U.S. legal profession and other opportunities for retired judges in the United States, which may be more attractive, including serving as a visiting judge. For example, retired

U.S. judges may have the opportunity to join U.S. law firms, but serving as a traveling judge would create conflicts for a U.S. firm in a way that it does not create conflicts for retired U.K. judges who join barristers' chambers.

Varying state laws also mean U.S. law is fragmented in a way that fundamentally separates it from the shared common law tradition in other countries.⁵³ The United States, while undoubtedly a major common law commercial center, is therefore less central to the narrative of shared law that the "common law" represents, with the possible exception of New York and Delaware law.⁵⁴ The prestigious U.S. federal courts, for example, do not make contract law.⁵⁵ In addition, international disdain for the U.S. court system and its procedures (as opposed to substantive law), may also play a part.⁵⁶ All of these reasons may contribute to the lack of U.S. traveling judges.

The Global Influence of Traveling Judges

While the commercial courts hiring traveling judges are still relatively new, they may be gaining influence. As they attract cases and issue opinions, they are well poised to fill a gap in the public development of international commercial law created by the domination of private disputes resolved in international arbitration. International commercial law is an area where consistency tends to be particularly valued, and traveling judges may indeed be likely to promote it.

Their ability to do so, however, will depend on circumstances at home and in the hiring jurisdiction. Some traveling judges have received pressure to resign from their posts by prominent individuals and civil society in their home jurisdictions, who criticize the

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judges for appearing to legitimize host governments with poor human rights records. Several traveling judges have resigned or not renewed their terms in Hong Kong following the 2020 passage of the draconian National Security Law (which creates new speech offenses and allows the government to bypass various elements of Hong Kong criminal procedure).⁵⁷ In August 2022, two Irish judges resigned from the DIFC courts almost immediately after they were appointed,⁵⁸ after prominent members of civil society criticized them for "lending credibility" to the UAE judicial system.⁵⁹ A recently retired New Zealand judge who had been sworn in with the Irish judges resigned a few weeks later following similar pressure from human rights campaigners.⁶⁰

Moreover, such judges are not insulated from local politics, and circumstances in the hiring jurisdiction could also become more hostile to traveling judges over time. Unlike arbitration, in which private parties form the private tribunal for themselves, these courts are instruments of a state. That status brings with it certain indicia of legitimacy that private

arbitration may lack. It also brings with it a reliance on the host government. Traveling judges may be intended to mitigate concerns about local judiciaries and local control over them, but that balance can be delicate. Hiring jurisdictions may include different, and potentially changing, levels of government support for the court, for hiring traveling judges, and for expanding or contracting the court's jurisdiction. The courts ultimately operate on the hosts' terms, applying local law, confined by the courts' jurisdiction as well as the states' limitations on judges' tenure on the court, on the assignment of cases, and on traveling judges' participation in different aspects of judicial administration.

Detaching judges from home jurisdictions, however, and focusing on the role of judge as different from the role of private arbitrator, also creates opportunities. At least in theory, courts serve a greater community beyond just the parties and possibly beyond the government that hosts the court. International commercial courts face the challenging task of defining that community. Is it a local community, a national community, or an international one? Is the community limited to commercial actors, or does it include others? These courts have the opportunity to contribute to a modern international commercial dispute resolution system that aspires to address global problems, like climate change, that were created in part by international commerce's failure to internalize externalities. To do so, however, these courts — and these judges — would have to define and uphold their responsibilities to a broader community beyond the commercial parties they seem designed to serve.⁶¹ Traveling judges should be vigilant about their duties not only to the

host government that hired them, but also to the local and international communities who will bear the impact of the law they develop and the decisions they make about where to serve.



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¹ There are a few exceptions. For example, Ninth Circuit judges may sit on courts in the Marshall Islands. Code of Conduct for United States Judges, Canon 4(A); 28 USC § 297; see also, e.g., Del. Const., art IV, § 4 (Delaware judicial officers “shall hold no other office of profit”); Delaware Judges’ Code of Judicial Conduct, Canon 3/Rule 3.9; N.Y. Const., art. VI, § 20(b)(4).

² Alyssa S. King & Pamela K. Bookman, *Traveling Judges*, 116 AM. J. INT’L L. 477 (2022).

³ Among the 44 members of the Standing International Forum of Commercial Courts (SIFOCC), (whose American members include the New York Commercial Division and the Delaware Court of Appeals) as of June 1, 2021, nine members hired judges from other jurisdictions. Standing International Forum of Commercial Courts, <https://sifocc.org/> (last visited Oct. 2, 2022). These include the Hong Kong Court of Final Appeal; the Singapore International Commercial Court (SICC), a division of the high court of Singapore with jurisdiction restricted to international commercial disputes; four court systems for new special economic zones (SEZs) in oil-exporting states — the Dubai International Financial Centre (DIFC), the Abu Dhabi Global Market (ADGM), the Qatar Financial Centre (QFC), and the Astana International Financial Centre (AIFC) in Kazakhstan — all of which limit jurisdiction to civil or commercial disputes; two commercial courts in the Caribbean — the Cayman Islands Financial Services Division (a division of the Cayman Islands Grand Court) and the Eastern Caribbean Supreme Court (for which we focus on the BVI commercial division); and the Supreme Court of the Gambia. King & Bookman,

supra note 2, Appendix, Table 1 (table of the courts listing jurisdiction, type of court, year founded, and numbers of local and traveling judges). There may be additional commercially oriented courts, and even SIFOCC members, that should belong in this category, but we were unable to find sufficient information about them.

⁴ There are 235 seats on all these courts combined, 81 of which (34%) were occupied by 72 traveling judges (some sat on multiple courts). Appendix, Table 1. Some current traveling judges have also sat on other host courts in the past. For example, at least one judge on the SICC has previously served as a judge on the BVI Commercial Division in the ECSC.

⁵ See Willem Theus, *International Commercial Courts: A New Frontier in International Commercial Dispute Resolution? Lessons from the Mixed Courts of the Colonial Era*, 12 EUR. J. INT’L ECON. L. (2022).

⁶ See, e.g., Ellen R. Feingold, *Building a Judiciary for the Empire: The Development of the Colonial Legal Service*, in COLONIAL JUSTICE AND DECOLONIZATION IN THE HIGH COURT OF TANZANIA, 1920-1971, 26 (Cambridge Imperial and Post-Colonial Studies Series) (2018); Jennifer Corrin Care, *Cultures in Conflict: The Role of the Common Law in the South Pacific*, 6 J. SOUTH PAC. L. 167 (2002).

⁷ *Southeast Asian Law*, THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY (Stanley N. Katz ed., 2009); Nurfadzilah Yahaya, *The European Concept of Jurisdiction in the Colonies*, in THE OXFORD HANDBOOK OF JURISDICTION IN INTERNATIONAL LAW 60, 74-76 (Stephen Allen et al. eds., 2019).

⁸ A. Nizar Hamzeh, *Qatar: The Duality of the Legal System*, 30 MIDDLE EASTERN STUD. 79, 82 (1994); Ali Al-Muhairi, *The Development of the UAE Legal System and Unification with the Judicial System*, 11 ARAB L. Q. 116, 122-24 (1996).

⁹ Al-Muhairi, *supra* note 8 at 124-25 (discussing the 1946 Trucial States order in Council); NATHAN J. BROWN, *THE RULE OF LAW IN THE ARAB WORLD: COURTS IN EGYPT AND THE GULF* 131-134 (1997).

¹⁰ Consular courts are “[c]ourts held by the consuls of one country, within the territory of another, under authority given by treaty, for the settlement of civil cases between citizens of the country which the consul represents.” *Consular Courts*, THE LAW DICTIONARY, <https://thelawdictionary.org/consular-courts/> (last visited Oct. 2, 2022).

¹¹ HUSAIN M. AL BAHARNA, *BRITISH EXTRA-TERRITORIAL JURISDICTION IN THE GULF* 1913-1971, 11, 17-18, 38-39 (1998); Hamzeh, *supra* note 8, at 82; Al-Muhairi *supra* note 8, at 82.

¹² ANNA DZIEDZIC, *FOREIGN JUDGES IN THE PACIFIC* (2021).

¹³ British Overseas Territories have substantial local independence, subject to British oversight. In May 2022, the U.K. government considered imposing direct rule over the BVI after a U.K.-appointed commission found extensive corruption in the BVI government. See BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY: REPORT OF THE COMMISSIONER THE RT HON SIR GARY HICKINBOTTOM (Apr. 4, 2022), https://bvi.gov.vg/sites/default/files/resources/web_accessible_-_bvi_coi_report.pdf. The U.K. government ultimately decided against imposing direct rule. See Alex Therrien, *British Virgin Islands: U.K. Decides Against Direct Rule of Territory*, BBC NEWS (June 8, 2022), <https://www.bbc.com/news/uk-61736373>.

¹⁴ On the Caribbean, see, e.g., Tony Freyer & Andrew P. Morriss, *Creating Cayman as an Offshore Financial Center: Structure & Strategy since 1960*, 45 ARIZ. ST. L.J. 1297, 1360 (2013).

¹⁵ The CFA’s decisions may be superseded by those of the Standing Committee of the National People’s Congress. See Lin Feng, *The Expatriate Judges and Rule of Law in Hong Kong: Its Past, Present and Future*, in THE CULTURE OF JUDICIAL INDEPENDENCE IN A GLOBALISED WORLD 279, 280, 285-289 (2016).

¹⁶ See KATHARINA PISTOR, *CODE OF CAPITAL* 176-178 (2019) (noting the domination of U.S. and English law firms and English firms’ benefits from the colonial past).

¹⁷ See, e.g., Robert K. Campbell, Christopher Jefferies, Sinead Cuthill, & James Wagner, *Assessing the LCIA’s 2021 Annual Casework Report*, FAEGRE DRINKER (May 19, 2022), at <https://www.faegre-drinker.com/en/insights/publications/2022/5/assessing-the-lcias-2021-annual-casework-report> (collecting statistics).

¹⁸ There is a longstanding debate over whether the international commercial arbitration system is autonomous or reliant on states. See, e.g., Ralf Michaels, *Is Arbitration Autonomous?* in THE CAMBRIDGE COMPANION TO INTERNATIONAL ARBITRATION (2021); compare, e.g., JAN PAULSON, *THE IDEA OF ARBITRATION* (2013) (theorizing arbitration’s authority as based on multiple sources, including contract and state power) with EMMANUEL GAILLARD, *LEGAL THEORY OF INTERNATIONAL ARBITRATION* (2010) (theorizing arbitration as autonomous).

¹⁹ See John F. Coyle, *Business Courts and Interstate Competition*, 53 WM. & MARY L. REV. 1915 (2012); Pamela K. Bookman, *The Adjudication Business*, 45 YALE J. INT’L L. 227 (2020).

²⁰ See Bookman, *Adjudication Business*, *supra* note 19; Zhengxin Huo & Man Yip, *Comparing the International Commercial Courts of China with the Singapore International Commercial Court*, 68 INT’L & COMP. L. Q. 903 (2019). In 2021, localities within China established at least two “local” international commercial courts. See Cao Yin, *New Beijing Court to Handle International Commercial Disputes*, CHINA DAILY, Dec. 28, 2021, <http://global.chinadaily.com.cn/a/202112/28/WS61caebb4a310cdd39bc7df30.html>; Yuan Yanchao, ed., *Suzhou International Commercial Court Launched*, CHINA JUSTICE OBSERVER (May 12, 2021), available <https://www.chinajusticeobserver.com/a/suzhou-international-commercial-court-launched>. More commercial courts continue to appear. See, e.g., *Kosovo’s Assembly Passes The Law On Creating A Commercial Court, US AID*, (Feb. 11, 2022), <https://www.usaid.gov/kosovo/news-information/news/kosovos-assembly-passes-law-creating-commercial-court>.

²¹ See, e.g., Stephan Wilske, *International Commercial Courts and Arbitration—Alternatives, Substitutes or Trojan Horse?*, 11 CONTEMP. ASIA ARB. J. 153, 154 (2018); Janet Walker, *Specialised International Courts: Keeping Arbitration on Top of Its Game*, 85 INT’L J. ARB., MEDIATION & DISP. MGMT. 2, 22 (2019). But cf. Thomas Schultz & Clément Bachmann, *International Commercial Courts: Possible Problematic Social Externalities of a Dispute Resolution Product with Good Market Potential*, in INTERNATIONAL COMMERCIAL COURTS: THE FUTURE OF TRANSNATIONAL ADJUDICATION (Stavros Brekoulakis & Georgios Dimitropoulos eds., 2022) (critiquing the “best of both worlds” narrative).

²² See Pamela K. Bookman, *Arbitral Courts*, 61 VA. J. INT’L L. 161 (2021); Pamela K. Bookman, *The Innovation and Limitations of Arbitral Courts*, 104 JUDICATURE 30 (2020).

²³ Susan D. Franck, James Freda, Kellen Lavin, Tobias Lehmann & Anne van Aaken, *The Diversity*

- Challenge: Exploring the “Invisible College” of International Arbitration, 53 *COLUM. J. TRANSNAT’L L.* 429, 448 (2015).
- 24 We refer to “traveling” rather than “foreign” judges for three reasons. First, it avoids complicated citizenship questions. Second, it focuses on transjurisdictional (rather than only transnational) travel. To differentiate Delaware judges and courts from Nebraska ones, for example, we identify judges by their “home jurisdiction,” the place of their primary legal career. Third, traveling judges often offer not foreign-ness but familiarity—London-based counsel can appear before a London-based judge in Dubai, Kazakhstan, or the Cayman Islands.
- 25 The current U.S. judge on the SICC, a former Delaware Supreme Court justice, may soon step down, but a Delaware Bankruptcy Court judge intends to join the court in 2022. Shermaine Ang, *Senior Judge of the Supreme Court and 2 new International Judges appointed for 2022*, *THE STRAITS TIMES* (Nov. 16, 2021), <https://www.straitstimes.com/singapore/courts-crime/senior-judge-of-the-supreme-court-and-2-new-international-judges-appointed>.
- 26 SICC, *Judges*, <https://www.sicc.gov.sg/about-the-sicc/judges#/> (last visited July 26, 2022).
- 27 See *infra* Part III.A. (Three-quarters of traveling judges in this study are retired judges.)
- 28 The two courts are the AIFC courts in Kazakhstan and the ADGM courts in Abu Dhabi. The AIFC courts in Kazakhstan have all U.K. judges. See Appendix, Table 1.
- 29 See Bahrain Commercial Dispute Resolution (BCDR) Court, <https://bcdr.org/bcdr-court/> (last visited Oct. 20, 2022).
- 30 See Standing International Forum of Commercial Courts, *supra* note 3.
- 31 Of the nine jurisdictions, only Kazakhstan was never under British influence. Today, Hong Kong, the DIFC, the QFC, the ADGM, and the AIFC are all common law jurisdictions located in non-common law countries.
- 32 See CHRISTOPHER M. BRUNER, *RE-IMAGINING OFFSHORE FINANCE: MARKET-DOMINANT SMALL JURISDICTIONS IN A GLOBALIZING FINANCIAL WORLD* (2019).
- 33 William J. Moon, *Delaware’s New Competition*, 114 *Nw. U. L. Rev.* 1403 (2020); James Nani, *Singapore Vies to Be Insolvency Hub with Sontchi Joining Bench*, *BLOOMBERG LAW* (Jan. 24, 2022), <https://news.bloomberglaw.com/bankruptcy-law/singapore-vies-to-be-insolvency-hub-with-sontchi-joining-bench> (noting “Singapore’s reputation among corporate and bankruptcy law practitioners for pushing to be the ‘Delaware of Asia’”).
- 34 See Alyssa S. King, *Global Civil Procedure*, 62 *HARV. INT’L L. J.* 223 (2021).
- 35 Cf. Marin K. Levy, *Visiting Judges*, 107 *CALIF. L. Rev.* 67, 130 (2019) (making these observations about visiting judges).
- 36 See, e.g., Rosalind Dixon & Vicki Jackson, *Hybrid Constitutional Courts: Foreign Judges on National Constitutional Courts*, 7 *COLUM. J. TRANSNAT’L L.* 283, 304–305 (2019).
- 37 Foreign judges on constitutional courts relying on their home law can compromise the court’s democratic legitimacy. See *id.* On commercial courts, traveling judges’ expertise in their home jurisdiction’s law is more directly prized.
- 38 See Announcement of Retirement of Judge Christopher Sontchi, U.S. Bankruptcy Court District of Delaware, (Nov. 15, 2021), <https://www.deb.uscourts.gov/news/announcement-retirement-judge-christopher-sontchi>; *Singapore Vies to Be Insolvency Hub With Sontchi Joining Bench*, *BLOOMBERG LAW* (Jan. 24, 2022), <https://news.bloomberglaw.com/bankruptcy-law/singapore-vies-to-be-insolvency-hub-with-sontchi-joining-bench>.
- 39 In a recent webinar, Lucy Reed, the former Freshfields Dispute Resolution Head, suggested that one key to a successful (domestic) international commercial court will be a truly international bench. Lucy Reed, “The Competition: International Arbitration, International Commercial Courts and the Singapore Convention,” *New York Arbitration Week*, (Nov. 16, 2021).
- 40 In future work, we hope to place the phenomenon of traveling judges more squarely in the large body of literature on the transplanting of legal institutions. See, e.g., Mirjan Damaška, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 *AM. J. COMP. L.* 839, 839 (1997); Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 *INT’L ORG.* 887, 893–94 (1998); Gregory Shaffer, *Transnational Legal Process and State Change*, 37 *LAW & Soc. INQUIRY* 229, 236, 259 (2012); Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 *NOTRE DAME L. Rev.* 579, 616–621 (2016).
- 41 PISTOR, *supra* note 16, at 178.
- 42 See also Mateja Durovic & Franciszek Lech, *Harmonization of Commercial Law Based on Common Law*, in *INTERNATIONAL COMMERCIAL COURTS, THE FUTURE OF TRANSNATIONAL LITIGATION 204–206* (2022) (describing advantages of English common law).
- 43 Sir William Blair, *The New Litigation Landscape: International Commercial Courts and Procedural Innovations*, 2 *INT’L J. PROC. L.* 212, 223 (2019).
- 44 Christopher Grout & William Blair, *The Role of International Commercial Courts*, *supra* note 42, at 33.
- 45 See, e.g., Jeffrey Mason, *Institution-Building Done Well: The DIFC Courts*, *EXONENTS MAG* (Feb. 10, 2020), <https://exponentmag.org/2020/02/10/institution-building-done-well-the-difc-courts/> (“Dubai wanted a world-class commercial court. So it effectively imported British common law courts.”).
- 46 See King & Bookman, *supra* note 2, at 508 & n.199. English law is already the most popular law governing international commercial contracts. See, e.g., Helen Dodds, *International Businesses Take to English Law, Especially Where Arbitration is Needed*, *GULF NEWS* (Dec. 3, 2021), <https://gulfnews.com/business/analysis/international-businesses-take-to-english-law-especially-where-arbitration-is-needed-1.84146105>; Gilles Cuniberti, *The International Market for Contracts: The Most Attractive Contract Laws*, 34 *Nw. J. INT’L L. & Bus.* (2014).
- 47 See Yves Dezalay & Bryant G. Garth, *Legitimizing the New Legal Orthodoxy*, in *GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY 306* (2002).
- 48 See, e.g., Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 *U. PA. J. INT’L ECON. L.* 179 (1999).
- 49 Holger Spamann, *Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law*, 2009 *B.Y.U. L. Rev.* 1813, 1849.
- 50 Dezalay & Garth, *supra* note 47, at 307.
- 51 See, e.g., HAROLD H. KOH, *TRANSNATIONAL LITIGATION IN UNITED STATES COURTS* at v (2008); Melinda R. Lewis, *The “Lawfare” Of Forum Non Conveniens: Suits by Foreigners in U.S. Courts for Air Accidents Occurring Abroad*, 78 *J. AIR L. & COMMERCE*, 319, 337 (2013).
- 52 See, e.g., Christopher A. Whytock, *Transnational Litigation in U.S. Courts: A Theoretical and Empirical Reassessment*, 19 *J. EMP. L. STUD.* 4 (2022).
- 53 See, e.g., DZIEDZIC, *supra* note 12, at 106.
- 54 William J. Moon, *Delaware’s New Competition*, 114 *Nw. U. L. Rev.* 1403 (2020); Omari Scott Simmons, *Delaware’s Global Threat*, 41 *J. CORP. L.* 217 (2015).
- 55 Cf. Florencia Marotta-Wurgler & Samuel Issacharoff, *The Hollowed Out Common Law*, 67 *UCLA L. Rev.* 600 (2020).
- 56 See Dezalay & Garth, *supra* note 47, at 308 (describing the choice for transnational commercial parties in Argentina or Kazakhstan as between English and New York law, and the English perspective as saying, “if you have New York law you might get drawn into the U.S. court system, and that is something you do not want to do.”). Cf. Pamela K. Bookman, *Litigation Isolationism*, 67 *STAN. L. Rev.* 1081 (2015) (charting the history of transnational litigation in U.S. courts and rising barriers to it); David S. Law & Mila Versteeg, *Is the Influence of the U.S. Constitution Declining?*, in *MODERN CONSTITUTIONS* (2020).
- 57 Grace Tsoi & Lam Cho Wai, *Hong Kong national security law: What is it and is it worrying?* (June 28, 2022), <https://www.bbc.com/news/world-asia-china-52765838>.
- 58 Mary Carolan, *Retired Scottish Judge Urged to Resign from Dubai Financial Centre Courts*, *IRISH TIMES*, Aug. 8, 2022 <https://www.irishtimes.com/crime-law/2022/08/08/retired-scottish-judge-urged-to-resign-from-dubai-international-financial-centre-courts/>; *A Statement from Lord Reed, President of the Supreme Court, The Right Hon Lord Reed of Allermuir* (Mar. 30, 2022), <https://www.supremecourt.uk/news/role-of-uk-judges-on-the-hong-kong-court-of-final-appeal-update-march-2022.html> (announcing resignation); Catherine Baksi, *Hale Quits Hong Kong Judicial Post*, *L. Soc’y GAZETTE* (June 4, 2021); Greg Torode & Swati Pandey, *Australian Judge Quits Hong Kong Court, Citing National Security Law*, *REUTERS* (Sept. 18, 2020), <https://www.reuters.com/article/us-hongkong-security-judges/australian-judge-quits-hong-kong-court-citing-national-security-law-idUSKBN26912R>.
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- 60 Kurt Bayer, *New Zealand Judge Sir William Young Resigns From Dubai Judges Job After Pressure Over Human Rights*, *NZ HERALD* (Aug. 19, 2022), <https://www.newstalkzb.co.nz/news/national/exclusive-new-zealand-judge-sir-william-young-resigns-from-dubai-judges-job-after-pressure-over-human-rights/>.
- 61 See Pamela K. Bookman & Alyssa S. King, *Transnational Dispute Resolution, International Commercial Courts and the Future of International Commercial Law*, in *TRANSNATIONAL COMMERCIAL DISPUTES IN AN AGE OF ANTIGLOBALISM AND PANDEMIC* (Sundaresh Menon & Anselmo Reyes eds., forthcoming 2023).