New Courts, New Perspectives

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- Matthew Erie, *The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution*, **__ Va. J. Int'l L. __** (forthcoming 2020), available at SSRN.
- Will Moon, *Delaware's New Competition*, **__ Nw. U. L. Rev. __** (forthcoming 2020), available at SSRN.

Fascinating developments are afoot in other countries' courts. Recent articles by Matthew Erie and Will Moon offer terrific insights into a variety of innovative developments in foreign business courts. These articles have implications for those interested in procedural innovation, the development of legal institutions, transnational governance, the international development and influence of the common law, the role of courts in establishing and maintaining the rule of law, and the role of U.S. courts in transnational litigation and as an international judicial leader.

Erie's article describes the rise of "new legal hubs" (NLHs) across "Inter-Asia," including in Hong Kong, China, Singapore, Dubai, and Kazakhstan. Erie defines an NLH "as a 'one-stop shop' for cross-border commercial-dispute resolution, often located in financial centers, promoted as an official policy by nondemocratic or hybrid [democratic and authoritarian] states." NLHs have been established over the past few decades—some as recently as earlier this year. These new institutions establish courts in combination with arbitration centers and mediation services, often housed in the same state-of-the-art buildings.

Erie, a legal anthropologist at Oxford, conducted extensive empirical research in five jurisdictions that are home to NLHs. The article contains a wealth of fantastic details and insights about the history, political economy, and functioning of these courts and legal centers. It explores the role of lawyers and legal culture in the creation of legal institutions and depicts procedural innovations. These courts tend to exclude the local law and local language in favor of common law procedural and substantive law and English language. The Dubai International Financial Center's court, for example, allows its judgments to be converted into arbitral awards, potentially allowing for international enforcement as if they were arbitral awards. Singapore is experimenting with merging arbitration and mediation into a procedure known as "Arb-Med-Arb" that allows, among other things, for consent awards to be accepted as an arbitral award. China offers "smart courts," integrating artificial intelligence, big data, and machine learning into the adjudication process to minimize over-burdened court dockets and increase access to justice, particularly for online disputes. Courts in NLHs highlight the role of courts in relation to arbitration and other modes of dispute resolution.

In addition to these innovations, Erie's analysis places NLHs in a global context that is important for understanding the role of courts and law on the international plane. As London and New York take themselves down a notch in global influence, they create an opening for other providers of legal services, such as Singapore and Hong Kong, to step into the market for international commercial dispute resolution. NLHs seem to catalyze globalization, facilitating cross-border commercial transactions. They also "exist in relation to one another . . . as a mainly decentralized network." They enter non-binding agreements to enforce each other's judgments and they contribute to our understanding of how judges in different jurisdictions engage in dialog.

But Erie's central proposition is that despite the appearance that NLHs facilitate globalization, NLHs may conflict with their host states, creating thorny conflicts between the rule of law and nondemocratic governments. In part because NLHs operate in "exceptional zones"—carve-outs from the rules that generally apply to the rest of the country—they develop and apply "bespoke rules and institutions that differ from those of the host state." "But their very exceptionality . . . can cause an array of conflicts with the host state, from institutional competition and jurisdictional turf wars to political rivalries and ideological dissonance." Thus, "NLHs demonstrate the potential and fragility of 'rule of law' in nondemocratic states that promote globalization against trends in the West."

This rich account of NLHs in Inter-Asia pairs well with Moon's article, which focuses on specialized business courts in offshore jurisdictions such as the Cayman Islands, the British Virgin Islands, and Bermuda. Moon describes these foreign nations as "Delaware's new competition." Like Delaware, they offer permissive corporate governance rules and specialized business courts, attracting publicly traded American companies to incorporate there. Moon makes an important contribution to the corporate-governance literature, continuing debates about Delaware's role started by Roberta Romano in the 1980s.

Most interesting to students of courts is Moon's description of these offshore islands' new specialized commercial divisions. Like the courts in NLHs, these courts have hired judges with business law expertise, often foreign individuals who are well respected judges in their home states (often the UK). Indeed, some people serve as judges for NLHs and offshore states and as international arbitrators. Also like NLH courts, offshore business courts incorporate a common law tradition and apply common law substantive and procedural law.

The new courts Erie and Moon describe raise difficult normative issues about the public accessibility of the dispute-resolution process. A classic divide between arbitration and litigation is that the former can be kept confidential, while courts and their judgments are open to the public. But the "open justice" principle, recently reaffirmed by the UK Supreme Court, has varying applications in different countries. These new business courts in NLHs and offshore nations are, by default, public. They are state-created courts. They often post decisions on their websites, such as the Dubai International Financial Centre Court's and Bermuda's. But NLH courts allow parties to opt into confidential proceedings and judgments and do not (and potentially never will) identify or clarify the standards for determining whether to grant parties' requests for confidentiality. The offshore courts are more "transparent" in their secrecy—over 55% of Cayman Islands Financial Services Division opinions are sealed, and even that court's "public" decisions are only available to registered users who have paid an annual fee. Even U.S. courts have been known to grant confidentiality requests when both parties agree, notwithstanding the possible public harm that results from such secrecy, as demonstrated by the recent opioid litigation. It stands to reason that international business courts, who may aim to please the parties before them, would grant such requests.

This secrecy stands in tension with another goal of NLHs and offshore business courts: to develop law. They thus raise fundamental questions about institutional design and legal development. If a state subsidizes dispute resolution in part to foster the development of precedent, how much publicity is enough? These courts may be able to proceed in secret to resolve the particular dispute between the parties, while ignoring the other purposes that courts serve.

NLHs and offshore business courts thus provide a window into the role of courts as creators and preservers of the rule of law domestically and internationally. All purport to promote investment and investment security in their local economies. They may do so by offering well-respected international jurists, a common law tradition, or confidentiality. But can these attributes make up for foreigners' distrust of the host state? As Erie asks, can they generate positive legal developments in other aspects

of domestic governance?

Moon's paper also examines these foreign court developments from the perspective of U.S. courts, particularly Delaware. U.S. courts—whether Delaware for corporate disputes or federal courts for international human rights disputes—have traditionally thought of themselves as being inviting, even too inviting, to transnational litigation. They have helped develop international law and domestic law with far-reaching extraterritorial effects. But I have argued that these tides are changing because of rising barriers to transnational litigation in U.S. courts and rising competition abroad.

Erie and Moon provide deep dives into two different, important sources of that rising foreign competition. These perspectives should illuminate how we understand courts as international actors in a world with quickly changing global dynamics. These articles are significant contributions in their own right, and also provide a launching pad for important future work for these scholars and others interested in examining courts from a variety of angles.

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