



International Commercial Courts: The Future of Transnational Adjudication – An Introduction

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Over the past fifteen years, international adjudication has become one of the most exciting research areas in international law.¹ Before the development of international adjudication as a distinct field, few studies had systematically examined the role and importance of international courts and tribunals. The lack of attention to international adjudication was mainly due to the original design of the international legal order. While the World Court was supposed to be the epicentre of the international legal order in the wake of the two world wars, its jurisdictional set-up as well as the historical development of public international law since its inception did not allow it to play this role.²

Indeed, the original model of the ‘international court’ developed in the twentieth century intended that only disputes between States based on

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¹ This field is also referred to as international dispute settlement; see generally Chester Brown, *A Common Law of International Adjudication* (Oxford University Press 2007); Cesare P. R. Romano, Karen J. Alter and Yuval Shany (eds.), *The Oxford Handbook of International Adjudication* (Oxford University Press 2015); William A. Schabas and Shannonbrooke Murphy (eds.), *Research Handbook on International Courts and Tribunals* (Edward Elgar 2017); Hélène Ruiz Fabri (ed.), *Max Planck Encyclopedia of International Procedural Law (MPEiPro)* (launched 5 September 2019).

² See generally Peter Tomka, ‘The Role of the International Court of Justice in World Affairs: Successes and Challenges with Special Reference to OAS Member States and the Pact of Bogotá’, Statement by H. E. Judge Peter Tomka, President of the International Court of Justice, at the Organization of American States, Lecture Series of the Americas (Thursday, 10 April 2014) www.icj-cij.org/files/press-releases/4/18324.pdf, accessed 1 December 2019.

public international law were to be adjudicated before them. This model did not hold true in practice for very long. International courts had to start adapting to the realities of a globalizing world that was increasingly growing out of traditional divides in international law, including divides between public and private and international and domestic. The move away from divides is reflected in the jurisdiction, the applicable law and the organization of more recently established international courts. International courts started relying increasingly on paradigms from domestic law as well as international arbitration to accommodate a rapidly diversifying and globalizing world.

After World War II, the majority of States engaged in an unprecedented enterprise of multinational law and institution-building which has resulted in a significant body of global regulatory law. Many scholars have argued that this global regulatory law should be viewed as global administrative law. Such a perspective would entail that all global actors, including States, be subject to administrative review against fundamental administrative standards such as transparency, participation, reason giving and accountability.³ The task of administrative review has been entrusted to a number of international courts and tribunals, including investment treaty tribunals.

These international courts and tribunals are markedly different from old-style international courts.⁴ Today, a wide range of new-style international courts and tribunals have emerged with far-reaching powers, including the power to review the validity of administrative decisions, and operate mostly within specialized international regimes.⁵ These international courts and tribunals are used not only by States, but – crucially – by a wide range of non-state actors too, including international commissions, institutional actors and private litigants.⁶ The new-style international courts and tribunals can significantly influence State behaviour through their pronouncements on international law and by specifying remedies when States violate that law.

At the same time, in a world where cross-border transactions are the order of the day, cases involving such transactions among exclusively

³ See Benedict Kingsbury, Nico Krisch and Richard Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15.

⁴ On a taxonomy of international courts and tribunals, see Cesare P. R. Romano, 'A Taxonomy of International Rule of Law Institutions' (2011) 2 *Journal of International Dispute Settlement* 241.

⁵ On the notion of the international regime see Stephen D. Krasner, *International Regimes* (Cornell University Press 1983).

⁶ See Karen J. Alter, *The New Terrain of International Law: International Courts in International Politics* (Princeton University Press 2014).

private parties cannot find recourse to international courts. Instead, international commercial arbitration has become the default jurisdiction for the resolution of disputes in cross-border transactions.⁷

International law has tried to fill this gap with the development and proliferation of international standards for domestic courts, as well as international organizations working in the field of domestic judiciary reform.⁸ Still, these initiatives were not in the position to cover the lack of courts addressing cases arising out of complex scenarios of cross-border trade transactions. This gap in international adjudication has ultimately been filled by domestic courts. International commercial courts (ICommCs) are a new species in the field of international – and domestic – dispute settlement.⁹ They are domestic courts, on one hand, but are different from the ordinary courts of the jurisdiction from which they stem – a ‘difference’ characterized by their ‘international’ character. They are ‘international courts’, on the other hand, as their composition and the cases before them have an international – that is, cross-border – dimension.¹⁰ International commercial courts are a novel addition to the

⁷ See, for example, Walter Mattli, ‘Private Justice in a Global Economy: From Litigation to Arbitration’ (2001) 55 *International Organization* 919.

⁸ See section 2 of this chapter.

⁹ See Denise Huiwen Wong, ‘The Rise of the International Commercial Court: What Is It and Will It Work?’ (2014) 33 *Civil Justice Quarterly* 205; Zain Al Abdin Sharar and Mohammed Al Khulaifi, ‘The Courts in Qatar Financial Centre and Dubai International Financial Centre: A Comparative Analysis’, 46 *Hong Kong LJ* 529 (2016); Firew Tiba, ‘The Emergence of Hybrid International Commercial Courts and the Future of Cross Border Commercial Dispute Resolution in Asia’, (2016–17) 14 *Loy U Chi Int’l L Rev* 31; Sundaresh Menon, ‘International Commercial Courts: Towards a Transnational System of Dispute Resolution’ (*DIFC Courts Lecture Series* 2015) www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/opening-lecture-difc-lecture-series-2015.pdf, accessed 1 December 2019; Xandra Kramer and John Sorabji, ‘Editorial: International Business Courts in Europe and Beyond: A Global Competition for Justice?’ (Special Issue 2019) *Erasmus Law Review*; Sir William Blair, ‘The New Litigation Landscape: International Commercial Courts and Procedural Innovations’, *International Journal of Procedural Law* 212 (2019); Pamela Bookman, ‘The Adjudication Business’ (2020) 45 *Yale Journal of International Law* 227; Matthew S. Erie, ‘The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution’ (2020) 60 *Virginia Journal of International Law* 228.

¹⁰ The main focus of this introduction as well as the whole edited volume is on the new ICommCs established in the past fifteen years as fora distinct from the ordinary courts of the host jurisdictions. These are courts that are domestic but have a comparative advantage in adjudicating private and commercial cross-border disputes. The prime example is the Commercial Court in London, now part of the Business and Property Courts, which are part of the High Court of Justice in London. The Commercial Court has functioned as a domestic court ever since its inception more than a century ago, dealing with all types of disputes arising in the City of London. But the Commercial Court in London has also

field and practice of ‘transnational adjudication’.¹¹ In this new era of transnational adjudication, ICommCs globalize dispute resolution from the bottom in ways further explained later.¹²

The first institutions of this new era of transnational adjudication are the Dubai International Financial Centre (DIFC) Courts, established in 2004.¹³ The Qatar International Court and Dispute Resolution Centre (QICDRC) was established in 2009.¹⁴ The Abu Dhabi Global Market (ADGM) Courts followed in 2015.¹⁵ The idea of ICommCs also migrated to Southeast Asia, where the Singapore International Commercial Court (SICC) was also set up in 2015.¹⁶ The Astana International Financial Centre (AIFC) Court is the first ICommC in Central Asia¹⁷ – a region which is trying to keep up with developments in other parts of the continent. China, a country with a long history of international courts of a similar type, followed in 2018.¹⁸ The much-anticipated international commercial courts of the Supreme People’s Court of China operate now as the China International Commercial Court (CICC).¹⁹

A more recent trend emerged in Member States of the European Union (EU) with the creation of similar courts, or chambers within

become an international commercial court – with a far heavier caseload than any of the ‘new breed’ of ICommCs. Another example is the Hong Kong Court of Final Appeal that has a roster of Permanent and Non-permanent Judges, differentiating between Hong Kong and Overseas Non-permanent Judges; see www.hkcfca.hk/en/about/who/judges/npjs/index.html, accessed 1 November 2020.

¹¹ We thus consider ICommCs as a new step in the development of international and transnational adjudication, not as public international law courts. For a discussion on what is to be regarded as international adjudication see Cesare P. R. Romano, Karen J. Alter, and Yuval Shany, Mapping International Adjudicative Bodies, the Issues, and Players, in Cesare P. R. Romano, Karen J. Alter and Yuval Shany (eds.), *The Oxford Handbook of International Adjudication* (Oxford University Press 2014).

¹² See also Georgios Dimitropoulos, International Commercial Courts in the ‘Modern Law of Nature’: Adjudicatory Unilateralism in Special Economic Zones (2021) 24 *Journal of International Economic Law* 361.

¹³ See Dubai Law No. 12 of 2004: The Law of the Judicial Authority at Dubai International Financial Centre, as amended.

¹⁴ See Article 8(3) of the QFC Law – Law No. 7 of 2005 – as amended by Law No. 2 of 2009 (Amending Certain Provisions of the Qatar Financial Centre (QFC)).

¹⁵ See Abu Dhabi Law No. 4 of 2013 concerning Abu Dhabi Global Market, as amended.

¹⁶ See Section 18A, Supreme Court of Judicature Act (Cap 322).

¹⁷ Constitutional Statute no. No 438-V ZRK of 7 December 2015: Astana Financial Services Authority (AFSA); AIFC Court; AIFC International Arbitration Centre (IAC).

¹⁸ See Pär Kristoffer Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan* (Oxford University Press 2012).

¹⁹ See ‘Opinion concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions’ (Updated 27 June 2018), <http://cicc.court.gov.cn/html/1/219/208/210/819.html>, accessed 1 November 2020.

existing court structures.²⁰ There are now ICommCs in three different Members States of the EU: Germany, France and the Netherlands. The German state of Hesse in January 2018 introduced a special chamber for commercial law cases within the district court of Frankfurt am Main.²¹ In February 2018, an agreement was signed between the French justice minister and the head of the Paris Bar Association at the Paris Court of Appeal for the purpose of creating an international chamber within the Paris Court of Appeal.²² In March 2018, the Netherlands Commercial Court Bill was passed in the Netherlands, amending the Dutch Code of Civil Procedure to provide for the use of English as the language of proceedings within the Netherlands Commercial Court.²³ A failed attempt to set up such a court took place in Belgium, where the Brussels International Business Court (BIBC) never came to fruition, after it had been announced by the Belgian government at the end of 2017.²⁴

International commercial courts coexist with ordinary domestic courts as the natural forum of general jurisdiction for all domestic matters. They moreover coexist with arbitration as the private system of adjudication of disputes of a mostly commercial nature. They present themselves as a new forum for the resolution of cross-border disputes in the global competition to attract cases to their jurisdictions. In comparison to previous phases of judicial globalization, domestic jurisdictions and domestic courts are not consumers of international rules but are becoming the rule-setters themselves.

The introduction to this edited book on *International Commercial Courts: The Future of Transnational Adjudication* discusses the proliferation and main features of ICommCs. Section 1 of this introduction explains that the ‘pure’ international court model has already

²⁰ See Xandra Kramer, ‘The Domino Effect of International Commercial Courts in Europe – Who’s Next?’ (Conflict of Laws, 20 February 2018) <http://conflictoflaws.net/2018/the-domino-effect-of-international-commercial-courts-in-europe-whos-next>, accessed 1 November 2020.

²¹ See <https://ordentliche-gerichtsbarkeit.hessen.de/ordentliche-gerichte/lgb-frankfurt-am-main/lgb-frankfurt-am-main/chamber-international>, accessed 1 November 2020.

²² See ‘Preconisations Sur la Mise en Place à Paris de Chambres Specialisees pour le traitement du contentieux international des affaires’ (3 May 2017), www.justice.gouv.fr/publication/Rapport_chambres_internationales.pdf, accessed 1 November 2020.

²³ See <https://netherlands-commercial-court.com>, accessed 1 November 2020.

²⁴ See Chambre des Représentants de Belgique, ‘Projet de loi instaurant la Brussels International Business Court’ (15 May 2018) www.dekamer.be/flwb/pdf/54/3072/54K3072001.pdf, accessed 1 November 2020.

experienced a great variegation with elements of domestic law as well as arbitration lending several features to international courts. Section 2 presents past efforts to internationalize domestic courts. It is claimed that this trend was part of a larger effort of top-down globalization of domestic judicial systems so that they would facilitate cross-border transactions, and more broadly, a globalized world where goods, capital and companies cross borders more conveniently. Section 3 presents the creation of the new institution of ICommCs that started to proliferate in order to cover the previously existing gap in a world of globalized transactions but without courts adapted to the needs of resolving disputes arising out of these transactions. Section 4 provides an outline of the present edited volume.

0.1 Judicial Globalization and the Proliferation of International Courts

The last quarter of the twentieth century saw a ‘juridification’ process in the international legal order as legal rules emerged for the regulation of various fields at the level of international governance.²⁵ One of the most recent and most important phases in this process was that of ‘judicial globalization’ or ‘international judicialization’.²⁶ Judicial globalization means the creation and proliferation of judicial and quasi-judicial bodies for the adjudication of international disputes.²⁷ Cesare Romano identifies an international judicial body as one that is:²⁸ (i) a permanent institution; (ii) established by an international legal instrument, usually a treaty; (iii)

²⁵ See, for example, Bernhard Zangl and Michael Zürn (eds.), *Verrechtlichung: Baustein Für Global Governance?* (Dietz 2004).

²⁶ See, for example, Alec Stone Sweet, ‘Judicialization and the Construction of Governance’ (1999) 32 *Comparative Political Studies* 147; Laurence R. Helfer and Anne-Marie Slaughter, ‘Toward a Theory of Effective Supranational Adjudication’ (1997) 107 *Yale Law Journal* 273; Robert O. Keohane, Andrew Moravcsik and Anne-Marie Slaughter, ‘Legalized Dispute Resolution: Interstate and Transnational’ (2000) 54 *International Organization* 457; Anne-Marie Slaughter, ‘A Global Community of Courts’ (2003) 44 *Harvard International Law Journal* 191; Jenny S. Martinez, ‘Toward an International Judicial System’ (2003) 56 *Stanford Law Review* 429; Alter (n. 6).

²⁷ Accordingly, most international courts were created in the last quarter of the twentieth century; see Christian Tomuschat, ‘International Courts and Tribunals’, *Max Planck Encyclopedia of Public International Law [MPEPIL]* (Article last updated: February 2011) para. 7 (hereinafter: Tomuschat, *International Courts and Tribunals*).

²⁸ Cesare P. R. Romano, ‘The Proliferation of International Judicial Bodies: The Pieces of the Puzzle’ (1999) 31 *N.Y.U. J. Int’l L & Pol* 709; see also Tomuschat, *International Courts and Tribunals*.

relying on international law to resolve cases; (iv) following set rules of procedure; and (v) issuing legally binding judgments. In addition, international courts very often form part of an international organization.²⁹ The prime example of an international court is the International Court of Justice (ICJ). Apart from permanent bodies, non-permanent bodies have become very common in international law as well, and are usually referred to as arbitral tribunals. These bodies are ad hoc, reflecting the specific configuration of the litigant parties in a specific dispute;³⁰ they rely on party autonomy more than the permanent international courts do, as the parties have the power to influence the rules of proceedings as well as the nomination of the adjudicators who sit on the tribunals.

The original model of an international court as developed in the post-World War II international legal landscape has undergone many organizational, procedural and other changes. International courts now take a plethora of types, forms and shapes. In traditional international law, international disputes were considered disputes between States, and international courts only admitted cases between States. The *ratione personae* jurisdiction of some international courts has expanded to claims brought forward by individuals.³¹ Moreover, international courts were developed as bodies that *ratione iuris* apply international law as defined in Article 38 ICJ Statute, or as specified in the founding documents of the relevant international courts.³² Several exceptions apply nowadays even to this rule – for example, the hybrid panels in East Timor, Kosovo, Sierra Leone and Cambodia, as well as Bosnia and Herzegovina, apply a mixture of national and international law.³³ Also at the level of procedure, parties are sometimes allowed to modify the rules of the court subject to their agreement.³⁴ Organizationally, judges appointed to international courts are as a rule ‘international judges’. Hybrid criminal courts employ a mixture of national and international staff.

Beyond the ‘pure’ model of the international court, as reflected in the organization and jurisdiction of the ICJ, other types of international courts have emerged. Paradigms from domestic law as well as arbitration

²⁹ Tomuschat, *International Courts and Tribunals*, para. 7.

³⁰ See *ibid.*, at para. 1.

³¹ *Ibid.*, at para. 3 and 56; Karen J. Alter, ‘Private Litigants and the New International Courts’ (2006) 39 *Comparative Political Studies* 22.

³² Tomuschat, *International Courts and Tribunals*, para. 4.

³³ Laura A. Dickinson, ‘The Relationship between Hybrid Courts and International Courts: The Case of Kosovo’ (2003) 37 *New England Law Review* 1059.

³⁴ See Article 48 of the Rules of the Tribunal of the International Tribunal for the Law of the Sea (ITLOS).

have started filtering into the traditional model of international court adjudication. Accordingly, it is difficult to speak of just one model of international courts.

The emergence of these new-style tribunals has arguably resulted from a different perspective of international law and has deeply affected the concept of national sovereignty: from the traditional perspective that States cannot be obliged to comply, except to the extent States consent to such compliance, to an international rule of law perspective which assumes that States are not above international law and that their acts, including legislative and governmental acts, ought to be reviewed for compliance with international law. Such a perspective of international and global administrative law clashes with traditional concepts of national sovereignty and the principle of democratic legitimacy. According to traditional concepts of democracy, based on theories of social (fictional) contracts, all powers of a State stem from its citizens, who collectively are the only actor that can review State behaviour through national courts (which typically rule in the name of the people) or through national elections. In the global administrative law world, States do not have unfettered power and their behaviour must comply with fundamental principles of international and global administrative law. This proposition may seem to curtail national sovereignty, but it may also reflect the realization that in today's strongly interdependent world, national isolation is not a viable political choice.³⁵

0.2 Internationalization of Domestic Dispute Resolution

Apart from the multiplication and the qualitative change of courts within international regimes, there has been a second, less noticed wave of judicial globalization: the development and proliferation of international standards for the organization and function of domestic courts, as well as sometimes specialized international bodies dealing with the organization and operation of domestic courts. This trend has increased exponentially since the 2000s in an effort from international organizations to encourage reforms in domestic court systems. This reform impetus was initiated by an economic condition: while economic transactions had reached an unprecedented volume, institutions adjudicating on disputes arising out of these transactions largely remained domestic.

³⁵ Alter (n. 6), at 339.

Since the 1980s, international – mostly economic – organizations have become interested in the performance of the justice sector and have promoted judicial reforms in different countries. The World Bank, the International Monetary Fund (IMF) and the Organisation for Economic Co-operation and Development (OECD) are among the most active international organizations in this area. The World Bank, for example, measures the quality of judicial processes and the performance of national justice systems as part of its *Doing Business* indicators.³⁶ It moreover operates at three different levels in the field of internationalization of dispute resolution:³⁷ financing stand-alone justice reform projects – that is, projects dedicated exclusively to justice reform; justice projects conducted as part of broader lending projects; financing analytical and advisory work in relation to anti-corruption agencies, ombuds-person offices, legal aid and legal empowerment and human rights protection. To streamline its justice sector activities, the World Bank has developed an overall strategy for justice reform.³⁸ In addition, the IMF also introduces judicial branch reforms as part of its lending activity; such reforms have also featured very prominently in the context of the more recent activities of the IMF in Europe.³⁹

Moreover, a number of non-governmental transnational networks of courts, judges and other judicial institutions have been established with a view to developing standards regarding the independence, accountability and efficiency of national judiciaries. A prominent example is the International Consortium for Court Excellence. The Consortium, established in 2008, is a network of national, regional and international organizations, including supreme courts, district courts, organizations of courts and judges and international organizations like the World Bank. The Consortium has developed the ‘International Framework for Court Excellence’, including the ‘Global Measures of Court Performance’, and implementation guidance providing for a voluntary

³⁶ See World Bank, *Doing Business: Comparing Business Regulation in 190 Economies* (World Bank 2020) <https://openknowledge.worldbank.org/bitstream/handle/10986/32436/9781464814402.pdf>.

³⁷ World Bank, *New Directions in Justice Reform: A Companion Piece to the Updated Strategy and Implementation Plan on Strengthening Governance, Tackling Corruption* (World Bank 2012), 3–5.

³⁸ World Bank (n. 32).

³⁹ See, for example, Armin von Bogdandy and Michael Ioannidis, ‘Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done’ (2014) 51 CHLR 59.

quality management system that can help courts improve their performance by assessing the quality of justice and court administration.⁴⁰

Commercial courts have created a similar network. On the initiative of Lord Thomas of Cwmgiedd, former Lord Chief Justice of England and Wales and current President of the QICDRC, the Standing International Forum of Commercial Courts (SIFoCC) was formed.⁴¹ The SIFoCC organizes meetings of judiciaries and officials of commercial courts, and it has undertaken a variety of initiatives. The most important of these initiatives is the Multilateral Memorandum on the Enforcement of Commercial Judgments for Money launched in June 2019.⁴² International commercial courts from all over the world were some of the first commercial courts to join this network.

0.3 Proliferation of International Commercial Courts

In a world where cross-border transactions are the order of the day, parties until recently could not find recourse to international courts for cases involving such transactions among exclusively private parties.⁴³ International arbitration instead assumed the role of default jurisdiction for the resolution of disputes of cross-border transactions. The identified gap in international adjudication has given rise to a new species of courts: international commercial courts. On one side, ICommCs are domestic courts as they are creatures of domestic legal orders – but they are different from the ordinary courts of the jurisdiction in which they are situated. On the other side, they are international courts, as their composition as well as the cases they decide have an international dimension. International commercial courts are a novel addition to the system of international dispute settlement as they present an effort to globalize the resolution of disputes in a bottom-up way.⁴⁴ Overall, they are creatures of

⁴⁰ The International Framework for Court Excellence (2nd Edition, March 2013), www.courtexcellence.com/~media/Microsites/Files/ICCE/The%20International%20Framework%20E%202014%20V3.ashx, accessed 1 November 2020.

⁴¹ See www.sifocc.org/about-us, accessed 1 November 2020.

⁴² Standing International Forum of Commercial Courts, Multilateral Memorandum on Enforcement of Commercial Judgments for Money (June 2019), www.judiciary.uk/wp-content/uploads/2019/06/Multilateral-Memorandum-on-Enforcement.pdf, accessed 1 November 2020.

⁴³ Cf. also W. Laurence Craig, 'Some Trends and Developments in the Laws and Practice of International Commercial Arbitration' (2016) 50 *Texas International Law Journal* 699, 700.

⁴⁴ See Dimitropoulos (n. 13).