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INTRODUCTION TO THE SYMPOSIUM ON GLOBAL LABS OF INTERNATIONAL COMMERCIAL DISPUTE RESOLUTION

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Legal globalization has never been flat, but is it decentralizing and rebalancing? The two main centers for international commercial dispute resolution and global governance since the post-World War II period—New York and London—are based in states that have been affected by strong anti-globalization movements. By contrast, multiple jurisdictions in Asia, the Middle East and Continental Europe are experimenting with novel institutional designs in an effort to become world-recognized fora for resolving international commercial disputes. This symposium explores the emergence of these "new legal hubs" across Eurasia and beyond,[1] and considers what this global laboratory of international commercial courts and dispute resolution services might mean for the diversification of such dispute resolution going forward. All of this is also playing out as the coronavirus pandemic is unfolding, adding new dynamics into the mix.

Just as the United States benefits from issuing the world's reserve currency, so the United States and the United Kingdom often enjoy the "exorbitant privilege" of issuing the world's "reserve law" and providing the world's centers for international commercial dispute resolution.[2] Of the top one hundred highest-grossing law firms in the world, ninety-one are headquartered in the United States and the United Kingdom. The New York offices of U.S. firms earn around US$1.8 billion annually from international dispute resolution, and almost two thirds of litigants in English commercial courts are foreign. The legal sector accounts for 1.5 percent of UK gross domestic product, which is nearly double the percentage in other large European states. The topography of legal globalization is decidedly pointy.[3]

Yet times, they are a'changin. Or are they? That is one of the questions posed by this symposium. On the one hand, trade protectionism, nationalist politics, and the "return" of sovereignty in these traditional centers of international dispute resolution are shifting the tectonic plates of both private and public international law. The election of Donald Trump in the United States, and the Brexit vote in the United Kingdom, raised questions about whether the dominance of New York and London as the primary jurisdictions for international commercial dispute resolution would continue. Meanwhile new international commercial courts—English-language domestic courts that focus on international commercial disputes—have been established or considered in Eurasian economies like Dubai (2004), Qatar (2009), Singapore (2015), and China (2018), and continental European states like France (2010), Germany (2018), and the Netherlands (2019).[4]

Many of these new courts are intended to serve as one-stop shops for international commercial dispute resolution, primarily for private parties but also potentially for investor-state disputes, in financial centers like Hong Kong, China, Singapore, Dubai, and Kazakhstan. These new dispute resolution services are not only aimed at catering for the economic rise of the region, but they also reflect the much more positive popular sentiment toward

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

[2] *International Commercial Law: Exorbitant Privilege*, ECONOMIST (May 10, 2014).

[3] ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? (2017).

[4] Pamela K. Bookman, *The Adjudication Business*, 45 YALE J. INT'L L. 227 (2020).

economic globalization that exists in Asia compared to the West.[5] These new dispute resolution centers have the potential to alter the international landscape of commercial dispute resolution by multiplying and diversifying forums and by changing the nature of dispute resolution procedures, such as by hybridizing litigation and arbitration through the creation of "arbitral courts."[6] They thus raise timely questions about dispute resolution institutions as engines of doctrinal, procedural, and technological experimentation, not to mention geopolitical rebalancing.

On the other hand, the viability and international market reach of such institutions is far from a foregone conclusion. Although there is an ever-diversifying supply of forums, the question is whether demand will follow. For such "field of dreams" projects, there are significant resources, human capital, and state reputation on the line. Will parties to international commercial disputes relocate from London to the European continent in the wake of Brexit, or will the Continental courts continue to be treated as relatively parochial jurisdictions? Will parties to projects along the Belt and Road Initiative agree to have their disputes heard by international commercial courts established by China, or will rule of law considerations cause cold feet? Will dispute resolution in Eurasian legal hubs soar in the Asian Century, or will remote hearings allow existing commercial centers to extend their global reach with even greater ease?

We begin this symposium with a contribution by Pamela Bookman and Matthew Erie that frames these questions.[7] They introduce the overlapping phenomena of new legal hubs, international commercial courts, and arbitral courts, surveying their impact on international commercial dispute resolution, international commercial law, and the geopolitics of disputes. International commercial courts in continental Europe raise interesting questions about the hybridization of common law and civil law traditions and English and non-English language proceedings. New legal hubs in non-democratic states raise questions about the compatibility of fulfilling some of the goals of international commercial dispute resolution (like impartial application of the rule of law) when those institutions are based in countries that lack robust rule of law traditions. Bookman and Erie argue for the importance of monitoring this changing landscape, while cautioning that supply has the potential to exceed demand.

Giesela Rühl picks up the question about Continental Europe's part in this global experimentation.[8] She notes that, in the past few years, various Continental states have started creating new judicial bodies for international commercial cases. These jurisdictions appear to be driven by a desire to attract high-volume international commercial litigation and seem to be responding to the potential market opportunity created by the Brexit vote. Yet, for all this recent activism, Rühl concludes that Continental Europe is lagging far behind when it comes to international commercial dispute resolution, being unable to compete effectively with either traditional market leaders, like London, or new entrants in Asia and the Middle East. If Continental Europe wants to capture a significant segment of the international litigation market, it needs to spearhead changes on a European—not national—level.

Julien Chaisse and Xu Qian shift our focus to China in their contribution on the China International Commercial Court (CICC) as an example of conservative innovation.[9] They argue that, in the global development of new international commercial dispute resolution centers, the CICC represents a genuinely innovative step in China's legal history. Yet, they caution that the court is unlikely to live up to its international name and ambition.

[5] Rory Hornera et al., *Globalisation, Uneven Development and the North–South "Big Switch"*, 11 Cambridge J. Regions, Econ. & Soc'y 17 (2018). For example, a 2017 YouGov poll found that support for globalization was highest in East and Southeast Asia, with over 70% of the people surveyed believing it was a force for good compared to much lower rates of positivity in many Western states. *See* Matthew Smith, *International Survey: Globalization is Still Seen as a Force for Good in the World*, YouGov (Nov. 17, 2016).

[6] Pamela K. Bookman, *Arbitral Courts*, 61 Va. J. Int'l L. (forthcoming).

[7] Pamela K. Bookman & Matthew S. Erie, *Experimenting with International Commercial Dispute Resolution*, 115 AJIL Unbound 5 (2021).

[8] Giesela Rühl, *The Resolution of International Commercial Disputes – What Role (if any) for Continental Europe?*, 115 AJIL Unbound 11 (2021).

[9] Julien Chaisse & Xu Qian, *Conservative Innovation: The Ambiguities of the China International Commercial Court*, 115 AJIL Unbound 17 (2021).

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In particular, Chaisse and Qian argue that the CICC's stringent jurisdictional requirements and conservative institutional design will make it difficult or impossible for the court to attract new international commercial investments to the Belt and Road Initiative as well as foreign-related parties to the Chinese forum. They illustrate their concerns by examining how hypothetical parties or disputes would be ruled out from the jurisdiction of the CICC, making the court function more like a domestic court than a truly international one.

By contrast, Guiguo Wang and Rajesh Sharma strike a more optimistic tone in their contribution on the possibility of a global laboratory of dispute resolution with an Asian flavor.[10] They focus attention on the establishment of the International Commercial Dispute Prevention and Settlement Organization (ICDPASO) by the China Council for the Promotion of International Trade and the China Chamber of International Commerce, which is expected to be operational in late 2020 and has not previously been the subject of scholarship. The ICDPASO aims to serve as a legal hub for the resolution of commercial and investment disputes arising out of countries along the Belt and Road Initiative and beyond. They emphasize that the ICDPASO will provide an Asian-centric multilateral dispute resolution forum that emphasizes non-adversarial dispute resolution traditions like mediation and conciliation. In doing so, Wang and Sharma argue that the ICDPASO has the potential to impact the broader character of international commercial dispute resolution.

While jurisdictions in Continental Europe, the Middle East, and Asia have been quick to develop international commercial courts, other jurisdictions have been slower moving and more cautious. S.I. Strong shines a spotlight on this issue in her contribution on international commercial courts in the United States and Australia.[11] Strong notes that some significant common law jurisdictions, like the United States and Australia, have not been quick to enter into the race to provide dedicated international commercial courts to service cross-border disputes. She explains that debates about establishing such courts are much more advanced in Australia than in the United States, venturing several potential explanations for this divergence. Striking a chord with the previous contribution, Strong notes that international commercial courts might come to be rivalled by jurisdictions specializing in international commercial mediation services, particularly given the recent entry into force of the UN Convention on International Settlement Agreements Resulting from Mediation.[12]

A rise in dispute resolution fora also entails increased opportunity for agile actors to engage in forum shopping in search of favorable rules. This is an issue addressed by Victoria Sahani in her contribution on third-party funding.[13] Third-party funding describes arrangements in which a funder finances the legal representation of a party involved in litigation or arbitration, either domestically or internationally. Third-party funding, which has been documented in more than sixty countries including many of the jurisdictions highlighted in this symposium, raises important regulatory issues, including how the practice is defined, what disclosures are required, and how and by whom the practice is regulated. In Sahani's view, the proliferation of fora with different rules on this practice has increased the possibility for sophisticated commercial players to use this diversity to their advantage, developing new innovations and shifting fora in ways that leave public regulators continuously struggling to understand these developments and catch up in time to regulate effectively.

All of these innovations in institutions, practices and rules are playing out now in a world that has been deeply affected by the coronavirus. To help contain the virus's spread, countries around the world have shut their borders and severely limited international travel. International arbitration centers and international commercial courts have

[10] Guiguo Wang & Rajesh Sharma, *The International Commercial Dispute Prevention and Settlement Organization: A Global Laboratory of Dispute Resolution with an Asian Flavor*, 115 AJIL Unbound 22 (2021).

[11] S.I. Strong, *International Commercial Courts in the United States and Australia: Possible, Probable, Preferable?*, 115 AJIL Unbound 28 (2021).

[12] *See* UN Comm. on Int'l Trade Law, Report, Fifty-First Session, UN Doc. A/73/17 at Annex I (2018).

[13] Victoria Shannon Sahani, *Global Laboratories of Third-Party Funding Regulation*, 115 AJIL Unbound 34 (2021).

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had to transition rapidly to providing their hearing services exclusively or almost exclusively online.[14] There seems to be a growing sense that, even when the pandemic passes, the field will never return to where it was previously given the newfound acceptance of doing at least some elements of transnational case management and hearings online—a theme that is in line with discussions in this symposium about procedural innovation in transnational dispute resolution. This movement might work to entrench the advantages of the technological-haves over the technological-have-nots.

Yet what consequences will moving online have for the distribution of cases among the traditional and emerging centers of dispute resolution? Moving to the virtual world may encourage the death of distance by allowing some of the traditional centers to better service other parts of the world without requiring litigants to travel. If so, we may see a reconcentration of international commercial dispute resolution in traditional hubs, consistent with the winner-takes-all dynamics of some digital markets. But online cases also focus the mind on the significance of time zones. Providing hearing and case management services within the relevant time zone becomes crucial, which may have the effect of decentralizing and further regionalizing international commercial dispute settlement (e.g., Asian dispute resolution in Asia).

Moving online might also separate the world based on latitude while integrating it based on longitude. Instead of seeing regional dispute resolution surge, we may see a growing provision of international services based on longitude not latitude (e.g., Latin America being serviced by traditional hubs in North America that are on the same time zone, Africa being serviced by traditional hubs in Europe). When one is focused on geographical differences, distances between east and west (latitude) are as significant as distances between north and south (longitude). But when one focuses on time differences, divisions between east and west remain while those between north and south collapse. If, as the economist Richard Baldwin suggests, the next wave of globalization will be in services, the geography of those flows may differ significantly from those of shipping containers.[15]

[14] For the impact of coronavirus shutdowns and travel restrictions on judicial proceedings and international arbitration, *see* Kim M. Rooney, *The Global Impact of the Covid-19 Pandemic on Commercial Dispute Resolution in the First Seven Months*, Int'l B. Ass'n (Oct. 2020); Maxi Scherer et al., *International Arbitration and the COVID-19 Revolution (Part 1 of 2)*, Kluwer Arb. Blog (Oct. 8, 2020).

[15] Richard Baldwin, The Globotics Upheaval: Globalization, Robotics, and the Future of Work (2019).

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