

TRAVELING JUDGES

By Alyssa S. King* and Pamela K. Bookman**

ABSTRACT

Around the world, domestic courts focused on commercial disputes hire foreign judges. The practice seems to resemble arbitration, but is also rooted in colonialism. These traveling judges are predominantly retired English judges hired by small, market-dominant jurisdictions, like Hong Kong or Dubai. The judges' identities reveal efforts to harness business preferences for English common law into domestic court systems. While judges aspire to spread the rule of law, local politics may dictate these courts' futures. This Article maps the practice of traveling judges and explores its implications.

INTRODUCTION

Every January, Hong Kong celebrates the ceremonial opening of the legal year. The chief justice gives a speech in English celebrating the rule of law and the judiciary's guardianship of it.¹ The "overseas" judges on Hong Kong's highest court, the Court of Final Appeal (CFA),²

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¹ See, e.g., *Chief Justice Opens Legal Year with Pledge to Uphold Hong Kong's Judicial Independence*, S. CHINA MORNING POST (Jan. 13, 2020).

² Hong Kong's Basic Law established the CFA in 1997, when Hong Kong moved from British to Chinese rule. XIANGGANG JIBEN FA, Art. 82 (H.K.). It was to hear final appeals, continue the common law tradition, and reassure domestic and international audiences of the stability of the rule of law in the territory. In addition to local judges, the court has up to thirty overseas non-permanent judges (NPs), who have consistently been either serving or retired judges of United Kingdom's apex court or retired judges of Australia's, Canada's, and New Zealand's apex courts. One overseas judge sits on each five-member panel hearing merits appeals. Stuart Hargreaves,

rarely attend. This year, Chief Justice Andrew Cheung probably meant to reassure his audience when he confirmed that overseas judges could sit in “national security” cases, applying a draconian 2020 law that could punish speech at home and abroad.³ But that promise instead strengthened calls for the overseas judges on the CFA to resign.⁴ In March 2022, two more overseas judges—the current president and deputy president of the UK Supreme Court—resigned, breaking the long-standing tradition of having two members of that court on the CFA.⁵ Several remaining judges published statements explaining their commitment to Hong Kong’s rule of law.⁶

“Traveling judges” are those who—like Hong Kong’s overseas judges—travel from their home jurisdictions to serve on another jurisdiction’s court. We refer to “traveling”⁷ rather than “foreign” judges for three reasons. First, it avoids complicated citizenship questions. Second, it focuses on trans-jurisdictional (rather than only transnational) travel.⁸ To differentiate Delaware judges and courts from Nebraska ones,⁹ for example, we identify judges by their “home jurisdiction,” the place of their primary legal career.¹⁰ Third, traveling judges often offer potential litigants not foreign-ness but familiarity—London-based counsel can appear before a London-based judge in Dubai, Kazakhstan, or the Cayman Islands.

A growing body of scholarship examines the emergence of courts or divisions focused on international commercial disputes.¹¹ Several of these courts have followed Hong Kong’s lead and hired traveling judges. Studies of foreign judges, however, tend to focus on constitutional law and ignore most of these courts.¹² Scholarship on the rise of international commercial

Canaries or Colonials? The Reduced Prominence of the “Overseas Judges” on Hong Kong’s Court of Final Appeal, 16 ASIAN J. COMP. L. 1, 7–8 (2022). Although judges may travel to Hong Kong only one or two weeks a year, their presence has symbolic importance, including sending a message that post-1997, “Hong Kong would continue to be a safe place for business to be conducted.” *Id.* at 17.

³ See CHINA’S NATIONAL SECURITY: ENDANGERING HONG KONG’S RULE OF LAW? (Cora Chan & Fiona de Londras eds., 2020); Alvin Y.H. Cheung, *Unpalatable Realities, No Choices*, 19 INT’L J. CONST. L. 1154 (2021).

⁴ *The Times View on UK Justices in Hong Kong: Judgment Call*, TIMES (LONDON) (Feb. 2, 2022).

⁵ *A Statement from Lord Reed, President of the Supreme Court, The Right Hon Lord Reed of Allermuir* (Mar. 30, 2022), available at <https://www.supremecourt.uk/news/role-of-uk-judges-on-the-hong-kong-court-of-final-appeal-update-march-2022.html> (announcing resignation).

⁶ Chris Lau & Tony Cheung, *At Least Eight Out of 10 Remaining Overseas Judges at Hong Kong’s Highest Court to Stay On*, S. CHINA MORNING POST (Mar. 31, 2022), at <https://www.scmp.com/news/hong-kong/politics/article/3172534/hong-kong-leader-accuses-britain-meddling-judicial>.

⁷ Some judges sit on more than one court. See Section I.C. Of course, during the COVID-19 pandemic, when most of our research was conducted, judges stopped traveling and conducted proceedings virtually instead.

⁸ Most traveling judges are foreign citizens. Some, however, travel from overseas but share a nationality with the locals in the hiring court’s jurisdiction. For example, Cayman Islands belongs and UK citizens both have British nationality. See note 117 *infra* and accompanying text. Thus, all foreign judges are traveling judges, but not all traveling judges are necessarily “foreign.”

⁹ Our methodology thus differs from comparative constitutional law studies of foreign judges, which focus on nationality. See Rosalind Dixon & Vicki Jackson, *Hybrid Constitutional Courts: Foreign Judges on National Constitutional Courts*, 7 COLUM. J. TRANSNAT’L L. 283, 332 & n. 194 (2019) (designating as “foreign” a Fijian judge who grew up in Fiji but left as a child).

¹⁰ See Section I.B.

¹¹ See, e.g., Pamela K. Bookman, *The Adjudication Business*, 45 YALE J. INT’L L. 227 (2020); INTERNATIONAL ACADEMY OF COMPARATIVE LAW, NEW SPECIALISED COMMERCIAL COURTS AND THEIR ROLE IN CROSS-BORDER LITIGATION (Man Yip & Giesela Rühl eds., forthcoming 2023); INTERNATIONAL COMMERCIAL COURTS: THE FUTURE OF TRANSNATIONAL ADJUDICATION (Stavros Brekoulakis & Georgios Dimitropoulos eds., 2022); INTERNATIONAL BUSINESS COURTS: A EUROPEAN AND GLOBAL PERSPECTIVE (Xandra Kramer & John Sorabji eds., 2019), at <https://boeken.rechtsgebieden.boomportaal.nl/publicaties/9789462369719>.

¹² See, e.g., ANNA DZIEDZIC, FOREIGN JUDGES IN THE PACIFIC 1 (2021); Dixon & Jackson, *supra* note 9.

courts,¹³ meanwhile, has not yet focused rigorously on the decision makers,¹⁴ often assuming they resemble arbitrators.¹⁵

This Article begins the study of traveling judges on commercially focused courts by identifying who they are, where they serve, and what roles they play. In some ways, they repeat old patterns. Traveling judges are overwhelmingly from the UK and former dominion colonies. They are less diverse than international arbitrators and far more likely to have judicial experience. A look at their backgrounds suggests that traveling judges might be a phenomenon limited to common law countries, but only half of hiring jurisdictions are in such states. Almost all, however, are small jurisdictions that are or aspire to be market-dominant.¹⁶ Traveling judges offer hiring jurisdictions a method of transplanting well-respected courts, like London's commercial court, on their shores. They recreate these courts, however, in new political environments under the supervision of different states. They may therefore face different constraints, destined to change over time, which will affect both hiring jurisdictions' ability to achieve their goals and traveling judges' ability to judge in the way they are accustomed.

The stakes are high. As these courts proliferate, they are poised to exert increasing influence over dispute resolution, law development, and global judicial governance.¹⁷ Traveling judges may improve international commercial dispute resolution around the world, promote rule of law values, and contribute to convergence in commercial law or even civil justice. But they could also promote a neocolonial world order that harnesses certain jurisdictions' sovereignty to sustain a commercial law that benefits some multinationals at the expense of the global community more broadly defined.¹⁸

A better understanding of traveling judges will contribute to studies of judges, judicial identity, and judicial legitimacy, among other areas. Private international law and international economic law scholars may study these courts and their judges' role in promoting foreign investment, the market for law and dispute resolution, and the harmonization and convergence of international

¹³ International commercial courts are domestic courts "established to cater for an international audience." Christopher Grout & William Blair, *The Role of International Commercial Courts in Commercial Dispute Resolution*, in INTERNATIONAL COMMERCIAL COURTS, *supra* note 11, at 31.

¹⁴ Cf. Pamela K. Bookman, *Arbitral Courts*, 61 VA. J. INT'L L. 161, 212–14 (2021) (noting the identity of judges on arbitration-court hybrids as crucial to their perceived legitimacy). The few studies discussing foreign judges in commercial contexts have usually focused on one court. See, e.g., Anselmo Reyes, *Reflections on the SICC, International Judges and International Commercial Dispute Resolution*, in THE CAMBRIDGE HANDBOOK OF FOREIGN JUDGES ON DOMESTIC COURTS (Anna Dziedzic & Simon N.M. Young eds., forthcoming 2023); Man Yip, *The Singapore International Commercial Court: The Future of Litigation?*, 12 ERASMUS L. REV. 82 (2019); Anna Dziedzic, *Foreign Judges and Hong Kong's New National Security Law*, 25 COMMONWEALTH JUD. J. 27 (2020). Those who study the CFA's foreign judges tend to focus on the court's public law work. See, e.g., David S. Law, *Judicial Comparativism and Judicial Diplomacy*, 163 U. PA. L. REV. 927, 1008 (2015).

¹⁵ See, e.g., Thomas Schultz & Clément Bachmann, *International Commercial Courts: Possible Problematic Social Externalities of a Dispute Resolution Product with Good Market Potential*, in INTERNATIONAL COMMERCIAL COURTS, *supra* note 11, at 71 (international commercial court judges "probably resemble today's arbitrators"); see also *id.* at 68 (noting "we do not know the first thing" about who international commercial court judges are and how they understand the world).

¹⁶ See CHRISTOPHER M. BRUNER, RE-IMAGINING OFFSHORE FINANCE: MARKET-DOMINANT SMALL JURISDICTIONS IN A GLOBALIZING FINANCIAL WORLD (2016).

¹⁷ See, e.g., Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 TULANE L. REV. 67 (2009).

¹⁸ 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 ANTI-GLOBALISM AND PANDEMIC (Sundares Menon & Anselmo Reyes eds., forthcoming 2022) (discussing international commercial courts' potential to develop international commercial law in a manner that addresses global problems, and obstacles to their doing so).

commercial law. Historians may appreciate traveling judges' implications for the legacy of colonialism and the legal origins debate. Political scientists may view traveling judges as a window into debates about democratic accountability, institution building, and legal transplantation. And legal scholars more generally may be interested in what this phenomenon reveals about the development of public and private law, the boundaries between them, and the relationship between international dispute resolution and national sovereignty.

This study focuses on traveling judges on courts that handle international commercial disputes, in particular members of the Standing International Forum of Commercial Courts (SIFOCC).¹⁹ We determined which SIFOCC member courts hire traveling judges,²⁰ collected extensive information about the courts and the judges,²¹ and interviewed over twenty-five judges and court personnel. This study uses grounded theory²² to contribute to the growing methodological fields of empirical and social science approaches to comparative law²³ and international law.²⁴ It also incorporates legal history to develop explanations for why these jurisdictions hire these traveling judges.

Out of forty-four SIFOCC members, nine employed traveling judges as of June 1, 2021.²⁵ In addition to the Hong Kong SAR judiciary, this group includes 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 British Virgin Islands (BVI) Commercial Division); and the Supreme Court of The Gambia.²⁶

¹⁹ See Standing International Forum of International Courts (SIFOCC), *About Us*, at <https://sifocc.org/about-us>.

²⁰ SIFOCC membership provides a useful, albeit imperfect, proxy for identifying courts focused on international commercial litigation. See Part II.A. *infra*.

²¹ Some of these jurisdictions are easy to learn about; others have a limited web presence, making research more challenging.

²² When using grounded theory, researchers start with a general research question and base their ultimate theoretical contribution on patterns emerging from the data. Grounded theory is especially suited to the exploration of understudied phenomena. See JOSHUA KARTON, *THE CULTURE OF INTERNATIONAL ARBITRATION AND THE EVOLUTION OF CONTRACT LAW* 30–37 (2013); BARNEY G. GLASER & ANSELM L. STRAUSS, *THE DISCOVERY OF GROUNDED THEORY: STRATEGIES FOR QUALITATIVE RESEARCH* (1967).

²³ Holger Spamann, *Empirical Comparative Law*, 11 ANN. REV. L. & SOC. SCI. 131 (2015); Christoph Engel, *Challenges in the Interdisciplinary Use of Comparative Law*, 69 AM. J. COMP. L. (forthcoming 2022); Lena Salaymeh & Ralf Michaels, *Decolonial Comparative Law: A Conceptual Beginning*, 86 RABEL J. COMP. & INT'L PRIV. L. (RABELSZ) 166 (2022).

²⁴ See Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AJIL 1 (2012); Daniel Abebe, Adam Chilton & Tom Ginsburg, *The Social Science Approach to International Law*, 22 CHI. J. INT'L L. 1 (2021).

²⁵ SIFOCC members may include court systems, like the ECSC; individual courts, like the Southern District of New York; commercial divisions, like the New York Commercial Division; or whole judiciaries, like the Hong Kong SAR judiciary.

There may be additional commercially oriented courts with traveling judges, and even additional SIFOCC members, that should belong in this study, but we were unable to find sufficient information about them. See Part II.A. *infra*.

²⁶ See Appendix, Table 1 for a table of the courts listing jurisdiction, type of court, year founded, and numbers of local and traveling judges.

To make sense of this list, this Article identifies the common features of these jurisdictions and their courts, while acknowledging their many differences. Half are located in common law countries. All but one are in former British colonies or protectorates.²⁷ The jurisdictions in this study—including the SEZs in the oil states—all follow the common law tradition. Either by way of colonial legacy or by recent legislation, these jurisdictions have adopted substantive law and procedures that mirror those in London to varying degrees. The most commercially oriented courts are in small jurisdictions that are or aspire to be “market-dominant” with an outsized influence in global finance.²⁸ Political and judicial leaders in these jurisdictions have designed these courts for cross-border disputes, anticipating transnational parties.

Some courts have only a few traveling judges on a mostly local bench. Two courts employ 100 percent traveling judges.²⁹ As of June 1, 2021, we identified seventy-two sitting traveling judges on all courts included in our study. Several judges sat on two or more courts.³⁰ They were overwhelmingly white, male, retired judges.³¹ Nearly seventy percent also acted as arbitrators, often spending more time as arbitrators than as traveling judges.

Considered as a group, the traveling judges reveal a stark British influence. Most have some UK-based legal education. About half are from England and Wales. The remainder come from other common law or hybrid jurisdictions, with no single other jurisdiction providing more than five traveling judges, and most providing only one or two. Despite the prominence of New York and Delaware commercial law, we found only one U.S. traveling judge.³²

The demographics of traveling judges reflect the way hiring governments seek to appeal to foreign investors, which in turn reflects not only colonial history but also the rise of international commercial arbitration and perceptions about what legal environments are most business-friendly. Judge demographics also reflect constraints on sought-after individuals’ willingness and desire to serve as traveling judges, which may be informed by their home jurisdictions’ judicial retirement age and by judges’ post-retirement career options.

In addition to these empirical and analytical contributions, this Article examines some implications of our study, all of which reveal a reassertion of state power in international commercial dispute resolution. First, traveling judges’ demographics reflect the hiring jurisdictions’ use of the English common law tradition—and its judges—to further their foreign investment goals. Our results undermine arguments that transjudicial global networks are becoming less dominated by earlier hegemonic powers³³ and support studies of the domination of English common law in the coding of global capital, linking today’s legal arrangements to colonial history. Second, although traveling commercial judges resemble international

²⁷ 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.

²⁸ See BRUNER, *supra* note 16.

²⁹ The two courts are the AIFC courts in Kazakhstan and the ADGM courts in Abu Dhabi. See Appendix, Table 1.

³⁰ There are 235 seats on all these courts combined, eighty-one of which (34%) were occupied by seventy-two 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.

³¹ See Part III.A.1 *infra*. (three-quarters of traveling judges in this study are retired judges).

³² A former Delaware Bankruptcy Court judge joined the court in 2022. See SICC, *Judges* (July 2022), at https://www.sicc.gov.sg/about-the-sicc/judges#45_Judge.

³³ See, e.g., Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191, 198 (2003).

arbitrators, comparing those groups suggests that hiring jurisdictions prioritize certain elements—including judicial experience and nationality—differently than parties do when appointing arbitrators. Third, different host governments and local circumstances may create obstacles to the courts' ability to achieve their various goals and to traveling judges' ability to judge in the ways they may be accustomed to judging in their home jurisdictions.

The Article proceeds as follows. Part I provides historical background and reviews the literatures on foreign judges and international commercial dispute resolution. Part II describes our methodology. Part III reports our findings on who traveling judges are, how they are hired and paid, how they may be removed from office, and what they do while in office and on the side (as most traveling judge positions are part-time). Part IV analyzes which courts hire traveling judges, why they do so, why the judges are available, and why they choose to accept the invitation. Part V discusses implications relating to English legal dominance, judicial identity, and the rule of law.

GLOSSARY OF COURT NAMES

International Commercial Courts	General Jurisdiction Courts and Commercial Divisions
Abu Dhabi Global Market (ADGM) Courts	Cayman Islands Grand Court, Financial Services Division (FSD)
Astana International Financial Centre (AIFC) Court (Kazakhstan)	Eastern Caribbean Supreme Court (ECSC), including the Commercial Division in the Territory of the Virgin Islands (BVI Commercial Division)
Dubai International Financial Centre (DIFC) Courts	Hong Kong Court of Final Appeal (CFA)
Qatar International Court (QIC)	Supreme Court of The Gambia
Singapore International Commercial Court (SICC)	

I. TRAVELING JUDGES AND COMMERCIAL COURTS

The courts in this study are in places with three kinds of histories—former British colonies that had colonial courts (the Caribbean, Hong Kong, The Gambia, and Singapore), former British protectorates that had consular courts (the UAE and Qatar), and one that was neither (Kazakhstan). The courts that hire traveling judges are all less than thirty years old; many are less than ten.³⁴

This Part first explores the history of traveling judges in these jurisdictions. It then discusses the literature on foreign judges and global judicial dialogue to identify how traveling judges in the commercial context resemble and differ from foreign judges in other contexts. Finally, this Part discusses the latest developments in international commercial dispute resolution—in courts and arbitration—to better understand the role of traveling judges in this emerging landscape.

A. *The History of Traveling Judges*

Internationalized courts run partially by foreigners and that adjudicate disputes involving foreign parties have a long history, dating back to the Roman Empire and involving both common law and civil law traditions.³⁵ Regions outside the British Empire also had tribunals

³⁴ Although the ECSC is older, its first commercial division was established in 2009.

³⁵ 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. Y.B. INT'L ECON. L. 275 (2022).

run by and for foreigners, “mostly built upon a French legal foundation.”³⁶ This Section provides a short history of the influence of English law and judges in the nineteenth and twentieth centuries. Today, the array of common law judiciaries and the global legal profession—as well as modern traveling judges—reflect this history.³⁷ While often omitted from studies of international commercial courts,³⁸ this history helps to explain today’s traveling judges.

The British Empire used colonial judges to create the foundation of a shared common law tradition based on English law and language.³⁹ The degree of imposition of English legal influence depended on a jurisdiction’s status within the British Empire.⁴⁰ In colonies like Singapore and the Cayman Islands, the Empire imposed portions of its law and legal structures, including by establishing *colonial* courts—local common law courts intended to promote and protect commercial development.⁴¹ In the nineteenth and early twentieth century, colonial court judges were primarily English, Scottish, and Irish barristers, but the dearth of desirable candidates eventually forced the Colonial Office to consider candidates from the dominions of Canada, Australia, and New Zealand.⁴² It was understood that candidates would be white.⁴³ Applicants included both individuals who had not made a sufficient living on the home islands and others who “came from families with a tradition of living in British territories abroad.”⁴⁴ Final appeal from colonial courts was to the Judicial Committee of the Privy Council (JCPC), a tribunal seated in London that originally included only UK judges, but came to reflect a more diverse bench of (male) judges from across the empire.⁴⁵

In protectorates, like the Trucial States (now the UAE) and Qatar, the British government lacked direct control and did not impose a common law legal system. These states were governed by tribal law, Shari’a, and customary law.⁴⁶ As the region developed in the 1940s and British interests shifted from military strategic to financial with the discovery of oil, the British government required ruling sheiks to cede jurisdiction over British subjects to Britain because they did

³⁶ Willem Theus, *There and Back Again: From Consular Courts Through Mixed Arbitral Tribunals to International Commercial Courts*, at n. 120 (draft on file with authors); see also Mathilde Cohen, *Judicial Colonialism Today: The French Overseas Courts*, 8 J. L. & COURTS 247 (2020).

³⁷ See KATHARINA PISTOR, *THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY* 176–78 (2019) (noting the domination of U.S. and English law firms and English firms’ benefits from the colonial past).

³⁸ But see Theus, *supra* note 35; Theus, *There and Back Again*, *supra* note 36.

³⁹ 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*, at 25 (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. 1 (2002).

⁴⁰ Christian R. Bursat, *Why Didn’t the Common Law Follow the Flag?*, 105 VA. L. REV. 483, 515–18 (2019).

⁴¹ *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, Daniel Costelloe, Malgosia Fitzmaurice, Paul Gragl & Edward Guntrip eds., 2019).

⁴² Feingold, *supra* note 39, at 28, 33.

⁴³ *Id.* at 38; see *id.* at 28 (noting that “[t]he Colonial Service did not usually employ colonial subjects as colonial judges” and few colonial subjects had the necessary legal education).

⁴⁴ *Id.* at 34.

⁴⁵ Rohit De, *A Peripatetic World Court: Cosmopolitan Courts, Nationalist Judges and the Indian Appeal to the Privy Council*, 32 L. & HIST. REV. 821 (2014).

⁴⁶ 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).

not trust the local courts.⁴⁷ The resulting *consular* courts⁴⁸ heard disputes involving British citizens, other foreigners, and their interests.⁴⁹ As with colonial courts, final appeal from consular courts was to the JCPC.⁵⁰ The local courts maintained jurisdiction over Muslim residents.

When some former colonies and protectorates established independence in the 1960s and 1970s, some continued to employ now-foreign judges on their courts.⁵¹ The JCPC sometimes retained jurisdiction over final appeals. Other territories—including Hong Kong, the Cayman Islands, and the BVI—did not become fully independent.⁵² Over time, they developed benches with a mix of local and traveling judges.⁵³ Appellate courts over these territories likewise had traveling judges, such as the Hong Kong CFA, which in 1997 replaced the JCPC as the court of final appeal for Hong Kong.⁵⁴ In the Caribbean, the Eastern Caribbean Supreme Court (ECSC), established in 1967, combined first-instance and appellate jurisdiction over both newly independent countries like St. Lucia and some remaining British Overseas Territories like the BVI.⁵⁵ ECSC judges must have previously served as a judge or practitioner “in some part of the Commonwealth,” but not necessarily in an ECSC member states.⁵⁶ The JCPC—today made up of the justices of the UK Supreme Court—has

⁴⁷ Al-Muhairi, *supra* note 46, at 124–25 (discussing the 1946 Trucial States Order in Council); NATHAN BROWN, *THE RULE OF LAW IN THE ARAB WORLD: COURTS IN EGYPT AND THE GULF* 131–34 (1997).

⁴⁸ 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*, at <https://thelawdictionary.org/consular-courts>.

⁴⁹ HUSAIN M. AL BAHARNA, *BRITISH EXTRA-TERRITORIAL JURISDICTION IN THE GULF 1913–1971: AN ANALYSIS OF THE SYSTEM OF BRITISH COURTS IN THE TERRITORIES OF THE BRITISH PROTECTED STATES OF THE GULF DURING THE PRE-INDEPENDENCE ERA*, 11, 17–18, 38–39 (1998); Hamzeh, *supra* note 46, at 82; Al-Muhairi *supra* note 46, at 82.

⁵⁰ Hamzeh, *supra* note 46, at 82.

⁵¹ DZIEDZIC, *supra* note 12, at 1. Upon independence, many states retained the JCPC as the final court of appeal, although some, including Singapore, have since withdrawn from the JCPC’s jurisdiction.

⁵² British Overseas Territories have substantial local independence, subject to British oversight. In May 2022, the UK government considered imposing direct rule over the BVI after a UK-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), at https://bvi.gov.vg/sites/default/files/resources/web_accessible_-_bvi_coi_report.pdf. The UK government ultimately decided against imposing direct rule. See Alex Therrien, *British Virgin Islands: UK Decides Against Direct Rule of Territory*, BBC NEWS (June 8, 2022), at <https://www.bbc.com/news/uk-61736373>.

⁵³ 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, 285–89 (2016). 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).

⁵⁴ See note 2 *supra*.

⁵⁵ The ECSC is a high court for the Organization of Eastern Caribbean States, which includes six independent states—Antigua and Barbuda, the Commonwealth of Dominica, Grenada, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines—and three British Overseas Territories: Anguilla, BVI, and Montserrat. ECSC has two divisions, the High Court and the Court of Appeal, existing in each member state. Eastern Caribbean Supreme Court, *Court Overview*, at <https://www.eccourts.org/court-overview>. The BVI and Saint Lucia, have established commercial divisions within their High Courts. Standing International Forum of Commercial Courts, *Eastern Caribbean Courts*, at <https://sifocc.org/countries/eastern-caribbean>. Trial judges sit in specific member states and territories, while Court of Appeal justices travel on circuit.

⁵⁶ ECSC, *ECSC Judicial Officers*, at <https://www.eccourts.org/judicial-officers>; West Indies Associated States Supreme Court Order 1967, Art. 18(1) (UK). In the case of the BVI Commercial Divisions, judicial service in an international commercial court also qualifies, and practitioners must have specialized in litigating “cross-border or International Commercial cases.” ECSC, *Vacancy Notice—Presiding Judge*, BVI, at <https://www.eccourts.org/vacancy-notice-presiding-judge-tvi> (for applications due July 1, 2022).

continued as the final court of appeal for many jurisdictions,⁵⁷ including most ECSC jurisdictions, placing British judges with extraterritorial jurisdiction at the judicial apex of both British territories and several independent states.⁵⁸

In the Middle East, independence also brought legal reform. Advised by regional experts and borrowing heavily from European legal regimes,⁵⁹ the UAE established local courts that followed a mixture of Shari'a law and civil law traditions.⁶⁰ Qatar likewise maintained a dual legal system with Shari'a courts and the secular, civil law Adlia court, with jurisdiction over non-Muslims.⁶¹

B. Foreign Judges and Judicial Globalization

The practice of foreign judges sitting on domestic courts is a “largely under-studied phenomenon,”⁶² but the interaction of national and international judges has been studied extensively. In the mid-2000s, Anne-Marie Slaughter identified a “global community of courts” wherein judges traveled not to sit on other courts, but to meet to discuss common problems.⁶³ Slaughter suggested that unlike the colonial past, when national judiciaries *received* an empire’s law, the “global community of courts” had transitioned to *dialogue* with other countries’ laws,⁶⁴ with the UK and the United States diminishing their roles as the most influential “lender” courts.⁶⁵ Around the same time, however, Yves Dezalay and Bryant Garth’s work on legal globalization described the United States as “the leading exporter of rules” in the “governance of the state and economy.”⁶⁶ The United States led many efforts to promote U.S. legal models and train judges around the world.⁶⁷ More recently, Katharina Pistor has noted that “global capitalism as we know it . . . is built around two domestic legal systems, the laws of England and those of New York State.”⁶⁸

In the last two decades, scholars of transjudicial dialogue have focused on citation practices across courts and whether judicial networks in fact facilitate legal harmonization.⁶⁹ Most of this debate

⁵⁷ Judicial Committee of the Privy Council, *Role of the JCPC*, at <https://www.jcpc.uk/about/role-of-the-jcpc.html>.

⁵⁸ See Paul F. Scott, *The Privy Council and the Constitutional Legacies of Empire*, 71 N. IRELAND LEGAL Q. 261 (2020).

⁵⁹ Al-Muhairi, *supra* note 46, at 128, 134.

⁶⁰ See Bookman, *Adjudication Business*, *supra* note 11, at 243.

⁶¹ Hamzeh, *supra* note 46, at 82.

⁶² Anna Dziedzic, *Foreign Judges: Pacific Practice and Global Insights*, 24 COMMONWEALTH JUD. J. 26 (2019).

⁶³ Slaughter, *supra* note 33, at 193–94. See also, e.g., Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1214 (2007); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429 (2003).

⁶⁴ Slaughter, *supra* note 33, at 197.

⁶⁵ *Id.* at 198–99. Canada and South Africa are both former dominion colonies, self-governing settler colonies within the British Empire. Their influence thus may not represent a significant break with imperial patterns.

⁶⁶ Yves Dezalay & Bryant G. Garth, *Legitimizing the New Legal Orthodoxy*, in GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY 306, 307 (2002).

⁶⁷ 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).

⁶⁸ PISTOR, *supra* note 37, at 132, 143.

⁶⁹ See, e.g., Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT’L L. 999 (2004); Johanna Kalb, *The Judicial Role in New Democracies: A Strategic Account of Comparative Citation*, 38 YALE J. INT’L L. 423, 424 (2013). In the United States, much of this debate concerned whether U.S. courts should cite foreign court opinions. See, e.g., VICKI C. JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* (2010); Martin Gelter & Mathias M. Siems, *Citations to Foreign Courts—Illegitimate and Superfluous, or Unavoidable? Evidence from Europe*, 62 AM. J. COMP. L. 35, 35 (2014).

discusses constitutional or human rights law.⁷⁰ With a few exceptions, debates about citing foreign courts have ignored the presence of foreign judges on domestic courts.⁷¹ The studies connecting conversations about judicial cross-citations and foreign judges have focused on public law.⁷²

The Hong Kong CFA's overseas judges⁷³ have received greater scrutiny. These judges' presence was intended to assure domestic and international constituencies, especially business, that Hong Kong would maintain its status as a leading commercial center after 1997.⁷⁴ Until recently, both the Hong Kong government and the pan-democratic opposition emphasized the presence of these judges as guaranteeing the rule of law and the Hong Kong judiciary's independence.⁷⁵ That consensus appears to be collapsing.⁷⁶

C. *Traveling Adjudicators and International Commercial Dispute Resolution*

International commercial arbitrators also travel extensively and provide a template for traveling judges. This Section discusses the rise of both kinds of traveling adjudicators.

1. *International Commercial Arbitration*

International commercial arbitrators adjudicate enormous numbers of disputes.⁷⁷ They are themselves one of many reasons commercial parties are said to prefer arbitration.⁷⁸ Parties often select arbitrators, from a list provided by an arbitral institution, for their "virtue," subject matter expertise, or experience adjudicating complex disputes.⁷⁹ As private

⁷⁰ See, e.g., David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 WASH. L. REV. 523 (2011); The Hon. Justice Michael Kirby AC CMG, *Transnational Judicial Dialogue, Internationalisation of Law and Australian Judges*, 9 MELB. J. INT'L L. 171 (2008); Paul Schiff Berman, *Judges as Cosmopolitan Transnational Actors*, 12 TULSA J. COMP. & INT'L L. 109 (2004). *But cf.* Paul B. Stephan, *Courts on Courts: Contracting for Engagement and Indifference in International Judicial Encounters*, 100 VA. L. REV. 17 (2014) (arguing that contract theory, rather than efforts to promote the global rule of law, explains transjudicial dialogue in private international law).

⁷¹ See DZIEDZIC, *supra* note 12, at 8.

⁷² See, e.g., Stephen Eliot Smith, *The Way We Do Things Back Home: Do Expatriate Judges Preferentially Cite the Jurisprudence of Their Home Countries?*, 13 OXFORD U. COMMONWEALTH L.J. 331, 332 (2013) (finding Australian and New Zealand judges on Pacific Commonwealth courts more likely to cite their home courts); DZIEDZIC, *supra* note 12, at 13–14 (arguing foreign judges tend to work with familiar legal concepts); Law, *supra* note 14, at 992–94 (noting that the presence of overseas judges from the UK and Australia explains the Hong Kong CFA's systematic reliance on foreign law, especially English and Australian law).

⁷³ See note 2 *supra* (describing the CFA).

⁷⁴ See, e.g., Dixon & Jackson, *supra* note 9, at 334; Law, *supra* note 14.

⁷⁵ DZIEDZIC, *Hong Kong's New National Security Law*, *supra* note 14.

⁷⁶ See, e.g., Eric Lai, *Foreign Judges Are Enabling Hong Kong's Legal Crackdown*, DIPLOMAT (Feb. 11, 2022), at <https://thediplomat.com/2022/02/foreign-judges-are-enabling-hong-kongs-legal-crackdown>.

⁷⁷ 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.faegredrinker.com/en/insights/publications/2022/5/assessing-the-lcias-2021-annual-casework-report> (collecting statistics).

⁷⁸ Commercial parties are said to prefer arbitration for many reasons, including avoiding specific domestic legal systems. See QUEEN MARY UNIVERSITY OF LONDON, 2018 INTERNATIONAL ARBITRATION SURVEY: THE EVOLUTION OF INTERNATIONAL ARBITRATION 2 (2018), available at [http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey—The-Evolution-of-International-Arbitration-\(2\).PDF](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey—The-Evolution-of-International-Arbitration-(2).PDF).

⁷⁹ YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1996); see also Thomas Schultz & Robert Kovacs, *The Rise of a Third Generation of Arbitrators? Fifteen Years After Dezalay and Garth*, 28 ARB. INT'L 161 (2012) (updating the scholarship of Dezalay and Garth). *But see* Catherine A. Rogers, *Gulliver's Troubled Travels, or the Conundrum of Comparative Law*, 67 GEO. WASH. L. REV. 149, 153, 166–68 (1998) (criticizing Dezalay and Garth's methodology).

individuals, arbitrators represent a separation from any state;⁸⁰ 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.

A 2015 study of international arbitrators found that the median arbitrator was a fifty-four-year-old male citizen of a developed state.⁸¹ The field overall was “relatively homogenous,” with 15 to 20 percent of arbitrators from developing countries (depending on how that was defined). The study found 23 percent of arbitrators were U.S. nationals, while 9.6 percent were UK nationals.⁸² The authors argued that greater diversity on several levels would help arbitration establish and maintain legitimacy in the eyes of the international community it serves.⁸³

2. *The Rise of Commercial Courts and International Commercial Courts*

Despite arbitration’s popularity, many cross-border disputes are litigated in domestic courts. Some of those courts, like the Southern District of New York or the Supreme Court of Delaware, have broad jurisdiction over civil and criminal cases. Others, like the London Commercial Court or the New York Commercial Division, specialize in commercial disputes whether domestic or transnational. Starting in the 1990s, jurisdictions around the world began copying the London Commercial Court model of establishing specialized commercial court divisions.⁸⁴ 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.⁸⁵

Many of these new courts have adopted procedures or structures that mimic either the London Commercial Court and/or conventions in international arbitration, in an effort to create courts that

⁸⁰ 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 PAULSSON, *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).

⁸¹ 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, 461–63 (2015) (discussing definition of “developed”).

⁸² *Id.* at 459.

⁸³ *Id.*; see also, e.g., Benjamin G. Davis, *American Diversity in International Arbitration: A New Arbitration Story or Evidence of Things Not Seen*, 88 *FORDHAM L. REV.* 2143, 2154 (2020); A. Claire Cutler, *International Commercial Arbitration, Transnational Governance, and the New Constitutionalism*, in *INTERNATIONAL ARBITRATION AND GLOBAL GOVERNANCE: CONTENDING THEORIES AND EVIDENCE* 140, 142–43 (2014).

⁸⁴ See John F. Coyle, *Business Courts and Interstate Competition*, 53 *WM. & MARY L. REV.* 1915 (2012); Bookman, *Adjudication Business*, *supra* note 11.

⁸⁵ See Bookman, *Adjudication Business*, *supra* 11; 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), at <http://global.chinadaily.com.cn/a/202112/28/WS61cae4310cdd39bc7df30.html>; Yuan Yanchao ed., *Suzhou International Commercial Court Launched*, *CHINA JUSTICE OBSERVER* (May 12, 2021), at <https://www.chinajusticeobserver.com/a/suzhou-international-commercial-court-launched>. More commercial courts continue to appear. See, e.g., USAID Press Release, *Kosovo’s Assembly Passes the Law on Creating a Commercial Court* (Feb. 11, 2022), at <https://www.usaid.gov/kosovo/news-information/news/kosovos-assembly-passes-law-creating-commercial-court>.

provide the “best of both worlds.”⁸⁶ The SEZs’ courts, for example, all operate entirely in English, have procedural codes modeled on London’s, and have either received English common law into the local SEZ’s law or based their statutes on English common law and statutes. The DIFC’s common law is “determined by the Courts of the DIFC from time to time drawing upon the common law of England and Wales and other common law jurisdictions as they see fit.”⁸⁷ In an echo of colonial era laws in places such as Hong Kong, English common law and equity apply in the ADGM “so far as it is applicable to the circumstances” of the ADGM.⁸⁸ The QIC’s and AIFC’s statutes largely reflect English law.⁸⁹ The SICC, a 2015-established division within an English language, common law judicial system, allows parties considerable autonomy to propose procedural rules, subject to court approval, mimicking the flexibility of arbitration.⁹⁰

Complex factors drive these efforts.⁹¹ Some scholars explain the adoption of English law, common law procedure, English language, and other conventions of the London Commercial Court and arbitration as a “race to the top”—a competition between courts and arbitration to provide the best dispute resolution available.⁹² Bookman has explored other motivating factors—including a desire to attract foreign direct investment or become a litigation destination like London.⁹³ King has questioned the premise of the “race to the top,” arguing instead that courts have incentives to offer procedure that sophisticated parties find familiar, but not necessarily “better.”⁹⁴ Familiar procedure can mean common law-style procedure because so many outside counsel are common law-trained lawyers.⁹⁵ The shared history of British influence and common law coordination under the JCPC, which persisted in most of the common law world (outside the United States) until a few decades ago, helped establish shared experience and expectations among common law lawyers, even in the face of local differences.⁹⁶

These studies have focused on the courts’ procedures and institutional structures. This study focuses on the judges.

II. METHODOLOGY

In studying traveling judges on courts that handle international commercial disputes, we faced two definitional challenges: which courts to count as “commercial” and which judges to

⁸⁶ 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 ARBITRATION: INT’L J. ARB., MEDIATION & DISP. MGMT. 2, 22 (2019). But cf. Schultz & Bachmann, *supra* note 15 (critiquing the “best of both worlds” narrative).

⁸⁷ The Dubai International Financial Centre Authority 2020, DIFC CA 002, Advisory Opinion.

⁸⁸ Application of English Law Regulations 2015 (Mar. 3, 2015) (ADGM).

⁸⁹ See, e.g., AIFC Regulation 3 of Dec. 5, 2017 (contracts); QFC Regulation No. 4 of 2005 (“Contracts Regulations”).

⁹⁰ See Singapore International Commercial Court Rules 2021, O 4 r 6(3) (procedural rules); O 13 r 15 (rules of evidence); O 28 r 3(2) (special rules for the Technology, Infrastructure and Construction List); Bookman, *Arbitral Courts*, *supra* note 14.

⁹¹ See Bookman, *Adjudication Business*, *supra* note 11; Alyssa S. King, *Global Civil Procedure*, 62 HARV. INT’L L.J. 223 (2021).

⁹² See Bookman, *Adjudication Business*, *supra* note 11, at 262–64.

⁹³ See *id.*

⁹⁴ King, *supra* note 91, at 257.

⁹⁵ *Id.* at 231–32.

⁹⁶ Cf. *id.* at 235 (suggesting foreign judges could be important actors in spreading global civil procedure norms); Bookman, *Arbitral Courts*, *supra* note 14, at 212–14 (discussing foreign judges on arbitration-court hybrids).

include as “traveling.” This Part explains how we selected which courts to include in our study, how we defined “traveling judges,” how we chose which judges to include in the study, and how we collected the data.

A. *Selecting the Courts*

This Section describes how we defined the universe of courts to include in this study. Our list is likely both under- and over-inclusive of courts that have aspirations in international commercial law, but it can be a starting point for future research.⁹⁷

Many courts that are not titled “international commercial courts” or that have broad subject-matter jurisdiction nevertheless have significant international commercial caseloads, like the Southern District of New York. Some courts that specialize in *commercial* disputes, like the London Commercial Court and the New York Commercial Division, hear substantial numbers of cross-border (as well as domestic) disputes—and will hear disputes without any ties to the jurisdiction if the parties choose the court in their forum-selection clause.⁹⁸ Courts that are called “international commercial courts,” like the Singapore International Commercial Court, may allow domestic parties to self-designate their dispute as international.⁹⁹ Other courts that might be called “international commercial courts,” like the DIFC courts, have jurisdiction over disputes that are local to the SEZ and similar zones, in addition to allowing parties to opt in to jurisdiction.¹⁰⁰

To capture the universe of courts that have or aspire to have substantial cross-border commercial dockets, we examined courts that self-identified as such by joining the recently created SIFOCC.¹⁰¹ In 2016, Lord Thomas, the former lord chief justice of England and Wales and a former judge on London’s Commercial Court,¹⁰² invited his counterparts around the world to create the SIFOCC.¹⁰³

SIFOCC membership is open to institutions from any jurisdiction “with an identifiable commercial court or with courts handling commercial disputes.”¹⁰⁴ Member courts all self-identify as courts that “hear and resolve domestic and/or international disputes over business and commerce.”¹⁰⁵ Membership thus provides a serviceable way to distinguish which courts consider

⁹⁷ Any mistakes are ours, but we are confident they do not detract from the purpose of identifying this phenomenon, situating it in the present moment, and building a foundation for future research.

⁹⁸ See Anselmo Reyes & Kevin Tan, *Recognition and Enforcement of International Commercial Court Judgments*, in *DISPUTE RESOLUTION IN CHINA, EUROPE AND WORLD* (Lei Chen & André Janssen eds., 2020).

⁹⁹ Singapore International Commercial Court Rules of Court (2021 rev. ed.), O 2 r 1(3)(a)(iii) (a claim is international in nature for the purposes of the SICC if the parties have expressly agreed that it relates to more than one state).

¹⁰⁰ See, e.g., Wilske, *supra* note 86; Dalma Demeter & Kayleigh Smith, *The Implications of International Commercial Courts on Arbitration*, 33 J. INT’L ARB. 441 (2016).

¹⁰¹ SIFOCC lists three purposes of the organization: (1) to benefit court users, i.e., business and markets, by having courts share best practices; (2) to have courts work together to contribute to the rule of law, stability and prosperity; and (3) to support developing countries “to enhance their attractiveness to investors by offering effective means for resolving commercial disputes.” SIFOCC, *supra* note 19.

¹⁰² The London Commercial Court, founded in 1895, is largely touted as the model for today’s commercial courts. Lord Thomas is currently the president of the QIC. QICDRC, *The Courts*, at <https://www.qicdrc.gov.qa/courts/court>.

¹⁰³ SIFOCC, *supra* note 19.

¹⁰⁴ “The judiciary of the country becomes the member, rather than any individual judge.” *Id.*

¹⁰⁵ SIFOCC, *About Commercial*, <https://sifocc.org/about-us/>.

themselves commercial and engage with foreign counterparts. The recent spate of specialized international commercial courts are all SIFOCC members.¹⁰⁶ Members also include domestic courts or divisions with large percentages of cross-border commercial cases, like the London Commercial Division, the Cayman Islands Financial Services Division (FSD), and the Supreme Court of Delaware.¹⁰⁷ Most are first instance courts, although some are appellate courts or high courts, which include both trial and appellate divisions.¹⁰⁸ Most SIFOCC member courts are common law courts, even if they are not located in common law host states.¹⁰⁹

SIFOCC membership is an imperfect measure of which courts are oriented toward commercial and cross-border disputes, but it provides a limiting principle and showcases the phenomenon. Whether a court has joined may be due to budget constraints or even happenstance.¹¹⁰ SIFOCC's founders were from common law jurisdictions and had worked in the UK and British overseas territories, which may account for the particularly strong common law presence.¹¹¹ But focusing on SIFOCC members does seem to capture the universe of courts that proactively self-identify as cross-border dispute resolution fora. This approach is in some respects over-inclusive because it brings in the Supreme Court of The Gambia, which is better understood as a domestic apex court with some foreign judges than as a court focused on serving transnational commercial litigants,¹¹² and the non-commercial divisions of the ECSC, which likewise focus on domestic disputes. Thus, although we include them in the initial count for completeness,¹¹³ we will largely exclude the Supreme Court of The Gambia and the ECSC's non-commercial divisions from the discussion in Parts III and IV.

Relying on SIFOCC leaves out certain courts.¹¹⁴ For example, the SIFOCC screen excludes the Cayman Islands Court of Appeal and the Bermuda Supreme Court, both of which hear

¹⁰⁶ See, e.g., Bookman, *Adjudication Business*, *supra* note 11, at 230 n. 13 (collecting sources). Examples of international commercial courts include the Paris International Commercial Chamber, the SICC, the Chinese International Commercial Courts, the DIFC courts, and the AIFC courts.

¹⁰⁷ SIFOCC members include four U.S. courts (the SDNY, New York State Supreme Court Commercial Division, Supreme Court of Delaware, and Pennsylvania Court of Common Pleas), the Business and Property Courts of England & Wales (including the London Commercial Court), and the Supreme Courts of the Philippines, Rwanda, Sierra Leone, Singapore, Sri Lanka, and Uganda. SIFOCC also includes high courts in countries from South Korea to Nigeria.

¹⁰⁸ Under a high court system, the high court (which may also be called a supreme or superior court) consists of a court of first instance and a court of appeal.

¹⁰⁹ Of the forty-four members, ten courts (in Brazil, China, Bahrain, France (two), Germany, Japan, the Netherlands, South Korea, and the UAE (Abu Dhabi Judicial Department)) can be described as civil law courts. Two are in mixed jurisdictions (the Philippines and Scotland). SIFOCC, *Members* (2022), at <https://sifocc.org/countries>.

¹¹⁰ Membership generally includes sponsoring a delegation to attend the international meetings. Interview with J17 (Dec. 21, 2021).

¹¹¹ See, e.g., Interviews with J4 (Aug. 11, 2021); J19 (Dec 20, 2021).

¹¹² See, e.g., Dixon & Jackson, *supra* note 9; Natalie Baird, *Judges as Cultural Outsiders: Exploring the Expatriate Model of Judging in the Pacific*, 19 CANTERBURY L. REV. 80 (2013); Judiciary of The Gambia, *Towards Effective and Equal Justice for All: Strategic Plan 2021–2025*, at 7, available at <https://judiciary.gov.gm/sites/default/files/2021-08/JSP%20Full%20Report.pdf>.

¹¹³ See Fig. 1 *infra*.

¹¹⁴ For example, SEZs in Honduras arguably had traveling judges largely from the United States. See, e.g., Beth Gaglia & Andrea Nuila, *A Private Government in Honduras Moves Forward*, NACLA (Feb. 15, 2021), at <https://nacla.org/news/2021/02/12/private-government-honduras-zede-prospera> (discussing plans for an SEZ dubbed “Honduran Hong Kong”); Prospera Arbitration Center, *Our Roster of Arbiters*, at <https://pac.hn> (envisioning default arbitration with former Arizona state judges as arbitrators). The Honduran Congress rejected this legal

appeals from SIFOCC member courts and which supervise international corporate tax havens; it likewise excludes courts in Gibraltar, Jersey, Guernsey, and the Isle of Man. We did not include these courts because they had not joined SIFOCC. It appears that their inclusion would not have substantially altered our overall results or analysis. To the extent these courts have traveling judges, most appear to reflect the demographics documented here. One might also have included the JCPC, which exercises extraterritorial jurisdiction, but that is a *sui generis* institution, and its judges do not travel to hear cases.¹¹⁵ In short, even if relying on SIFOCC is somewhat over- and under-inclusive, it remains a useful screen for identifying courts focused on cross-border commercial disputes.¹¹⁶

Traditional studies of foreign judges often include the Hong Kong CFA and the ECSC, but usually not the other courts we have identified—perhaps because some are still new, relatively small, and sometimes subnational. Foreign judges are also found on apex courts of very small states, such as the Pacific Island states, Andorra, Monaco, or Lichtenstein.¹¹⁷ While these states may hear some cross-border commercial disputes, we do not consider them because they are not centers for such disputes, as Hong Kong is, and their foreign judges are typically intended to fill benches where there are insufficient numbers of citizen judges, not to serve the needs of transnational litigants.¹¹⁸

B. *Classifying the Judges*

Focusing on these commercial courts, we then examined their benches to determine which include traveling judges. We define “traveling judges” as those judges 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. Courts that invite traveling judges do not require their judges to reside in the host jurisdiction before they accept the post. Traveling judges may have had some contact with the host court jurisdiction in their work as attorneys, but our definition excludes anyone who held government office, or for whom court or law firm bios or, failing that, news articles, indicate that they practiced as local lawyers. The barrister who “flies-in” regularly from London counts as traveling if appointed to the bench, but the UK born and English-trained head of the tax practice at a local firm would not.

structure in 2022. Gustavo Palencia, *Honduran Congress Unanimously Nixes Special Economic Zones*, REUTERS (Apr. 21, 2022), at <https://www.reuters.com/world/americas/honduran-congress-unanimously-nixes-special-economic-zones-2022-04-21>.

¹¹⁵ See De, *supra* note 45 (exploring the history of failed twentieth-century proposals to have the JCPC travel throughout the Empire).

¹¹⁶ Other SIFOCC member courts, such as the Commercial Court of Bermuda and Commercial Court of Bahrain can hire traveling judges. See Supreme Court Act of 1905, 2018 last updated, § 5 (Berm.) (judges on Bermuda Supreme Court must be qualified to practice as an advocate in a Bermuda court or in the UK or some “other part of Her Majesty’s dominions”). In Bermuda, no traveling judges currently sit on the commercial court. E-mail from Avita O’Connor, Registrar, to Alyssa King (Nov. 18, 2021) (on file with authors). In 2022, the Bahrain Center for Dispute Resolution Court appointed several traveling judges (after the June 2021 date of our research). *Appointment Of Judges Dedicated to Hearing BCDR Section One Cases in English*, BAHRAIN CHAMBER FOR DISPUTE RESOLUTION, BCDR, at <https://bcdr.org/appointment-of-judges-dedicated-to-hearing-bcdr-section-one-cases-in-english>. We were unable to find sufficient information about the composition of the Abu Dhabi Judicial Department as of June 2021. We did not include regulatory tribunals, such as the QFC Regulatory Tribunal, whose jurisdiction relates to administrative law rather than private commercial disputes. See QICDRC, *The Regulatory Tribunal*, at <https://www.qicdrc.gov.qa/courts/regulatory-tribunal>.

¹¹⁷ Most of these states have fewer than 100,000 people.

¹¹⁸ See DZIEDZIC, *supra* note 12, at 6 (offering this explanation); Dixon & Jackson, *supra* note 9 (similar).

Unlike most studies of “foreign” judges, we defined “traveling judges” by jurisdiction rather than purely by nationality.¹¹⁹ This approach accounts for states with multiple jurisdictions. Thus, we may distinguish English barristers from Scottish advocates, Delaware judges from Nebraska ones, or Ontario lawyers from Quebec ones. We focus on the location of the judge’s primary legal career, or her “home jurisdiction,” rather than nationality, which can raise complicated citizenship questions. Most traveling judges had prior legal careers concentrated in one home jurisdiction.¹²⁰ For judges who worked in multiple jurisdictions, we focused on the jurisdiction in which they worked prior to appointment as a traveling judge, where they worked the longest, and where they held government office.¹²¹ If a judge at home in one jurisdiction traveled to sit on another jurisdiction’s court and returned, we did not consider her to be a traveling judge when sitting on her home court.¹²²

C. Identifying Commercial Courts with Traveling Judges

By examining the judiciaries of SIFOCC member courts, we identified traveling judges on nine SIFOCC-member domestic courts or court systems in the Caribbean, the Middle East, Africa, Asia, and Central Asia, that is, on 20 percent of SIFOCC member institutions.¹²³ These traveling judges appear on some of the most innovative new international commercial courts¹²⁴ as well as some of the busiest jurisdictions in the Caribbean.¹²⁵

Those courts are:

¹¹⁹ Nationality also tells a less than complete story in the case of British Overseas Territories and the Hong Kong SAR, where residence status can be distinct from citizenship. For example, Caymanian judges and judges who were born, educated, and had an initial legal career in London, may both be British nationals. See Immigration: Cayman Islands, *Right to Be Caymanian*, at <http://www.immigration.gov.ky/portal/page/portal/immhome/livinghere/righttobecaymanian>; Nick Joseph, *Confusion Between BOT Citizenship and Being Caymanian*, HSM LAW (Feb. 2019), at <https://hsmoffice.com/law/confusion-between-bot-citizenship-and-being-caymanian-4476>. But they will not both have the right to live and work permanently in England or the Caymans respectively. *Id.* We therefore consider judges on the Cayman Islands Grand Court to be “traveling” if their home jurisdiction is outside the Cayman Islands and they did not have Caymanian Belonger status at the time of appointment. Likewise, citizenship is not the relevant factor in Hong Kong, where permanent resident judges may be dual nationals, nationals of another country, or may hold British National Overseas status if they were born in Hong Kong before 1997. Thus, “local” judges may lack Chinese citizenship. Dziedzic, *Hong Kong*, *supra* note 14, at 5.

¹²⁰ For the ECSC, we “lumped” ECSC jurisdictions together to determine who was local. We considered ECSC judges to be local if they lived or worked in an ECSC member jurisdiction. The same was true for current appointment and nationality.

¹²¹ This definition can yield more than one “home jurisdiction.” To identify traveling judges, we excluded a judge if she had ever been “at home” in the host court jurisdiction. For example, we excluded native Gambian judges if they had careers abroad and then returned home to The Gambia to serve on the Supreme Court. If a judge had multiple potential home jurisdictions, we considered the judge to be “traveling” if no home jurisdiction was the same as the host court. For purposes of other data, we report the most recent home jurisdiction prior to appointment on the host court.

¹²² For example, in the Caribbean, where judges may sit on different courts in the region, we did not consider a judge to be traveling when she returned to the courts of her place of citizenship, even if she had served as a judge in another jurisdiction prior to taking on that position.

¹²³ This list may not be complete; some of these courts have little public information available about their judges. As of June 2021, SIFOCC had forty-four members.

¹²⁴ See note 11 *supra* (listing recent scholarship on these courts).

¹²⁵ In the BVI and the Caymans, for example, “specialist adjudication is a significant part of the infrastructure.” Sir William Blair, *The New Litigation Landscape: International Commercial Courts and Procedural Innovations*, 2 INT’L J. PROC. L. 212, 216 (2019).

TABLE 1:
SIFOCC MEMBER COURTS WITH TRAVELING JUDGES—JUNE 2021

	Type of Court & Subject-Matter Jurisdiction (SMJ)*	Year Established	# of Traveling Judges	# of Local Judges
Eastern Caribbean Supreme Court (ECSC) (court for the Organization of Eastern Caribbean States, including 6 independent states and 3 British Overseas Territories)	High court (major trials and appeals) SMJ (ECSC): Broad SMJ (Commercial divisions): Commercial	1967 Commercial (trial) court in BVI: 2009 St. Lucia: 2016	ECSC: 8 BVI: 1 St. Lucia: 0	ECSC: 28 BVI: 1 St. Lucia: 1
Hong Kong Court of Final Appeal (CFA)[†]	Apex appellate court SMJ: Broad	1997	13	7
Supreme Court of The Gambia	Apex appellate court SMJ: Broad	New constitution: 1997	2	7
Dubai International Financial Centre (DIFC) Courts (courts for the DIFC, a special economic zone (SEZ) in Dubai, UAE)	Court of First Instance and Appellate Court SMJ: Civil and commercial disputes	2004	8	5
Qatar International Court (QIC) (courts for the Qatar Financial Centre, an SEZ in Qatar)	Court of First Instance and Appellate Court SMJ: Civil and commercial disputes	2006	11	2
Grand Court of the Cayman Islands (Financial Services Division (FSD))	Trial court division SMJ: Certain financial and commercial disputes	FSD: 2009	4	3
Singapore International Commercial Court (SICC)	Division of the General Division of the High Court (International Judges may also sit on the Court of Appeal) SMJ: International commercial disputes	2015	16	26
Abu Dhabi Global Market (ADGM) Courts (courts for the ADGM and other SEZs in Abu Dhabi, UAE)	Court of First Instance and Appellate Court SMJ: Civil and commercial disputes	2015	8	0
Astana International Financial Centre (AIFC) Courts (courts for the AIFC, an SEZ in Kazakhstan)	Court of First Instance and Appellate Court SMJ: Civil and commercial disputes	2019	9	0

*These rough subject-matter jurisdiction categories are intended to distinguish between courts focused on civil and commercial disputes and those with general jurisdiction, for example, encompassing civil and criminal matters. These designations do not precisely describe the scope of these courts' jurisdiction. In addition, courts in SEZs may have separate administrative chambers.

[†]The Hong Kong SAR judiciary as a whole is a SIFOCC member, but to our knowledge the lower courts did not have traveling judges in June 2021.

D. Judge Census

We first collected publicly available biographical and demographic information on all judges for each of the SIFOCC members that employed traveling judges in June 2021.¹²⁶ We identified over 120 current and former traveling judges on the relevant courts, of which seventy-two were listed as active judges on June 1, 2021. If available, we recorded the judge's nationality, home jurisdiction, previous employment, race, gender, and whether they worked as an arbitrator, as well as dates of retirement and hiring.¹²⁷ Historical information was much more readily available for some jurisdictions than for others.¹²⁸ As a result, we focused on a snapshot of the courts in June 2021. The study aimed to identify who traveling judges are across a variety of metrics to aid the analysis in this Article and future studies.

E. Interviewing Judges and Court Personnel

To give greater context to the data and to understand the practical working of these courts, we also interviewed current and former judges on these courts and current and former court staff. Our aim was to speak with at least one, and ideally two or more, local judges, traveling judges, or staff from each court in the study. Most of our interviewees were traveling judges. As lawyers often rely on personal connections, we used snowball sampling and began by talking to existing contacts.¹²⁹ The interviews were thus not representative, but were helpful in interpreting publicly available sources. Moreover, the interviews allowed us to understand elements of court practice that are not easily available to the public, such as judicial pay structure and case assignment. We asked participants how they came to serve on these courts, why they agreed to serve, how cases were assigned, how much time they spend as a traveling judge on each court on which they serve, and what their responsibilities are.

We spoke to twenty-eight judges and court personnel or others familiar with the working of these courts. We offered participants the opportunity to be anonymized or speak under Chatham House rules. We are unable to report totals for each court due to confidentiality concerns, but we can report that final interview numbers provided lopsided representation, favoring some courts more than others.

¹²⁶ As Anna Dziedzic has remarked, “the field of comparative law often assumes information is all available online and as such easily accessible,” but data collection on these courts is far from simple. Anna Dziedzic, *Women Judges, Local Judges, Foreign Judges: Methods of Collecting and Analysing Data on Gender and Pacific Judiciaries*, IACL-AIDC BLOG (Nov. 9, 2021), at <https://blog-iacl-aidc.org/women-judiciary/2021/11/9/women-judges-local-judges-foreign-judges-methods-of-collecting-and-analysing-data-on-gender-and-pacific-judiciaries> (remarking on collecting data on courts in Pacific Island states). The courts in our study vary tremendously in the availability of information about their structure and judges' identities.

¹²⁷ All data was double-coded.

¹²⁸ For instance, the Hong Kong CFA and DIFC list current and former judges on their websites. Other courts do not. Some future information was available.

¹²⁹ To conduct snowball sampling, researchers start with an initial list of interview subjects and then ask those subjects to recommend others who also know about the research subject. We began with initial contacts in several jurisdictions of interest. At the end of every interview, we asked the subjects to recommend colleagues who might speak with us. Frequently, participants were willing to make introductions by e-mail. The resulting sample of participants is neither randomized nor representative. However, this sort of sampling is appropriate when researchers want to understand a phenomenon involving a discrete social group. See Patrick Biernacki & Dan Waldorf, *Snowball Sampling: Problems and Techniques of Chain Referral Sampling*, 10 SOCIO. METHODS & RES. 141 (1981).

III. INTRODUCING TRAVELING JUDGES

This Part lays out who traveling judges were as of June 1, 2021. It also reports on how they are hired, fired, and paid, and what they do—both as judges and when they are not judging. Traveling judges on commercial courts are an overwhelmingly common law phenomenon. Almost all the traveling judges in this study spent their careers in a common law jurisdiction; all but one traveling judge holds at least one law degree from a common law country. A majority practiced in England and Wales and an even larger number studied law in the UK. Judges from outside the UK tend to travel within their own regions—but their numbers are typically too low to draw firm conclusions about their patterns of circulation. English judges, however, are everywhere. The result of this heavy focus on hiring English judges is that the demographics of traveling judges resemble the English judiciary in race and gender. There are, however, some significant differences if one focuses on individual courts or specific regions.

We include traveling judges throughout the ECSC as well as those on the Supreme Court of The Gambia in our initial count (Figure 1) based on their SIFOCC membership. But these courts do not fit the profile of international-business-focused courts. We also have the least amount of information about the judges on these two courts, apart from the BVI Commercial Division. In most of our discussion, we exclude the Supreme Court of The Gambia and the ECSC, except for the BVI Commercial Division, the ECSC division with the most international commercial cases.

These judges tend to be invited by well-respected acquaintances or colleagues; they usually serve for renewable terms of a few years; and they serve on good behavior, often removable by the authority that hired them. With some exceptions, their appointments are part-time. They are often also arbitrators or serve in other positions.

A. *Who Travels*

This Section reports our data on who traveling judges are as of June 1, 2021, in terms of their home jurisdiction, education, prior careers, race, and gender. We also note reasonable inferences about the judges' average age.

1. *Home Jurisdiction, Education, and Judicial Experience*

Home jurisdiction. Far and away the most common home jurisdiction was England and Wales (50 percent), followed distantly by Scotland (7 percent). Australian jurisdictions came in next with New South Wales (7 percent), Western Australia (3 percent), and Victoria (1 percent). A majority of judges (60 percent) were UK nationals. A supermajority (75 percent) was from the UK or a former dominion colony (Australia, Canada, New Zealand, or South Africa). Figure 1 below shows the home jurisdiction of all the traveling judges on commercial courts as of June 1, 2021. A chart listing all home jurisdictions appears as Appendix 1 at the end of this Article.

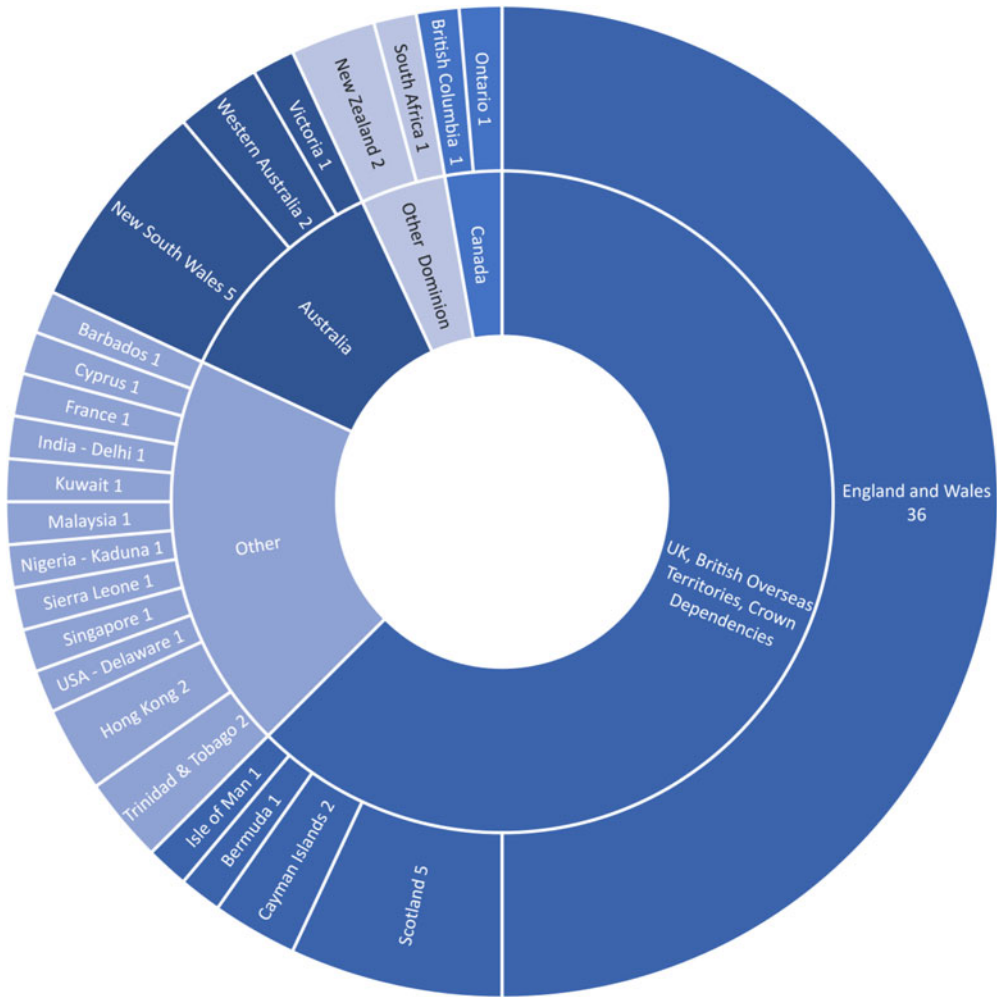


FIGURE 1. Traveling Judges by Home Jurisdiction—June 2021

Figure 1 shows that traveling judges are a primarily common law phenomenon. The only home jurisdiction listed with a purely civil law tradition is France, the home jurisdiction of Dominique Hascher of the SICC.¹³⁰ Six traveling judges are from countries with a mixed legal tradition.¹³¹ Still, the prevalence of common law judges is clear. In Hong Kong, the Caribbean jurisdictions, and The Gambia, only judges from common law or

¹³⁰ The SICC originally also had a judge from Japan and one from Austria.

¹³¹ Judges from mixed systems included those from Cyprus, Kuwait, South Africa, Malaysia, Scotland, and Canada. Cyprus and South Africa combine common law with French and Dutch influence. The Kuwaiti legal system also mixes common law, French civil law, and Islamic law. Malaysia, like several Middle Eastern jurisdictions, maintains a dual-track legal system with both common law and sharia courts. Being from a country with mixed legal traditions, however, does not guarantee much contact with different legal systems in practice. In Canada, for example, the substantive law of the Canadian province of Quebec is civil law, but the two Canadian judges on our list are from the common law provinces of Ontario and British Columbia. Canadian Supreme Court justices have some exposure to Quebec law, but a common law justice would hardly be considered a civil law jurist. The Canadian Supreme Court maintains Quebec seats for this purpose.

Commonwealth countries may serve.¹³² Figure 1 also suggests a break with colonial patterns in judicial hiring. Roughly twenty-five percent of traveling judges are from home jurisdictions that are not part of the UK or its former Dominion colonies.

Breaking out the individual SIFOCC member institutions demonstrates a difference between the ECSC, the Supreme Court of The Gambia, and the rest of the courts. The ECSC and the Supreme Court of The Gambia have the lowest percentages of UK traveling judges and the most regionally representative benches of traveling judges (to the best of our knowledge, both traveling judges in The Gambia were from West Africa). They are also less internationally oriented than the remaining courts, which are designed specifically for cross-border cases or which are in jurisdictions oriented around providing international legal services.

In a sense, all judges on the ECSC are traveling judges—trial judges do not sit in the same jurisdiction in which they practiced and the appellate court travels to member jurisdictions.¹³³ It is not unusual for lawyers to circulate within the Eastern Caribbean. Therefore, we counted as “traveling” only those ECSC judges who came from outside the Eastern Caribbean.

The ECSC has two commercial divisions, the BVI Commercial Division and the St. Lucia Commercial Division. In June 2021, the St. Lucia Commercial Division judge was from an ECSC member jurisdiction (i.e., that division had no traveling judges) and historically that division had a less international caseload.¹³⁴ Since it was established in 2009, the BVI Commercial Division has been staffed primarily by traveling judges who have resided in the BVI during their terms, some of which were scheduled for only a few months. These traveling judges often had prior practice experience in the region—BVI lawyers often hire London barristers for significant cases in the BVI—but dividing judges as we did still allowed us to distinguish those whose careers were focused within the Eastern Caribbean. As of June 2021, the BVI court had two judges: one English judge and one judge who began his career in England, but subsequently moved to Anguilla, an ECSC jurisdiction. The BVI Commercial Division fits the profile of an internationally oriented commercial court, but the rest of the ECSC does not. We therefore focus on the BVI Commercial Division in the rest of our discussion.

Based on the information we were able to obtain, the Supreme Court of The Gambia recently had two traveling judges, both from other common law jurisdictions in the region: Nigeria and Sierra Leone. We were not able to verify that both held office in June 2021. Moreover, the Supreme Court of The Gambia seems to be internally focused in its work and court officials have been prioritizing hiring Gambian judges at all levels. The Gambian Supreme Court offers valuable insights on the politics and ethics of traveling judicial service, but it is less relevant to a discussion of efforts to appeal to foreign commercial parties in 2021.

¹³² See Hong Kong Court of Final Appeal Ordinance, 1997 (Cap. 484), § 12(4), at <https://www.elegislation.gov.hk/hk/cap484> (H.K.) (common law); West Indies Associated States Supreme Court Order 1967, Art. 18(1) (UK) (ECSC) (Commonwealth); Grand Court Law, 2015 Revisions, Art. 6(2), at <http://gazettes.gov.ky/portal/pls/portal/docs/1/12022120.PDF> (Cayman Is.) (Commonwealth). These jurisdictions all contemplate traveling judges on non-commercial courts.

¹³³ This rule is in place because many Eastern Caribbean jurisdictions have very small bars; a judge who spent most of their time in practice at the local bar is considered to have too many potential conflicts of interest. Interview with J4 (Aug. 11, 2021).

¹³⁴ Interview with J17 (Dec. 21, 2021) (describing differences in caseload within the ECSC).

If one focuses only on the courts in our study most oriented to international commerce,¹³⁵ the traveling judges look more like their colonial antecedents. Eighty-three percent are from the UK and long-term Dominions (Australia, Canada, New Zealand, and South Africa). The AIFC courts in Kazakhstan have 100 percent English judges. The rest of our discussion will focus primarily on the judges in [Figure 2](#).



FIGURE 2. Traveling Judges by Home Jurisdiction Excluding Non-Commercial ECSC and The Gambia—June 2021

Education. English law influence is even more apparent when one looks at the traveling judges’ education. Of the judges included in [Figure 2](#), forty-six (73 percent) studied law in the United Kingdom. Most judges received their first degrees in the country in which they then spent their

¹³⁵ These courts include the BVI Commercial Division, the Cayman Islands FSD, the Hong Kong CFA, the SICC, and the courts in the DIFC, QFC, ADGM, and AIFC. This list excludes the Supreme Court of The Gambia and the ECSC as a whole.

careers (their home jurisdiction).¹³⁶ Judges who did not do so mostly studied in the UK (four judges overall).¹³⁷ About a quarter of traveling judges (seventeen) held a graduate degree in law, all of which were from common law countries—predominantly the United Kingdom and United States.¹³⁸

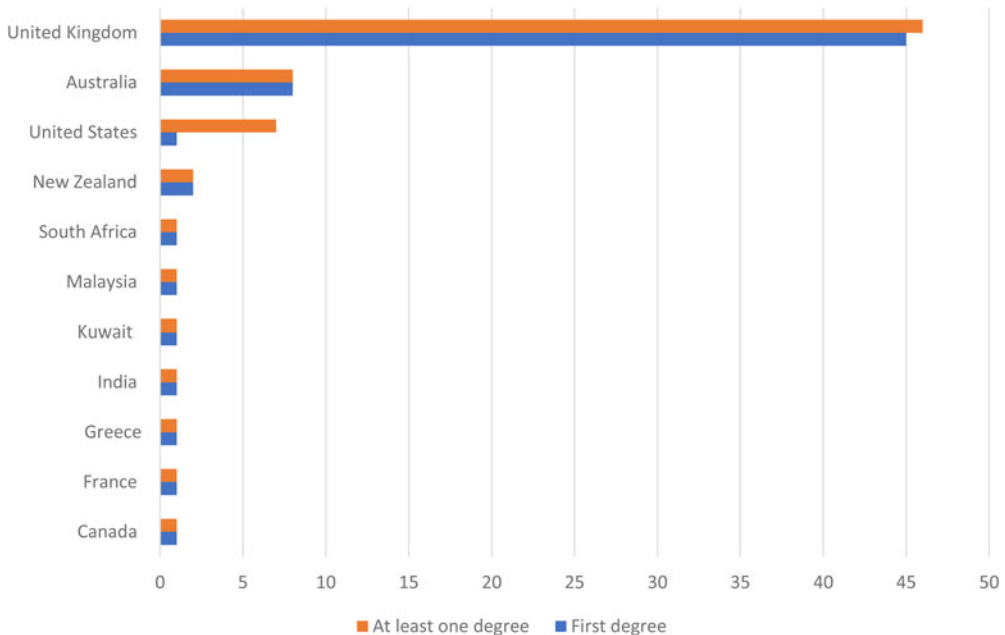


FIGURE 3. Country of Legal Education of Traveling Judges Excluding Non-Commercial ECSC and The Gambia—June 2021

Prior judicial experience. Most traveling judges have retired from serving as judges in their home jurisdictions. Fifty-four (86 percent) held initial judicial appointments in their home jurisdictions.¹³⁹ Twenty-nine sat on apex courts (46 percent).¹⁴⁰ Of those who had never sat on an apex court, four had experience as a judge on a commercial court, such as the London Commercial Court, or on a business law related court division, such as being the judge in charge of a construction list. Eighteen traveling judges (29 percent) had experience as a traveling judge on more than one court, whether concurrently with their 2021 position or prior to being hired by the 2021 court.

¹³⁶ All English judges got their first law degrees in the UK. The eight Australian judges received their first law degrees in Australia, the two Canadians in Canada, and the two New Zealanders in New Zealand.

¹³⁷ They are from Hong Kong (two), Bermuda (one), and Singapore (one). Although Jersey and Guernsey are separate jurisdictions and do not form part of the United Kingdom, we did not count judges from these jurisdictions as having gone to a different country for legal education.

¹³⁸ See Appendix, Table 4.

¹³⁹ Traveling judges *without* home judicial experience were from: England and Wales (seven); Kuwait (one); and New South Wales (one).

¹⁴⁰ We define apex court as the highest court of a given jurisdiction, but it may not be the highest court for all issues. In federal court systems, we counted as “highest court” the court that would have final say over the law. In the United States, the highest court of each state has final say over matters of state law. Thus, U.S. state supreme courts and the U.S. Supreme Court would both be apex courts. In Australia the apex court is the High Court of Australia, which is the ultimate court of appeal for federal, state, and territory courts.

2. Race and Gender (and Age)

Most traveling judges, both in 2021 and historically, have been white and male, reflecting the demographics of the English judiciary.¹⁴¹ As traveling judges tend to be at the end of their careers, relatively recent demographic changes in the UK bar would take time to appear in our data.

Significant differences exist in the demographics of courts in different regions. In part these differences reflect different ratios of traveling to local judges and in part they reflect regional variations in the demographics of traveling judges. They may also reflect conscious choices to localize, or regionalize, the judiciary.¹⁴²

Race. Across all the courts, as of June 2021, fifty-seven of the traveling judges we identified were white; seven were Black. The numbers then become quite small—four judges were South Asian, two were Arab, and two were East Asian. Based on the [Figure 2](#) data (i.e., excluding the non-commercial ECSC and the Supreme Court of The Gambia), there were fifty-five white judges and only one Black judge. Three were South Asian, two were Arab, and two were East Asian.

Gender. We determined gender identity based on the names and pronouns used in judges' biographies. Of all judges sitting in June 2021, sixty-one judges identified as men; eleven as women.¹⁴³ In our smaller [Figure 2](#) set, fifty-five identified as men and eight as women. With the exception of the BVI Commercial Division, every court or division had at least one woman judge, although not necessarily one woman traveling judge.¹⁴⁴

Age. We were not able to collect comprehensive information on traveling judges' ages, but inferences can be drawn from the fact that that three-quarters of traveling judges in this study are retired judges in their home jurisdictions. Prior to June 2021, the UK's retirement age was seventy.

3. Regional and Court Differences

Traveling vs. local judges. Ratios of traveling to local judges varied substantially among courts (Appendix, [Table 3](#)). The Hong Kong CFA had three permanent local judges and four non-permanent local judges, but thirteen traveling judges. The Cayman Islands Grand Court FSD had three local judges out of a bench of seven.¹⁴⁵ The oil state SEZs—in Dubai, Abu Dhabi, Qatar, and Kazakhstan—also had high proportions of traveling judges. The AIFC was the most extreme case. All nine AIFC judges were traveling judges, and all were

¹⁴¹ In 2021, 34% of court judges in the UK were women, and 9% identified as Black, Asian, and minority ethnic (BAME). Ministry of Justice, *Diversity of the Judiciary: Legal Professions, New Appointments and Current Post-Holders—2021 Statistics* (July 15, 2021), at <https://www.gov.uk/government/statistics/diversity-of-the-judiciary-2021-statistics/diversity-of-the-judiciary-2021-statistics-report>.

¹⁴² See, e.g., Interview with J17 (Dec. 21, 2021) (importance of local representation); Interview with J5 (April 7, 2021) (citing legacy of slavery in the Caribbean).

¹⁴³ None identified as non-binary or agender.

¹⁴⁴ The ECSC overall has a larger percentage of women than other courts on our list, but the two judges on the BVI Commercial Division were men.

¹⁴⁵ Of the four traveling judges, two resided in the Caymans in June 2021, although their home jurisdictions at the time of appointment were elsewhere.

white UK citizens who spent their prior legal careers in practice or in the judiciary of England and Wales.¹⁴⁶ The ADGM court likewise had no local judges. Five judges were from the United Kingdom, one was a Hong Kong permanent resident (although not a Chinese national), one was a New Zealander, and one was Australian. On the QIC, only two judges were Qatari. The DIFC, however, had several local judges and had been involved in developing local judicial talent—identifying candidates and helping them to study in the UK as well as training them internally.

The ECSC (if one includes the entire court) and SICC looked very different, with a larger complement of local judges, different racial demographics, and greater gender balance. These courts did not rely on English judges as much. Twenty-eight of the thirty-six judges on the ECSC in June 2021 were from Eastern Caribbean jurisdictions. The eight traveling judges' primary careers were in a variety of locations—with the majority coming from other (non-ECSC) countries in the Caribbean. Since its inception, the BVI Commercial Division has had only one or two judges at a time. The two judges serving full terms in 2021 were both white men, with home jurisdictions of England and Wales and Anguilla.

In June 2021, the SICC had the largest roster of the courts in this study, with forty-two active judges. The judges included thirty-three men and nine women. Twenty-six (62 percent) were Singaporean and sixteen (38 percent) were “international.” A majority of the court's judges were East Asian (55 percent). Of the international judges, one was East Asian and one was South Asian; the rest were white.

B. How Traveling Judges Are Hired, Removed, and Paid

Publicly available information reveals varying appointment structures. For example, permanent and non-permanent judges on the Hong Kong CFA are appointed by the chief executive on the recommendation of an independent commission (Judicial Committee) composed of local judges, persons from the legal profession, and eminent persons from other sectors.¹⁴⁷ Some news outlets report that appointments now require support from the Central Government in Beijing.¹⁴⁸ On the ECSC, the Crown appoints judges via the Judicial and Legal Services Commission.¹⁴⁹ In Singapore, judges are appointed by the president if she concurs with the advice of the prime minister, who in turn must consult with the chief justice.¹⁵⁰ In Dubai, DIFC judges are appointed by the ruler's decree.¹⁵¹

With the exception of the members of the UK Supreme Court then sitting on the CFA, traveling judges applied or were invited in their individual capacities rather than as

¹⁴⁶ See AIFC Court, *The Affirmation Ceremony for Chief Justice of AIFC Court Lord Mance* (July 8, 2020), at <https://court.aifc.kz/news/the-affirmation-ceremony-for-chief-justice-of-aifc-court-lord-mance>.

¹⁴⁷ XIANGGANG JIBEN FA, *supra* note 2, Art. 88.

¹⁴⁸ Primrose Riordan & Nicolle Liu, *Hong Kong Pro-Beijing Legislators Intervene in Judicial Appointment*, FIN. TIMES (June 23, 2021), at <https://www.ft.com/content/56de7f6d-c89a-4857-b2f9-5d184fa3d096>.

¹⁴⁹ West Indies Associated States Supreme Court Order 1967, Art. 5(1) (UK); *id.* Art. 18(1) (describing the Judicial and Legal Services Commission).

¹⁵⁰ Constitution of the Republic of Singapore, Aug. 9, 1965, Art. 95(1)–(2), (4)(c), (6); Supreme Court of Judicature Act, 1969 (Cap. 322), Sec. 18B (Sing.).

¹⁵¹ The Judicial Authority at Dubai International Financial Centre, 2004 (Law No. 12 of 2004), Arts. 3(4), 4(1), (UAE).

representatives of their home courts or countries.¹⁵² The Cayman Islands Grand Court and the ECSC have open public competitions, although suitable candidates might be encouraged to apply.¹⁵³ The remainder of the courts do not seem to take applications—one is invited.¹⁵⁴ The invitation was usually extended by an acquaintance who had some affiliation with or connection to the hiring court.¹⁵⁵ This approach seems to follow the historical English and colonial norm of appointing judges with a “tap on the shoulder,” rather than the more modern trend in Commonwealth countries of appointing judges through an independent judicial service commission. Only one traveling judge we interviewed applied without prompting and had no prior connection to the court.¹⁵⁶ We cannot determine how many judges have declined such invitations, but those that declined reportedly cited an otherwise overbooked schedule, lack of interest in travel, or conflicts of interest with other work (such as being a partner in a U.S. law firm).¹⁵⁷ Judges cited interest in the work and desire to advance the rule of law as reasons for taking the job.¹⁵⁸

Salary information for traveling judges was typically not readily available, but our interviews provided information about pay structure. On the ECSC and in the Cayman Islands, judges receive fixed salaries. The BVI Commercial Division Judges receive a higher salary than other judges.¹⁵⁹ On the Hong Kong CFA, the SICC, and the AIFC, ADGM, and DIFC courts, judges are compensated for their time hearing cases and preparing opinions (for example with a per diem or hourly sitting fee).¹⁶⁰ Unlike some foreign judges on constitutional courts, who are paid by international organizations,¹⁶¹ the hiring courts pay these traveling judges.

We found little publicly available information about termination of judicial appointments.¹⁶² Most courts appoint judges for renewable terms of three or five years. In the

¹⁵² See, e.g., Interview with J16 (Dec. 15, 2021). The UK Supreme Court had an agreement with the CFA to provide two sitting judges to serve on the CFA. Statement of the President of the UK Supreme Court, the Rt. Hon. Lord Reed of Allermuir (July 17, 2020), at <https://www.supremecourt.uk/news/role-of-uk-judges-on-the-hong-kong-court-of-final-appeal.html>. Cf. Statement, *supra* note 5 (announcing resignation in light of China’s breach of this agreement).

¹⁵³ See, e.g., Interview with J6 (Jan. 29, 2021); J5 (Apr. 7, 2021).

¹⁵⁴ We do not know if this is true in The Gambia.

¹⁵⁵ See, e.g., Interviews with J1 (July 12, 2021); J2 (July 23, 2021); J3 (July 28, 2021); J7 (Oct. 22, 2021); J8 (Oct. 18, 2021); J15 (Dec. 2, 2021); J16 (Dec. 15, 2021); J19 (Dec. 20, 2021). The chief justice of the hiring court sometimes extends the invitation. See, e.g., Interviews with J11 (Nov. 17, 2021); J19 (Dec. 20, 2021).

¹⁵⁶ Interview with J4 (Aug. 11, 2021).

¹⁵⁷ See Section IV.C.4. *infra* (discussing ethics rules in fused profession).

¹⁵⁸ See, e.g., Interviews with J1 (July 12, 2021); J15 (Dec. 2, 2021).

¹⁵⁹ Compare BVI Vacancy Notice, *supra* note 56 (citing gross salary of US\$200,000, free of tax, in addition to a 20% salary bonus and other benefits), with, e.g., Eastern Caribbean Supreme Court Vacancy Notice, High Court Judge, available at <https://oecs.org/en/work-with-us/jobs/external-vacancies/expired-jobs/eastern-caribbean-supreme-court-high-court-judge> (listing salary for ECSC high court judge for any member state of EC\$16,465 a month, or approximately US\$6,000, with fewer benefits, application due November 2020). Moreover, the BVI’s currency is the U.S. dollar, so judges are paid in that currency. E-mail from J4 to Alyssa King (Feb. 18, 2022) (on file with authors); see also Interview with J17 (Dec. 21, 2021).

¹⁶⁰ Interviews with J1 (July 12, 2021); J2 (July 23, 2021); J3 (July 28, 2021); J7 (Oct. 22, 2021); A1 (Sept. 30, 2021).

¹⁶¹ Cf. Dixon & Jackson, *supra* note 9.

¹⁶² In Hong Kong, three judges resigned over the National Security Law and another declined to renew her term. See notes 319–321 *infra* and accompanying text. One SICC judge resigned following allegations of sexual misconduct in his home jurisdiction. Aparna Sai, *SICC Judge Resigns Following Sexual Harassment Inquiry in Australia: Reports*, ASIAN LEGAL BUS. (June 25, 2020), at <https://www.legalbusinessonline.com/news/sicc-judge-resigns-following-sexual-harassment-inquiry-australia-reports/79615>.

Eastern Caribbean, appointments may be shorter (sometimes a matter of months), but full-time positions involve a three-year term. Traveling judges in Hong Kong have three-year terms that may be renewed by the chief executive based on the chief justice's recommendation.¹⁶³ The ADGM courts' traveling judges also have three-year terms, based on renewable contracts. The DIFC court has made temporary appointments; regular appointments are for specified periods of no more than three years, but the appointments may be renewed.¹⁶⁴ Judges in the Qatar and Kazakhstan courts are hired for five-year renewable terms.¹⁶⁵ International judges on the SICC are typically appointed for a three-year period but may also be appointed for the purpose of hearing specific cases.¹⁶⁶ This regime contrasts with longer terms for local judges. Most of the courts have a retirement age between sixty-five and seventy-five, but those limits may be ignored.¹⁶⁷

Most courts have some guarantee of judicial independence in their founding documents and a provision that they shall hold office "during good behaviour," or similar.¹⁶⁸

C. *What Traveling Judges Do*

With the exception of some courts in the Caribbean, serving as a traveling judge is not a full-time job. Interviews suggest that part-time judges on some courts spend up to a quarter of their working time on court duties. In an appellate position, this time may be considerably less.¹⁶⁹ At least one traveling judge sits as part of any HK CFA panel or SICC appellate panel, but both courts have multiple traveling judges to choose from.¹⁷⁰ Traveling judges' work closely resembles that of other common law judges, such as hearing motions, presiding at trial, and writing opinions. Indeed, none of the judges interviewed reported receiving any required judicial training upon their appointment to a traveling position, although some courts have regular training for all judges.¹⁷¹

In other ways, serving on these courts can resemble being an arbitrator on an arbitration provider's list. Like arbitration, many of these courts have subject-matter jurisdiction that is

¹⁶³ Hong Kong Court of Final Appeal Ordinance, 1997 (Cap. 484) § 14(4), at <https://www.elegislation.gov.hk/hk/cap484> (H.K.).

¹⁶⁴ DIFC Court Law 2004, (Law No. 10 of 2004), pt. 3, Art. 9(1) (U.A.E.); Interview with J3 (July 28, 2021).

¹⁶⁵ On Amending Some Rules of the Qatar Financial Center Law Issued by Law No. (7) of 2005, 2009 (Law No. 2 of 2009), sched. 6(4) (Qatar); AIFC Court Regulations 2017, § 12(3) (Kaz.).

¹⁶⁶ Interview with J2 (July 23, 2021); CONSTITUTION OF THE REPUBLIC OF SINGAPORE, Aug. 9, 1965, Art. 95(7)–(11) (international judges can be appointed for specific cases only or for a specified period).

¹⁶⁷ Eastern Caribbean Supreme Court, *Judicial Officers*, at <https://www.eccourts.org/judicial-officers> (sixty-five years); The Cayman Islands Constitution Order 2009, June 10, 2009, Art. 96(1)(a) (seventy years); DIFC Court Law 2004, (Law No. 10 of 2004), pt. 3, Art. 9(1) (UAE) (seventy-five years); Constitution (Amendment) Act, 2017, No. 5 of 2017 (The Gambia; increasing retirement age to seventy-five); see also Satang Nabaneh, *Foreign Judges on the Gambian Bench: Implications for Judicial Independence and Rule of Law*, in THE CAMBRIDGE HANDBOOK, *supra* note 14, at 6 (draft on file with authors); AIFC Court Regulations 2017, § 12(3) (Kaz.); Hong Kong Court of Final Appeal Ordinance, cap. 484, §§ 13A, 14 (H.K.).

¹⁶⁸ See, e.g., ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015, 2015, Art. 196(2) (UAE) (ADGM court judges "shall hold that office during good behaviour, subject to . . . removal by the Board on the recommendation of the Chief Justice.").

¹⁶⁹ See Hargreaves, *supra* note 2, at 16 (noting that overseas judges are used "sporadically").

¹⁷⁰ Simon N. M. Young & Antonio Da Roza, *The Judges*, in HONG KONG'S COURT OF FINAL APPEAL: THE DEVELOPMENT OF THE LAW IN CHINA'S HONG KONG, 253, 259 tbl. 11.2 (Simon N.M. Young & Yash P. Ghai eds. 2014); Yip, *supra* note 14, at 92. Exceptionally, no traveling judge participated in *HKSAR v. Lai Chee Ying*, [2021] HKCFA 3.

¹⁷¹ See, e.g., Interview with J11 (Nov. 17, 2021). Interviewees did cite other training they had had as judges. The SICC also holds an annual conference.

effectively limited to commercial cases and the parties are often before the court by consent. Like arbitration, many of the specialized courts with traveling judges assign judges based on their fit with a particular dispute (as well as availability).

Several judges had multiple simultaneous appointments.¹⁷² Thirteen judges in our study held simultaneous appointments on two courts; two held appointments on three courts (for example, on the Hong Kong CFA, the SICCC, and the DIFC courts). ADGM court appointments are part-time, but the court does not allow second judicial appointments.

As traveling judge positions are usually not full-time, judges often hold other roles. A majority (70 percent) of traveling judges identified themselves on firm or personal websites as arbitrators or were present on arbitration provider lists.¹⁷³ Many continue arbitral practice while holding the part-time judicial appointments described above.¹⁷⁴ Even with full-time appointments, a traveling judge might be sought out specifically for their expertise in a specific area of law and would be able to go back to practice in that area when the judicial appointment ends.¹⁷⁵ In contrast to others, however, full-time judges in the Caribbean do not have time for outside work and often live in the jurisdiction during their appointments.

IV. EXPLAINING TRAVELING JUDGES

This Part analyzes which courts hire traveling judges, why they hire them, what circumstances in home jurisdictions make traveling attractive or easier for prospective traveling judges, and why traveling judges travel.¹⁷⁶

A. *Who Invites Traveling Judges?*

The collection of commercial courts that hire traveling judges is diverse along many dimensions. To understand the potential global influence and implications of the modern phenomenon of traveling judges, it is important to understand their similarities as well as their differences. These courts are English-language, common law courts often modeled on the London Commercial Court to varying degrees. The courts vary in terms of their status within their host judicial system (apex court, high court, trial court) and in the breadth of their subject-matter jurisdiction. Almost all the host countries have a history of British colonial influence, either as protectorates or colonies. These states are, again to varying degrees, interested in making their judicial systems attractive to foreign potential litigants and a global audience; hiring jurisdictions are usually established or aspiring financial or legal hubs, tax havens, or destinations for foreign direct investment. Host states of these courts are often small jurisdictions, either non-democracies or non-self-governing territories.¹⁷⁷

¹⁷² Several courts permit such appointments. *See, e.g.*, AIFC Court Regulations 2017, § 12(8), (9) (Kaz.).

¹⁷³ We included commercial and investment arbitration experience. Prior experience and presence on institutional lists do not guarantee a judge is an active arbitrator.

¹⁷⁴ *See, e.g.*, Interviews with J1 (July 12, 2021); J2 (July 23, 2021); J7 (Oct. 22, 2021).

¹⁷⁵ Interview with J4 (Aug. 11, 2021).

¹⁷⁶ Our task here is not to identify “the” explanation for traveling judges. Multiple overlapping factors are likely at work to different extents in different contexts.

¹⁷⁷ No single trait seems necessary or sufficient to explain traveling judges’ presence on a commercial court, but together they suggest certain trends.

1. *Commercial Courts that Hire Traveling Judges*

This Subsection highlights commonalities and distinctions among the courts that hire traveling judges. To recap, our study of SIFOCC members found nine with traveling judges. Three courts handle both criminal and civil cases: the Supreme Court of The Gambia, the ECSC, and the Hong Kong CFA. As discussed in Part III, we exclude the Supreme Court of The Gambia and the ECSC with the exception of the BVI Commercial Division from our discussion, but include the Hong Kong CFA. Two members are commercial trial divisions in British Overseas Territories (BVI and Cayman Islands); five are the common law court systems of SEZs in oil producing states in the Middle East and Kazakhstan; and one—the SICC—has subject matter limited to disputes that are both commercial and international.

English, common law courts. All of these courts operate in English, even if English is not an official language of their host country. They all self-identify as common law courts. They all have procedural rules similar to, if not modeled after, the rules that operate in English courts. They apply substantive law often based on English common law and commercial statutes. This choice is perhaps unremarkable for the common law jurisdictions in the Caribbean, The Gambia, Hong Kong, and Singapore, but more surprising in the oil states, which do not otherwise have common law judiciaries.

Accommodating traveling judges. These courts include benches composed of either all traveling judges (ADGM, AIFC) or of a mix of traveling and local judges (in Singapore, the QFC, DIFC, BVI, Cayman Islands). The BVI and Caymans divisions are commercial divisions of busy, longstanding court systems. Only the BVI requires judges to live in the jurisdiction when they serve. The judges' terms can range from a few weeks to several years.¹⁷⁸ Some courts allow judges from any home jurisdictions,¹⁷⁹ others limit traveling judges to those from other common law jurisdictions,¹⁸⁰ or a subset of common law jurisdictions, like the Commonwealth.¹⁸¹ All except the BVI allow judges to fly-in to hear cases or to use video and teleconferencing. The latter practice became pervasive during the COVID-19 pandemic.

¹⁷⁸ Interviews with J4 (Aug. 11, 2021); J8 (Oct. 18, 2021).

¹⁷⁹ The SICC and the DIFC, QICDRC, and ADGM courts place no restriction on where traveling judges can come from. See CONSTITUTION OF THE REPUBLIC OF SINGAPORE, Aug. 9, 1965, Art. 95(1)–(2), (4)(c), (6) (Sing.); DIFC Court Law 2004, (Law No. 10 of 2004), pt. 3, Art. 9(3) (UAE) (DIFC court judges must have held high judicial office in any jurisdiction recognized by UAE government or have “significant experience as a qualified lawyer or judge in the common law system”); Amendments to the Qatar Financial Center Law, 2009 (Law No. 2 of 2009), sched. 6(2) (Qatar) (judges should be not less than thirty years old at the time of appointment and “shall have legal knowledge and experience”); ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations, 2015, Art. 192(3) (UAE) (judges should have at least ten years' experience as a lawyer).

¹⁸⁰ For example, Hong Kong and the AIFC courts require traveling judges to be from a common law home jurisdiction. See XIANGGANG JIBEN FA, *supra* note 2, Art. 92 at 86 (“Judges and other members of the judiciary of the Hong Kong Special Administrative Region shall be chosen on the basis of their judicial and professional qualities and may be recruited from other common law jurisdictions.”); AIFC Court Regulations 2017, § 12(6) (Kaz.) (judges should have “significant knowledge of the common law and experience as a lawyer or judge in a common law system”).

¹⁸¹ The ECSC normally requires judges to have previously been judges or practitioners “in some part of the Commonwealth.” West Indies Associated States Supreme Court Order 1967, Arts. 5(2), 18(1) (UK). The rules are different, however, for the BVI Commercial Division. See note 56 and accompanying text. In the Caymans, “any person qualified to practise as a barrister or solicitor in England or in an equivalent capacity in a

London as model. Almost all the courts were modeled to different degrees on English courts. The four SEZ court systems all adopted a mixture of procedures from the London Commercial Court and those associated with international commercial arbitration (IBA Rules).¹⁸² These courts are not secretive about their intention to provide London-style commercial dispute resolution—through courts, arbitration, and mediation services—or about their belief that judges are an important part of this mission. One judge (who sits elsewhere but has practiced in the Middle East) describes them, accurately, as aspiring to be “little Englands.”¹⁸³ The commercial focus of the SICCC likewise was inspired by the London Commercial Court.¹⁸⁴ The commercial divisions in the Caribbean were likewise modeled on the London Commercial Court.

Relationship to broader judicial system. As noted, these courts may be trial level courts, high courts (trial and appellate), or apex courts. Some, like the Cayman Islands FSD, are part of a greater judicial infrastructure of a jurisdiction that relies on traveling judges throughout the judiciary.¹⁸⁵ Others, like the SICCC, are the only divisions of their judiciaries that employ traveling judges.¹⁸⁶

The SEZs have court systems primarily staffed by traveling judges, but they are surrounded geographically (and legally and politically) by a domestic court system with domestic judges. There is documented jurisdictional competition between the DIFC and the “onshore” Dubai courts, for example, that showcases the potential tension between traveling-judge-dominated SEZ courts and their surrounding domestic courts.¹⁸⁷ Officials at the courts in the Kazakhstan and Abu Dhabi SEZs report working to build stronger relationships with the local judiciary to avoid similar conflicts.

2. History of British Influence

As noted at the outset, all but one host jurisdiction (Kazakhstan) has a history of direct or indirect British rule. Some hiring jurisdictions have a common law legal system as a result of this history. In the Middle East, this history provides experience with consular courts, designed to be used by foreigners for limited kinds of cases, during the time of British influence. The innovation of a separate common law legal system aimed at foreign investors today seems less surprising considering that history.

Commonwealth country approved by the Governor [rep of Queen/head of state] . . . and who has so practiced for not less than ten years” is eligible to serve as a judge on the Grand Court. Grand Court Law, 2015 Revisions, Art. 6(2) (Cayman Is.).

¹⁸² See Interview with J3 (July 28, 2021).

¹⁸³ Interview with J7 (Oct. 22, 2021).

¹⁸⁴ See Interview with J8 (Oct. 18, 2021); J19 (Dec. 20, 2021); Sundaresh Menon, *The Rule of Law and Singapore International Commercial Court*, SICCC (Jan 10, 2018), available at https://www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/b_58692c78-fc83-48e0-8da9-258928974ffc.pdf.

¹⁸⁵ The Cayman Islands Court of Appeal is not an SIFOCC member, but does hear appeals from commercial divisions and has traveling judges.

¹⁸⁶ International Judges of the Singapore International Commercial Court can serve as trial level judges or on appellate panels reviewing cases decided by SICCC trial courts.

¹⁸⁷ See Matthew S. Erie, *The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution*, 60 VA. J. INT'L L. 225, 286–88 (2020); Interviews with J3 (July 28, 2021); A3 (Sept. 9, 2021).

The history of the Hong Kong CFA provides the clearest bridge to today's traveling judges phenomenon.¹⁸⁸ At the 1997 handover of sovereignty, the PRC committed to maintaining Hong Kong's existing economic and legal systems for fifty years.¹⁸⁹ Placing foreign judges on the CFA helped demonstrate that commitment and stem capital flight.¹⁹⁰ In the years that followed, officials and both traveling and local judges on the CFA presented Hong Kong as a bastion of the rule of law within China—at least insofar as commercial interests were concerned.¹⁹¹ That once broad consensus within the Hong Kong legal profession has now broken down.¹⁹²

This history alone does not explain traveling judges. Many new commercial court divisions—for example, those in the Netherlands, France, Germany, Pakistan, India, and throughout the United States—have relied entirely on local judges. Just as colonial history may inform some jurisdictions' efforts to build on the English model or even transplant it, other jurisdictions may reject such options because that history makes the public concerned about loss of sovereignty or about foreign influence. Kazakhstan, moreover, provides a counterexample of a state with traveling judges—indeed with an entirely British bench—without a history of British colonial control. History, however, can combine with other political forces, local goals, and investor preferences, to drive host governments to see hiring traveling judges as a strategy that advances their interests.

3. *Investment-Friendly and Forum-Selling Commercial Courts*

Most of the commercial courts that hire traveling judges are part of the recent trend of designing courts to cater to commercial disputes.¹⁹³ They are in a sense international “forum sellers,” seeking to make their courts attractive not only to local parties but to a broader commercial community to support the jurisdictions as legal hubs, tax havens, and destinations for foreign direct investment.¹⁹⁴ Commercial courts are important to these jurisdictions in part because they are believed to attract certain types of foreign capital—including but not limited to legal business.¹⁹⁵

¹⁸⁸ See Section I.A *supra* (discussing the history of the British colonial judicial service).

¹⁸⁹ Lindsay Maizland & Eleanor Albert, *Hong Kong's Freedoms: What China Promised and How It's Cracking Down*, COUNCIL FOR. REL. (Feb. 17, 2021), at <https://www.cfr.org/background/hong-kong-freedoms-democracy-protests-china-crackdown>.

¹⁹⁰ Law, *supra* note 14.

¹⁹¹ See, e.g., Tony Cheung, *National Security Law: Ex-Chief Justice Geoffrey Ma Defends Role of Foreign Judges in Hong Kong, Argues They Should Help Enforce Mini-Constitution*, S. CHINA MORNING POST (May 6, 2021), at <https://www.scmp.com/news/hong-kong/politics/article/3132392/national-security-law-ex-chief-justice-geoffrey-ma-defends> (Ma, long viewed as a centrist, responded to criticism both from pro-Beijing politicians who distrusted foreign judges and from overseas politicians who worried the overseas NPs were legitimating Beijing's crackdown on Hong Kong); Tony Cheung, *Hong Kong's Judicial Independence Gets Vote of Confidence from Top British Judges, with Pair Deciding to Continue Serving on City's Top Court*, S. CHINA MORNING POST (Aug. 27, 2021), at https://www.scmp.com/news/hong-kong/politics/article/3146707/hong-kongs-judicial-independence-gets-vote-confidence-top?utm_source=rss_feed. But cf. notes 5–6 *supra* and accompanying text (describing recent resignations from the CFA).

¹⁹² This shift has occurred within the last year. See Primrose Riordan, Nicolle Liu & Jane Croft, *Hong Kong Bar Pleads with Foreign Judges to Keep Serving*, FIN. TIMES (Oct. 5, 2020) (Bar Chairman Phil Dykes, later forced to step down due to his pro-democratic sympathies, asked overseas NPs to stay).

¹⁹³ See Part I.C. *supra*.

¹⁹⁴ Cf. Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241 (2016).

¹⁹⁵ Bookman, *Adjudication Business*, *supra* note 11, at 240 (discussing forum selling among international commercial courts).

These courts may appeal to different kinds of investors or litigants. The SEZs' courts are explicitly oriented around foreign investment. The Dubai government wanted "a new, global judiciary that would be functional and be seen as legitimate by the commercial-investor world."¹⁹⁶ In the late 1990s and early 2000s, it hired two British law firms, Allen & Overy and Clifford Chance, to advise it on attracting foreign investors. It built the new DIFC courts around their recommendations.¹⁹⁷ The DIFC courts were then a model for Qatar, Abu Dhabi, and Kazakhstan.¹⁹⁸ These governments established SEZs that operate in English and follow the common law as a means of attracting foreign direct investment, often in response to specific requests from investors, who indicated that they wanted to invest in the region but also would prefer to do so with more familiar judicial structures in place.¹⁹⁹ Singapore has different goals, positioning its courts to hear a wide variety of commercial disputes from around the region.²⁰⁰ The Caribbean courts cover tax haven jurisdictions that cater to cross-border commercial disputes. The Cayman Islands FSD and the BVI Commercial Division hear many important and high value corporate cases, especially in international insolvency. These jurisdictions regularly collaborate with or hear cases that parallel proceedings in other important commercial jurisdictions, like New York, Hong Kong, and Singapore.

4. *Small States, Sub-national Jurisdictions, and Political Limitations*

Both size and government structure facilitate hiring traveling judges as well as other kinds of court innovation.²⁰¹ Hiring courts are all in relatively small states or subnational jurisdictions. In some jurisdictions, like those in Kazakhstan and Dubai, creating these courts required a constitutional amendment, but such requirements were quickly met as neither regime is an electoral democracy.²⁰² Jurisdictions without contested elections are less likely to face backlash for creating different rules for foreign companies or hiring non-locals as judges that has sometimes accompanied these efforts.

The importance of courts' legitimacy before a local constituency, and other aspects of the local political economy can impede initiatives to hire foreign judges. Belgium, for example, considered creating a "Brussels International Business Court" that would have included an international panel of judges, but the proposal was defeated in Parliament in part due to

¹⁹⁶ JAYANTH K. KRISHNAN, *THE STORY OF THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS: A RETROSPECTIVE* 19 (2018).

¹⁹⁷ *Id.*

¹⁹⁸ Interviews with J3 (July 28, 2021); A1 (Sept. 30, 2021); *see also, e.g.*, Firew Tiba, *The Emergence of Hybrid International Commercial Courts and the Future of Cross Border Commercial Dispute Resolution in Asia*, 14 *LOY. U. CHI. INT'L L. REV.* 31 (2016).

¹⁹⁹ KRISHNAN, *supra* note 197, at 19; ADGM Courts, *English Common Law*, at <https://www.adgm.com/adgm-courts/english-common-law> ("The direct application of English Common Law makes ADGM the first jurisdiction in the Middle East to adopt a similar approach to that of Singapore and Hong Kong."); *QICDRC Plays Key Role in Promoting Qatar as a Leading Regional and Global Investment Hub: Al-Kuwari*, *GULF TIMES* (Nov. 24, 2020), at <https://m.gulf-times.com/story/678786/QICDRC-plays-key-role-in-promoting-Qatar-as-a-leading-regional-and-global-investment-hub-Al-Kuwari>; Gabe Kirchheimer, *Kazakhstan Adopts English Law to Inspire Investor Confidence*, *BLOOMBERG* (Oct. 22, 2018), at <https://sponsored.bloomberg.com/article/aifc/kazakhstan-adopts-english-law-to-inspire-investor-confidence>.

²⁰⁰ Interview with J2 (July 23, 2021); Bookman, *Adjudication Business*, *supra* note 11.

²⁰¹ The overlap between this list and Chris Bruner's list of market-dominant small jurisdictions is not coincidental. *See* BRUNER, *supra* note 16.

²⁰² Bookman, *Adjudication Business*, *supra* note 11, at 243.

arguments that it was a “caviar court,” catering too heavily to litigants with high-value disputes rather than addressing wider access to justice concerns.²⁰³ Concern about legislative opposition has led the Supreme Court of the Bahamas to reduce the number of traveling judges it hires despite court leadership’s desire to attract international commercial cases.²⁰⁴

For the most part, the hiring governments in our study are unlikely to face local political backlash for internationalizing the commercial judiciary. First, local constituencies may be less concerned about courts with jurisdiction limited to commercial disputes primarily involving foreigners.²⁰⁵ Second, several jurisdictions in our study either do not have elections, or are regimes with uninterrupted, single-party rule or only partial elections in which opposition participation is limited.²⁰⁶ They do not face the same constraints on hiring.

B. Why Hire Traveling Judges?

Having identified the kind of courts that hire traveling judges, we next consider why these courts hire traveling judges, informed by our findings on who traveling judges are. In many jurisdictions, there is a strong default presumption that judges will be locals. This presumption holds even with respect to common law commercial courts,²⁰⁷ such as in India, which

²⁰³ A similar debate occurred in the Dutch Parliament, but those objections did not win the day. *See id.* at 251. In Paris, the judiciary designed the new commercial court divisions so as not to require statutory authorization. *See* Alexandre Biard, *International Commercial Courts in France: Innovation without Revolution?*, 12 ERASMUS L. REV. 24 (2019). Foreign judges do not appear to have been contemplated.

²⁰⁴ Interview with J17 (Dec. 21, 2021). The same is true in The Gambia, which embarked on “Gambianization” of the judiciary as part of its transition toward democracy. Amat Jeng, *The Gambia’s Democratic Transition Is Facing a Litmus Test*, AL JAZEERA (Oct. 15, 2021); Ana Laura Ferrari, *The Future of Democracy in The Gambia*, V-DEM (Dec. 15, 2020), at https://v-dem.net/weekly_graph/the-future-of-democracy-in-the-gambia.

²⁰⁵ When Delaware established an arbitration-court hybrid system to attract international commercial disputes, the initiative easily passed the state legislature. The set-up was ultimately struck down by the Third Circuit as unconstitutional, however. *See* Bookman, *Arbitral Courts*, *supra* note 14, at 163–64 (describing this history).

²⁰⁶ On varieties of authoritarianism, see Larry Jay Diamond, *Elections Without Democracy: Thinking About Hybrid Regimes*, 13 J. OF DEMOCRACY 21 (2002) (classification of hybrid regimes); Andreas Schedler, *The Logic of Electoral Authoritarianism*, in ELECTORAL AUTHORITARIANISM: THE DYNAMICS OF UNFREE COMPETITION, at 1 (Andreas Schedler ed., 2006). The UAE is often classified as authoritarian as its leader is not elected. Ahmet T. Kuru, *Authoritarianism and Democracy in Muslim Countries: Rentier States and Regional Diffusion*, 129 POL. SCI. Q. 399 (2014). Political scientists typically classify Kazakhstan and Singapore as electoral authoritarian or electoral autocratic regimes. *See* Eric C.C. Chang & Masaaki Higashijima, THE CHOICE OF ELECTORAL SYSTEMS IN ELECTORAL AUTOCRACIES, in GOVERNMENT AND OPPOSITION 1 (2021); David G. Lewis, *Varieties of Authoritarianism in Central Asia*, in ROUTLEDGE HANDBOOK OF CONTEMPORARY CENTRAL ASIA 73, 74, 76, 80–82 (Rico Issacs & Erica Marat eds., 2021); Netina Tan & Bernhard Grofman, *Electoral Rules and Manufacturing Legislative Supermajority: Evidence from Singapore*, 56 COMMONWEALTH & COMPARATIVE POL. 273 (2018). Some Singaporeans dispute this characterization. Hong Kong has never allowed direct election of its chief executive or of the entire legislature. Political scientists characterized it—before 2020—as liberal authoritarian or electoral authoritarian/autocratic. *See, e.g.*, Regina Smyth, William Bianco & Kwan Nok Chan, *Legislative Rules in Electoral Authoritarian Regimes: The Case of Hong Kong’s Legislative Council*, 81 J. OF POL. 892 (2019); Brian Fong, *In-Between Liberal Authoritarianism and Electoral Authoritarianism: Hong Kong’s Democratization Under Chinese Sovereignty, 1997–2016*, 24 DEMOCRATIZATION 724 (2017).

²⁰⁷ Not all states that have adopted the common law system without a British colonial past have invited traveling judges either. After the 1994 genocide, Rwanda, a former Belgian colony, switched from a civil law system to common law system and joined the British Commonwealth. Sabine Hertveldt, *Case Study: Rwanda: Pragmatism Leads the Way in Setting Up Specialized Commercial Courts*, in CELEBRATING REFORMS 2008, at 84–91 (World Bank Group 2007) (“We [in Rwanda] cherry picked from what works well in the United States, Canada, Britain, Ireland, Mauritius, Kenya, Ghana, Uganda, and Tanzania.”). Rwanda also has specialized

authorized special commercial court divisions in 2015,²⁰⁸ and Australia, which has considered establishing a national international commercial court.²⁰⁹ Likewise, not all commercial courts in non-common law jurisdictions use foreign judges, even when offering English language options. All the judges of the Paris international commercial court divisions are French nationals drawn from within the French judiciary.²¹⁰ The Chinese International Commercial Courts have an advisory board of foreign legal experts, but the judges are all Chinese.²¹¹ The local international commercial courts in Beijing and Suzhou also have only Chinese judges.²¹²

We therefore assess three standard explanations for foreign judges—lack of local capacity, desire for expertise, and reputation building—and find that they offer some, but incomplete, explanations for these traveling judges on commercial courts. Beyond expertise, for example, these judges also bring elite status. We then offer an additional explanation: traveling judges offer hiring jurisdictions a mechanism for transplanting an adapted version of a successful commercial court, like the London Commercial Court. These four explanations draw together similar themes among the different courts, although they are not intended to be exclusive and they should be re-evaluated over time in future research.

1. Lack of Local Judges

Scholars of foreign judges often cite a lack of local judges as an explanation for foreign or traveling judges.²¹³ Capacity issues may exist at some points in time for some jurisdictions, but lack of capacity does not require hiring former members of the UK Supreme Court.

It is intuitively appealing to explain traveling judges as filling a need created by a lack of local judges. Many traveling-judge host jurisdictions are geographically and demographically small. In such jurisdictions, there may be few local judges who have experience with complex commercial dispute resolution.²¹⁴

An underfunding of judicial salaries—not a shortage of lawyers—may create the need for traveling judges.²¹⁵ Underfunded judicial salaries can discourage lawyers from serving as

commercial court divisions designed as common law hybrids. But it did not hire traveling judges. The Judiciary of Rwanda, *Specialised Courts*, at <https://www.judiciary.gov.rw/index.php?id=22>.

²⁰⁸ See Sai Ramani Garimella & M.Z. Ashraful, *The Emergence of International Commercial Courts in India: A Narrative for Ease of Doing Business?*, 1 ERASMUS L. REV. 111 (2019).

²⁰⁹ See S.I. Strong, *International Commercial Courts in the United States and Australia: Possible, Probable, Preferable?*, 115 AJIL UNBOUND 28, 30 (2021).

²¹⁰ The German and Dutch international commercial courts also have local judges. Bookman, *Adjudication Business*, *supra* note 11, at 250–56.

²¹¹ See *id.* Serving on this board of advisors may raise ethical issues similar to those raised when acting as a traveling judge. Gary Born, a prominent arbitrator, resigned from the CICC expert committee in January 2022 in light of the PRC government's actions "over the past year." Alison Ross, *Born Resigns from Expert Committee of Chinese Court*, GAR (Jan. 24, 2022), at <https://globalarbitrationreview.com/born-resigns-expert-committee-of-chinese-court>.

²¹² See note 85 *supra* (discussing these courts).

²¹³ See, e.g., Dixon & Jackson, *supra* note 9; DZIEDZIC, *supra* note 12.

²¹⁴ For example, the Cayman Islands have a population of 65,000 people. World Bank, *Population, Total Cayman Islands*, at <https://data.worldbank.org/indicator/SP.POP.TOTL?locations=KY>.

²¹⁵ See Evaluation of the Commonwealth Fund for Technical Cooperation (CFTC): Volume I – Final Report [2008 Commonwealth Judicial Assistance Report] (reporting that The Gambia needed foreign judicial assistance because salaries for local judges were too low).

judges, especially when they can otherwise have lucrative careers in commercial law. In Hong Kong, where top barristers bill at high rates in comparison with judicial pay, the judiciary has a perennial recruitment problem.²¹⁶ Similar considerations may be at issue in Caribbean jurisdictions, where lawyers—especially those that specialize in areas like tax, corporate law, or insurance—can have considerably more lucrative careers than judges. If Singapore, by contrast, is looking to build a court with the capacity to hear disputes from around the globe, or at least throughout the region, it may need to hire traveling judges to accommodate the quantity and types of cases it would like to see in the future.²¹⁷

In the SEZs, traveling judges make up for a lack of local *common law* expertise, but that provides a satisfactory explanation only if one presupposes the necessity of a common law court in these non-common law states. There may be local judges qualified to hear complex disputes, but these jurisdictions displace them (or, in the case of the DIFC and Qatar, supplement them) with traveling judges.

2. *Expertise and Elite Status*

Foreign judges are often hired for their expertise,²¹⁸ and traveling judges certainly bring relevant experience, but they also bring elite status. Today's traveling judges on commercial courts tend to be successful, retired judges from their home jurisdictions, often having served on apex courts or other domestic courts that specialize in commercial disputes. Common law judges typically have experience as practicing lawyers. Traveling judges bring expertise in their home jurisdiction's law, for example English or Australian law, which they can easily apply in jurisdictions where local law closely resembles English law or in cases where the parties selected English law.²¹⁹ 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 U.S. judge on the SICC was a former chief justice of *Delaware*, and the second is a Delaware federal bankruptcy judge with expertise in cross-border insolvency.²²⁰

Traveling judges also come from home jurisdictions where judges, especially members of apex and specialized courts, are members of the legal elite. Traveling judges tend to have qualifications far beyond a requisite number of years in practice or even as a judge.²²¹ Again, the statistics vary by court. The BVI Commercial Division, and the ECSC as a whole, have no former apex court justices. In contrast, all thirteen traveling judges on the Hong Kong CFA were from apex courts and seven had been presiding judges (known in the United States as

²¹⁶ See Hargreaves, *supra* note 2, at 13–14 (refuting idea that capacity reasons justify the use of overseas judges in Hong Kong).

²¹⁷ See Yip, *supra* note 14.

²¹⁸ See, e.g., Dixon & Jackson, *supra* note 9, at 304–05.

²¹⁹ 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.

²²⁰ See U.S. Bankruptcy Court District of Delaware, *Announcement of Retirement of Judge Christopher Sontchi* (Nov. 15, 2021), at <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), at <https://news.bloomberglaw.com/bankruptcy-law/singapore-vies-to-be-insolvency-hub-with-sontchi-joining-bench>.

²²¹ See Part III.A.2 *supra*.

chief judges).²²² Dubai has a policy of hiring only former presiding judges of apex courts to be presiding judges for the DIFC; the QIC's presidents have consistently been former lord chief justices of England and Wales.²²³ In this way, today's traveling judges contrast sharply with colonial traveling judges, who tended to be "‘also-rans’ among English, Irish, and Scottish barristers or advocates."²²⁴ Where colonial judges were criticized for their ignorance of the local legal system and general lack of ability,²²⁵ today's traveling judges are prized for their legal expertise and are highly accomplished.

In general, traveling judges' common law and English-language legal educations enable them to serve as judges on hiring courts with a shared language and shared understanding of how to approach the law. Their expertise thus appears easily transferable to the traveling judge context, and any lack of familiarity with local law is often excused by the court's commercial focus. Judges report, however, that they may find more local differences and challenges as they confront the ways in which local law differs from English common law or in which local culture and politics differ from those they may be familiar with from their home jurisdictions.

3. Reputation Building: Traveling Judges as Separate from the Host State

Foreign judges are sometimes said to enhance the international reputation of the host state. Traveling judges' experience, expertise, and elite status serve this function. Like foreign judges in other contexts, traveling judges on commercial courts are also valuable *because* they are not from the hiring state. They are not involved in the politics of the hiring state. Having built their careers and reputations in their home jurisdictions, they appear un beholden to the host government for their livelihoods or their careers. Their separate-ness, as well as their elite status, reputations, and "virtue," are intended to reassure foreign investors who may not understand or trust the hiring state. Judges' presence is intended to be seen as an endorsement of the hiring jurisdiction and its rule(s) of law. Thus, they may build the institutional reputation of the court, and by association and sometimes by disassociation, of the host state.²²⁶

Traveling judges complement the hiring jurisdictions' reputations in different ways. To varying degrees, hiring authorities seek to signal to the international commercial community that their courts are efficient, non-corrupt, have English common law expertise, follow the rule of law, or are independent from the state.²²⁷ Traveling judges are helpful in part by virtue of who they are: foreign judges, most of whom have stellar reputations on all these grounds.

On the other hand, some features of traveling judges' positions raise questions about judicial independence. Whereas life or long-term tenure is sometimes considered a key

²²² In Hong Kong, judges hail from the High Court of Australia, the Supreme Court of Canada, the UK Supreme Court and its predecessor, the House of Lords.

²²³ Grout & Blair, *supra* note 13, at 42.

²²⁴ JOHN McLAREN, DEWIGGED, BOTHERED, AND BEWILDERED: BRITISH COLONIAL JUDGES ON TRIAL, 1800–1900, at 47 (2011).

²²⁵ DANIEL DUMAN, THE ENGLISH AND COLONIAL BARS IN THE NINETEENTH CENTURY 126 (1983).

²²⁶ *Cf.* DIXON & JACKSON, *supra* note 9 (discussing these potential benefits in the context of foreign judges on constitutional courts).

²²⁷ See, e.g., HARGREAVES, *supra* note 2, at 16 (noting that CFA overseas judges' "symbolic value is equally if not more important than the practical skills they bring").

component of judicial independence,²²⁸ many traveling judges have short-term, renewable contracts. In theory, traveling judges could easily lose their jobs, or not have cases assigned to them, if the host state did not like how they were performing their judicial duties.²²⁹

Concerns about independence raised by these structural features, however, might be muted when it comes to retired judges who may already be financially comfortable from their former careers or their concurrent careers as arbitrators. Most judges in our study report that they do not rely financially on judicial work.²³⁰

Thus, the signature guarantee of independence is the judges themselves. Their reputations precede them. They recruit acquaintances with similar reputations, who rely in part on assurances of the judge who invited them or because a well-respected colleague has agreed to serve on the court.²³¹ They assert that they, and their colleagues, would resign if government officials were to interfere directly in case outcomes.²³² This background provides considerable returns for the reputation of the courts on which they sit. As one judge put it: “In the end, as we know throughout the world, it all depends on the people you get and the choice of people who are coming into the judiciary.”²³³

4. *Transplant as Shortcut*

The traveling judges in our study bring several advantages, including experience, expertise, elite status, and separation from the host state. They also provide a mechanism for transplanting the success and reputation of the London Commercial Court or the New South Wales Commercial Division in Sydney.²³⁴ English common law “is still the most sought-after law for transnational commerce,”²³⁵ and English courts and judges are central to the law’s appeal.²³⁶ The London Commercial Court “has been described as the paradigm for the new international commercial courts, which are said to have been inspired in part by its success,”²³⁷ although these courts all differ from the London court in various nuances and adaptations to local circumstances.²³⁸ The London court is seen as “contributing to the success of London as an international commercial and financial centre that has led to its

²²⁸ See, e.g., Edward L. Glaeser, Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *Do Institutions Cause Growth*, 9 J. OF ECON. GROWTH 271 (2004); Lars P. Feld & Stefan Voigt, *Making Judges Independent – Some Proposals Regarding the Judiciary* (CESifo Working Paper Series No. 1260, 2004) (listing other structural indicators of judicial independence).

²²⁹ The Gambia provides an interesting example because President Jammeh frequently and readily fired Supreme Court justices he disagreed with, only to replace them with other traveling judges. Nabaneh, *supra* note 168, draft at 10–12.

²³⁰ See, e.g., Interviews with J1 (July 12, 2021), J7 (Oct. 22, 2021); J14 (Dec. 8, 2021); see also Dixon & Jackson, *supra* note 9 (recognizing foreignness and financial stability as protecting independence).

²³¹ Interviews with J1 (July 12, 2021), J3 (July 28, 2021); J10 (Nov. 15, 2021). At least one also consulted foreign service officers in his home state before taking on a high-profile position.

²³² See, e.g., Interviews with J16 (Dec. 15, 2021) (“we’d all resign” if the government interfered); J11 (Nov. 17, 2021).

²³³ Interview with J19 (Dec. 20, 2021).

²³⁴ See ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993).

²³⁵ PISTOR, *supra* note 37, at 178.

²³⁶ See also Mateja Durovic & Franciszek Lech, *Harmonization of Commercial Law Based on Common Law*, in *INTERNATIONAL COMMERCIAL COURTS*, *supra* note 11, at 204–06 (describing advantages of English common law).

²³⁷ Blair, *supra* note 125, at 223.

²³⁸ Grout & Blair, *supra* note 13, at 33.

emulation.”²³⁹ Striving for similar success, 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.²⁴⁰

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.²⁴¹ Our study does not support these hypotheses. Singapore’s court comes the closest to having a broadly multinational bench, but it does not have a balance of civil and common law traditions. It originally had three judges from civil law jurisdictions, and in 2022, it will have two. The Qatar court is also relatively more diverse, with individual judges from Kuwait and other hybrid jurisdictions in addition to many English judges and one Qatari judge. Although the UAE jurisdictions do not restrict hiring to common law lawyers, they have no traveling judges from non-common law jurisdictions.²⁴² On the ADGM court, all the judges are UK, Australian, or New Zealand citizens, including one who is a retired Hong Kong judge.

Instead of internationalism, these traveling judges provide their hiring jurisdictions with a sort of transplantation shortcut for replicating a famously successful and well-regarded court and its legal system, familiar to the general counsel of the companies these jurisdictions are trying to attract.²⁴³ 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 oil states did not previously have common law legal systems; they chose English law for their SEZs after consulting with English law firms who represent the investors they hoped to attract.²⁴⁴ Their courts model their founding statutes and rules of procedure on English law as well.

²³⁹ *Id.* at 35.

²⁴⁰ See, e.g., Jeffrey Mason, *Institution-Building Done Well: The DIFC Courts*, EXPONENTS MAG (Feb. 10, 2020), at <https://exponentsmag.org/2020/02/10/institution-building-done-well-the-difc-courts> (“When setting up the DIFC Courts, the government of Dubai was committed to developing a world-class institution with legitimacy both at home and abroad. . . . [T]o do so, it [e]ffectively cop[ied] British common law commercial courts.”).

²⁴¹ In a 2021 webinar, Lucy Reed, a well-known arbitrator, former Freshfields Dispute Resolution Head, and former Director of the Centre for International Law at the National University of Singapore, 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*, N.Y. ARB. WEEK (Nov. 16, 2021).

²⁴² The presiding judge of the DIFC Courts is Malaysian. The Malaysian legal system includes specialized Islamic law courts, and separate high courts for the Peninsula and the Borneo states, but is otherwise based on English common law. Yvonne Tew, *The Malaysian Legal System: A Tale of Two Courts*, 19 COMMONWEALTH JUD. J. 3, 3 (2011).

²⁴³ 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 L. & SOC. INQUIRY 229, 236, 259 (2012); Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. 579, 616–21 (2016).

²⁴⁴ See note 198 *supra* and accompanying text. 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), at <https://gulffnews.com/business/analysis/international->

Traveling judges also cost less in the short term than building a full-time bench with judges of a similar caliber. For jurisdictions that lack local common law qualified lawyers, training local lawyers to be judges on a sophisticated common law commercial court would require a serious long-term investment.²⁴⁵ Hiring traveling judges on short-term or part-time contracts is an easier, faster solution. It also avoids the creation of a class of lawyers with both deep international ties and local political investment.²⁴⁶ An elite retired judge might not be willing to relocate—but may be willing to spend a week or a month hearing cases, particularly in attractive or deluxe destinations, or, as is increasingly acceptable, online. As noted, this structure has enabled Hong Kong to hire some of the most elite judges in the common law world. The same is true for several other jurisdictions in our study. Serving as a traveling judge in the Caribbean seems to be a more full-time job, especially for trial judges, although some may have very short terms.

C. *Where Do Traveling Judges Travel From?*

The jurisdictions that hire traveling judges can do so because these judges are available. A central finding of our study is that traveling judges hail overwhelmingly from the UK, and to a lesser extent, from former dominion colonies. As discussed, the history of colonialism and global English legal influence provides a substantial explanation for these results. Here we explore two additional factors that inform a traveling judge's ability to travel: ethics and retirement rules that either enable or discourage traveling and the structure of the legal profession in potential judges' home jurisdictions.

1. *Ethics and Retirement Rules*

A home jurisdiction's ethics rules governing judicial retirement and what judges may do while sitting or post-retirement all help define who is likely to be available to serve as a traveling judge. The UK's and Australia's rules in these areas make serving as a traveling judge easier than the rules in the United States and Canada. These differences help explain the results of our study with respect to traveling judges' home jurisdictions.

First, in the UK and Australia, active judges may serve on additional courts, including the Hong Kong CFA and the supreme courts of Pacific Island nations.²⁴⁷ In other places, however, such moonlighting by active judges is prohibited. For example, both U.S. federal law and many U.S. states' laws prohibit active judges from serving in external capacities.²⁴⁸

[businesses-take-to-english-law-especially-where-arbitration-is-needed-1.84146105](https://doi.org/10.1017/ajil.2022.25); Gilles Cuniberti, *The International Market for Contracts: The Most Attractive Contract Laws*, 34 NW. J. INT'L L. & BUS. 455 (2014).

²⁴⁵ Anecdotal evidence suggests that some jurisdictions appear to be sponsoring talented young people to study abroad, often in England, to develop these skills and expertise. But developing this talent is a long game.

²⁴⁶ Cf. YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* 198–219 (2002).

²⁴⁷ See Law, *supra* note 14, at 993–94 (explaining the tradition of sitting UK Supreme Court justices sitting on the HK CFA); DZIEDZIC, *supra* note 14, at 27.

²⁴⁸ While federal judges can sit in other federal capacities, see, e.g., 28 USC § 292 (district court judges may sit by designation), and Ninth Circuit judges may sit on “any duly constituted court of the freely associated compact states [such as the Marshall Islands or Palau],” 28 USC § 297, the Code of Conduct directs that federal judges “should not act as an arbitrator or mediator or otherwise perform judicial functions apart from the judge's official duties unless expressly authorized by law.” Code of Conduct for United States Judges, Canon 4(A); see also, e.g.,

Most traveling judges, however, have retired from judicial posts in their home jurisdictions. Thus, rules around judicial retirement may affect who serves as a traveling judge. Most common law jurisdictions have a judicial retirement age, thus creating a supply of available former judges. For example, English judges face mandatory retirement at age seventy (soon to be seventy-five).

Judges in the U.S. federal courts and in Delaware, however, face no mandatory retirement age.²⁴⁹ Federal judges may also take “senior status,” which involves working part time in semi-retirement and sitting on other federal courts that need extra personnel.²⁵⁰ As a result, higher-status judges in the United States, who are more likely to be federal judges, can gain many of the benefits of being a traveling judge—a lighter caseload, travel to desirable locations—without leaving the federal judiciary. The lack of a retirement age and the availability of senior status opportunities provide some explanation for why there is a smaller body of retired, elite U.S. judges who might be available to serve as traveling judges.

Finally, English judges do not practice law after retirement as a matter of convention.²⁵¹ This restriction makes judging and arbitrating more attractive to those who retire but still want to pursue interesting work. In contrast, retired judges in the United States and Canada may join law firms,²⁵² which is also a much more lucrative career option. Thus, one reason there are so many English judges may be simply that so many are available.

2. Legal Profession Regulations

Jurisdictions with a split legal profession may be more likely to produce traveling judges because traveling judges may join barristers’ chambers without fear of creating conflicts of interest, whereas in fused professions, potential judges often must choose between joining a law firm and serving as a traveling judge.

In jurisdictions with a split profession like England and New South Wales, solicitors form law firms that share profits. Barristers may join a chambers to share expenses, but they may not share profits.²⁵³ Chamber members therefore can represent clients on opposite sides of the same case without creating a conflict of interest. In jurisdictions with a fused profession like those in the United States and Canada, however, all lawyers can share profits in firms. To take on a new client, a firm lawyer must confirm that representation does not create a conflict with the firm’s existing work.

In fused-profession jurisdictions, profit sharing presents an obstacle to firm lawyers serving as a traveling judge (or serving as an arbitrator or other neutral). Because a traveling judge’s

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).

²⁴⁹ By contrast, New York judges must retire at seventy. N.Y. CONST., Art. VI § 25.

²⁵⁰ 28 U.S.C. § 371; see Marin Levy, *Visiting Judges*, 107 CAL. L. REV. 67 (2019).

²⁵¹ Monidipa Fouzder, *Judges Will Be Allowed to Retire at 75*, L. SOC’Y GAZETTE (Mar. 8, 2021), at <https://www.lawgazette.co.uk/news/judges-will-be-allowed-to-retire-at-75/5107703.article>.

²⁵² Marla N. Greenstein, *Ethics for Former Judges*, ABA (Nov. 6, 2020), at https://www.americanbar.org/groups/judicial/publications/judges_journal/2020/fall/ethics-former-judges; Federation of Law Societies of Canada, Standing Committee on the Model Code of Professional Conduct, *Post-Judicial Return to Practice Discussion Paper*, Appendix B (May 2016), available at <https://flsc.ca/wp-content/uploads/2014/10/Discussion-Paper-Post-judicial-Return-to-Practice.pdf>.

²⁵³ Solicitors handle client facing work and, for certain kinds of litigation, hire barristers to represent those clients.

presence in a law firm could create conflicts with current or future clients, firms often do not allow members to serve as a neutral. Retired judges may decline invitations to serve as traveling judges if they want to join a law firm full time.

In jurisdictions with a split profession, barristers do not have the same concerns (although service as a neutral in multiple fora can create conflicts of its own).²⁵⁴ England and Wales, Scotland, Hong Kong, and several Australian jurisdictions (including New South Wales) have split professions, which may go some way to explaining why there are multiple traveling judges from each of these jurisdictions. These jurisdictions' strong standing in commercial matters contributes to their influence, but the lack of a split profession may help explain why we did not find a similar number of judges from common law legal markets of similar or larger size, like Toronto or New York, with fused professions. These factors also help explain why few U.S. judges travel despite the prominence of New York and Delaware in international commercial law.

D. Why Do Traveling Judges Travel?

Some may observe the traveling judge phenomenon as mercenary, but interviews and research reveal multiple reasons, including but not limited to compensation, that drive individuals to accept positions as traveling judges (or to apply for such positions). In general, traveling judge positions do not appear to be the most lucrative employment options available to these individuals.

To attract the top of the profession, most courts in this study do appear to offer robust compensation. Some (but not all) fly judges first-class and put them up in luxury accommodations.²⁵⁵ Several of the commercial courts are located in desirable locations that traveling judges may like to visit. We were not able to ascertain specific salary information, and it surely varies among courts (and perhaps among judges). From what we can gather, the hourly pay can be generous, and potentially more generous than local judge salaries, but not necessarily as generous as that of top arbitrators or practicing lawyers. Many traveling judges, moreover, are in a second stage of their careers. As noted above, some report that they are not motivated, or not primarily motivated, by compensation.²⁵⁶

Judging also offers intangibles, including some power and prestige. Many report that they appreciate the opportunity to contribute to the rule of law. Judges say they enjoy the complexity and challenge of high stakes cross-border disputes. Some are intrigued by the innovativeness of the courts.²⁵⁷ They enjoy the chance to work with other judges around the world, and perhaps not to be bound by their home jurisdiction's legal precedents.²⁵⁸ Some seem to prefer judging to arbitrating, or at least appreciate the differences between the two. As a judge, "you are the complete master of procedure," one explained, but with arbitration, "parties

²⁵⁴ *Almazeedi v. Penner & another* [2018] UKPC 3 (JCPC case finding that traveling judge on Cayman Islands FSD who also sat on the QIC should not have sat on FSD case related to Qatar).

²⁵⁵ See, e.g., Dinara Bekmagambetova, *Why British Judges Are Holding Court in Kazakhstan*, FIN. NEWS (Feb. 3, 2020), at <https://www.fnlonon.com/articles/why-british-judges-are-holding-court-in-kazakhstan-20200203> (quoting a former London High Court judge: "It was amazing. They put us up in this posh hotel, St Regis, and to see this modern city was somewhat unexpected"). Some courts fly the judges in business-class.

²⁵⁶ Interviews with J1 (July 12, 2021), J2 (July 23, 2021).

²⁵⁷ See, e.g., Interviews with J1 (July 12, 2021), J19 (Dec. 20, 2021).

²⁵⁸ See, e.g., Interview with J8 (Oct. 18, 2021) (one might become a traveling judge for "fun").

expect to have a good deal more control.”²⁵⁹ Judges have to compromise less on process.²⁶⁰ The fact that being a traveling judge is often not a full-time job also preserves time to pursue other endeavors, including work as an arbitrator, judge on a different court, lawyer, or academic.

* * * *

In sum, the courts that invite traveling judges reflect both colonial history—in which British judges worked around the world and English commercial law was spread by empire—and modern investor preferences, or at least what court designers take investor preferences to be. Governments hire traveling judges for their experience, expertise, and status, to build the court’s reputation and to replicate successful courts like London’s. Circumstances in judges’ home jurisdictions, such as retirement ages and restrictions on legal practice for retired judges, help shape the roster of judges available for travel, contributing additional explanations for the large number of UK and Australian judges. The judges themselves report a variety of motivations, but many seem to enjoy aspects of judging specifically—for example the ability to promote the rule of law, control procedure, and work with world-class colleagues.

V. TRAVELING JUDGES IN CONTEXT

The phenomenon of traveling judges has implications for many areas of the law.²⁶¹ This Part focuses on three that follow from this study, all of which speak to a reassertion of state power in international dispute resolution. First, traveling judges’ identities indicate that hiring jurisdictions are harnessing perceived preferences for English legal culture and incorporating those preferences into their court systems. Second, while many assume that traveling judges resemble arbitrators, comparing these two groups shows that hiring jurisdictions are concentrating on building courts that are not mere arbitration copycats and that prioritize dispute resolution values differently from arbitration. Third, examining hiring courts individually reveals the courts’ differing priorities, political environments, and institutional structures, which complicate and in some cases may undermine traveling judges’ ability to effectively replicate their home court experiences abroad.

A. *Harnessing English Common Law*

In this Section, we focus on what the identities of traveling judges—particularly their home jurisdictions, legal cultures, and place of legal education—reveal about the host governments’ values and goals. As a group, about half of traveling judges hail from England, while the other half come from a variety of other (mostly common law) home jurisdictions. Over 80 percent hail from the UK and its twentieth-century dominion colonies (Australia, New Zealand, Canada, and South Africa) and more than three-quarters studied law in the United

²⁵⁹ Interview with J15 (Dec. 2, 2021).

²⁶⁰ Interviews with J2 (July 23, 2021); J3 (July 28, 2021); J7 (Oct. 11, 2021); J16 (Dec. 15, 2021).

²⁶¹ This study lays the groundwork for research on other implications. See notes 17–18 *supra* and accompanying text; e.g., Bookman & King, *supra* note 18 (considering traveling judges’ capacity to develop international commercial law).

Kingdom. These twenty-first-century legal institutions thus reflect the influence of the British Empire and its law.

The study of international commercial courts has focused on ways in which these courts are broadly “international,” but traveling judges’ identities suggest that these courts do not have a broadly international judiciary. Instead, host jurisdictions are building on both the colonial legacy of the common law and a perceived global preference for common law legal traditions. This Section argues that traveling judges’ identities suggest that host governments design hiring courts to cater to the business community’s common law preferences, and considers why those preferences favor these traveling judges, but often not U.S. judges.

1. *Designing Courts to Cater to Common Law Preferences*

Many attribute the domination of English common law influence today throughout global commerce and among international commercial courts to “party preferences.”²⁶² Modern international commercial law almost universally recognizes parties’ autonomy to choose the law that governs their disputes and the forum that hears them, and parties (and their lawyers) often choose English common law.²⁶³ This preference has been credited to English law’s “widespread usage, ‘certainty, stability, predictability, independence and expertise of the judiciary, the commerciality and reliability of the court decision and for the willingness of judges to endorse contractual bargain[s] struck between commercial parties.’”²⁶⁴ This choice has been reinforced by the World Bank Doing Business reports, which ranked court systems for their attractiveness for doing business, and by legal origins studies, both of which declared the superiority of English common law.²⁶⁵ In common law jurisdictions like Hong Kong and Singapore, courts with traveling judges build on an English-law legal tradition; in the SEZs, courts have recently imported it. The prevalence of traveling judges from England and Wales or with UK educations may therefore be explained simply as hiring jurisdictions wanting to provide the “best” in class or as catering to these preferences.²⁶⁶

This dynamic might support the narrative that these courts are “racing to the top” to provide excellent international commercial dispute resolution.²⁶⁷ It is even more likely that these judges provide *familiarity*.²⁶⁸ Although traveling judges may be foreign to the jurisdiction, they may be anything but foreign to international commercial lawyers appearing there, who themselves often practice in overseas commercial centers and “fly-in” to conduct

²⁶² See Durovic & Lech, *supra* note 237, at 204–06 (praising English common law and describing the market’s preference for it).

²⁶³ Horatia Muir Watt, *Conclusion: Empire Through Contract: A Private International Law Perspective*, in *THE POLITICS OF PRIVATE TRANSNATIONAL GOVERNANCE BY CONTRACT*, at 277, 280 (A. Claire Cutler & Thomas Dietz eds., 2017).

²⁶⁴ Durovic & Lech, *supra* note 237, at 204 (quoting Tiba, *supra* note 199, at 52).

²⁶⁵ See Ralf Michaels, *Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law*, 57 *AM. J. COMP. L.* 765, 765 (2009). The World Bank ranking system was discredited and discontinued in 2021. Steven Harras, *World Bank Late in Shuttering “Biased” Business Reports*, *Waters Says*, 2021 CQ ROLL CALL, WL 4438648 (Sept. 28, 2021).

²⁶⁶ In other work, we have both separately questioned the completeness of this narrative. See King, *supra* note 91; Bookman, *Adjudication Business*, *supra* note 11.

²⁶⁷ See Bookman, *Adjudication Business*, *supra* note 11 (describing and critiquing this view); but see King, *supra* note 91 (questioning this view).

²⁶⁸ King, *supra* note 91.

hearings. In recent decades, U.S. and UK law firms have dominated the market for high-end commercial law. Common law courts give these lawyers familiar procedure before familiar judges.²⁶⁹

The English dominance among traveling judges is also inextricable from the common law's colonial history, which of course brought the common law to many of these jurisdictions and which helps to form the expectations of modern-day businesses and the lawyers advising them. In the Caribbean, Singapore, and Hong Kong, the common law justice system already existed when these new courts were created. Singapore's, moreover, had been entirely independent of traveling judges before the 2015 creation of the SICC. The perception of the common law's superiority is grounded in foreign investors' historical and modern desires to avoid certain local courts and legal systems and instead to recreate a more "civilised" justice.²⁷⁰ This history may also explain the comfort level of local authorities in the Middle East with hiring traveling judges and building judicial institutions for a foreign audience.

2. *Global Legal Power of Traveling Judges' Home Jurisdictions*

The common law tradition itself might facilitate the hiring of traveling judges. Common law courts draw on a shared history and distinct approach to the legal profession, united by a common language and common experience with a specific colonial power. Moreover, lawyers exert enormous control in the common law tradition.²⁷¹ This autonomy carries over to the judiciary.²⁷² Judges on elite courts are themselves well-regarded lawyers, not bureaucrats. Their reputations are more separate from the state and potentially transferrable to a new jurisdiction.

These elements help explain the presence of so many English judges, but not necessarily the absence of U.S. judges. At the turn of the twenty-first century, U.S. global legal influence seemed ascendant.²⁷³ U.S. judges and other Americans were traveling the world, spreading the American legal model²⁷⁴ and the rule of law,²⁷⁵ and trying "to promote a U.S. product as the lingua franca for business and politics."²⁷⁶ U.S. courts were also seen as a magnet for transnational litigation, although empirical accounts questioned that claim.²⁷⁷ 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

²⁶⁹ *Id.*

²⁷⁰ See, e.g., Burset, *supra* note 40, at 486–87; Note, *The Nature of the Jurisdiction of United States Courts Established in Foreign Countries*, 21 HARV. L. REV. 437, 438 (1908); Georg Schwarzenberger, *Foreword*, in BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS*, at xi (1953); CHARLES T. KOTUBY JR. & LUKE A. SOBOTA, *GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS: PRINCIPLES AND NORMS APPLICABLE IN TRANSNATIONAL DISPUTES* 23–25, 55–69 (2017).

²⁷¹ PISTOR, *supra* note 37, at 169.

²⁷² *Id.* at 173.

²⁷³ See Dezalay & Garth, *Legitimizing the New Legal Orthodoxy*, *supra* note 66.

²⁷⁴ See, e.g., deLisle, *supra* note 67.

²⁷⁵ Holger Spamann, *Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law*, 2009 B.Y.U. L. REV. 1813, 1849.

²⁷⁶ Dezalay & Garth, *Legitimizing the New Legal Orthodoxy*, *supra* note 66, at 307.

²⁷⁷ See, e.g., Christopher A. Whytock, *Transnational Litigation in U.S. Courts: A Theoretical and Empirical Reassessment*, 19 J. EMP. L. STUD. 4 (2022).

retirement age. To our knowledge, however, no former New York judges have served as traveling judges.

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, discussed above.²⁷⁸ With respect to common law development, the United States separated itself early on from the shared common law tradition that continues today.²⁷⁹ U.S. common law, itself a product of state law, is fragmented. The United States, while undoubtedly a major common law commercial center, is therefore less central to this narrative of shared law. U.S. state courts, meanwhile, have mostly fallen in influence and prestige,²⁸⁰ possibly with the important exception of Delaware courts.²⁸¹ The more prestigious U.S. federal courts, however, do not make contract law.²⁸² In addition, if one focuses on litigation culture rather than law development, one might have predicted waning American influence considering international disdain for the U.S. court system (as opposed to New York law).²⁸³ All of these reasons may contribute to the lack of U.S. traveling judges.

B. Comparing Traveling Judges and Arbitrators

Jurisdictions hiring traveling judges seem to understand that who the judge is matters, and therefore it matters who judges are.²⁸⁴ The selection of traveling judges is hardly accidental. Hiring governments have considerable agency in their selection, limited mostly by whether the judges agree to serve. Traveling judges on commercial courts, however, unlike foreign judges on constitutional courts, are chosen in large part to adjudicate cross-border disputes among international parties.²⁸⁵ Observing each court's bench of traveling judges, and the phenomenon as a whole, thus may reveal hiring governments' perceptions of the international commercial community's desires.

One might expect the corps of traveling judges to resemble that of international commercial arbitrators, especially given the extensive scholarship framing international commercial courts as "competing" with arbitration.²⁸⁶ This Section compares those groups to show

²⁷⁸ See Part IV.C.

²⁷⁹ See, e.g., DZIEDZIC, *supra* note 12, at 106.

²⁸⁰ See John C. P. Goldberg, *Benjamin Cardozo and the Death of the Common Law*, 34 *TOURO L. REV.* 147, 154 (2018) (claiming that "there is no member of a state judiciary who rivals [Justice Benjamin] Cardozo in stature," and that "judges today have little feel" for the common law).

²⁸¹ 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).

²⁸² Cf. Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed Out Common Law*, 67 *UCLA L. REV.* 600 (2020).

²⁸³ See Dezalay & Garth, *Legitimizing the New Legal Orthodoxy*, *supra* note 66, 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* (Rogers M. Smith & Richard R. Beeman eds., 2020).

²⁸⁴ See, e.g., ERIKA RACKLEY, *WOMEN, JUDGING AND THE JUDICIARY: FROM DIFFERENCE TO DIVERSITY* 164 (2013); Grout & Blair, *supra* note 13, at 41 (describing the importance, in arbitration and litigation, that parties know they will have expert adjudicators).

²⁸⁵ See note 13 *supra* (defining international commercial courts).

²⁸⁶ See Schultz & Bachmann, *supra* note 15 (hypothesizing that traveling judges mirror arbitrators).

that traveling judges support a certain kind of English-modeled court, distinct from arbitration.

As a whole, traveling commercial judges are even more homogenous and have vastly more judicial experience than arbitrators, even as more than half of traveling judges also serve as arbitrators. The fact that so many traveling judges are retired judges reinforces differences between hiring courts and arbitration, countering narratives that these courts are arbitration-court hybrids.²⁸⁷ The lack of diversity among traveling judges can compromise their legitimacy and authority among some audiences,²⁸⁸ but it is likely intended to provide familiarity, mirroring non-diverse benches in the traveling judges' home jurisdictions. Greater levels of diversity on certain courts, moreover, reveals the courts' different agendas. Some more than others appear to be building a more hybrid or internationalized court.

1. *Traveling Judges and Arbitrators As Groups*

As a group, traveling judges have much in common with arbitrators. They are often the same people.²⁸⁹ At a high level of generality, both groups are largely white, male, and from developed countries. Traveling judges, however, are even more likely to be white and male, and come from a even narrower set of developed countries.

The percentage of women traveling judges overall (13 percent) was slightly less than the percentage of women arbitrators (18 percent),²⁹⁰ although gender representation varies depending on the court. With the exception of the BVI Commercial Division, each court or division in our study has at least one woman judge, but often only one.²⁹¹

Still, significant differences remain. One of the starkest is the degree to which traveling judges have prior judicial experience. One could imagine these courts hiring individuals who have established themselves professionally as arbitrators and not as judges; indeed, the failed Brussels court²⁹² and the new Bahrain Chamber for Dispute Resolution court took that approach.²⁹³ Instead, traveling judges overwhelmingly had judicial careers in their home jurisdictions, often on high-profile or apex courts or specialty commercial courts in

²⁸⁷ Cf. Bookman, *Arbitral Courts*, *supra* note 14 (suggesting that traveling judges make these courts resemble arbitration).

²⁸⁸ We follow studies of diversity among arbitrators and international court judges to focus how diversity implicates questions of perceived legitimacy and authority. See, e.g., Franck, Freda, Lavin, Lehmann & van Aaken, *supra* note 81, at 95; Sarah Rudolph Cole, *Arbitrator Diversity: Can It Be Achieved?*, 98 WASH. U. L. REV. 965 (2020) (discussing importance of diversity for improving public perceptions of arbitration's legitimacy). Questions about this study's implications for judicial decision making are beyond the scope of this Article. Cf., e.g., Rosemary Hunter, *More Than Just a Different Face? Judicial Diversity and Decision-Making*, 68 CURRENT LEGAL PROBS. 119 (2015).

²⁸⁹ Among this study's traveling judges, roughly seventy percent also serve as international arbitrators. See Part III.C; see also Michael Hwang, *Commercial Courts and International Arbitration – Competitors or Partners?*, 31 ARB. INT'L 193, 195 (2015) ("first cohort of overseas judges . . . appointed to the bench of the DIFC Courts . . . were [all] practising arbitrators").

²⁹⁰ Franck, Freda, Lavin, Lehmann & van Aaken, *supra* note 81, at 48.

²⁹¹ See Liesbeth Lijnzaad, *The Smurfette Principle: Some Reflections About Gender and the Nomination of Women to the International Bench*, in IDENTITY AND DIVERSITY ON THE INTERNATIONAL BENCH: WHO IS THE JUDGE?, at 30–31 (Freya Baetens ed., 2020) ("The so-called *Smurfette* principle refers to the (visual) role of a single woman amidst a group of men. . . . [A] focus on the one woman who stands out confirms that the system is essentially male-oriented.").

²⁹² See *supra* note 203 and accompanying text.

²⁹³ On the BCDR, see notes 116 *supra*, 317 *infra*, and accompanying texts.

London or Sydney. Nearly 70 percent of traveling judges also act as arbitrators, but 86 percent had been judges before taking their current positions. By contrast, only 9 percent of studied arbitrators had previous judicial experience.²⁹⁴ We have found no evidence to suggest that arbitrators without judicial experience were approached for traveling judge positions and declined. To the contrary, our interviews suggested that former judges are the target profile for traveling judges in most jurisdictions.

Traveling judges also come from the common law tradition to a far greater extent than arbitrators. Nearly all traveling judges trained exclusively in a common law jurisdiction, in contrast to about half of surveyed arbitrators.²⁹⁵ Among arbitrators, a quarter had training from both common and civil law jurisdictions;²⁹⁶ among traveling judges, one did.

This profile suggests that the experience and expertise that judges bring differs from what arbitrators or lawyers might offer. Even if they are also arbitrators, they were first judges. In the eyes of an international community familiar with litigating in London or Sydney, these individuals' presence may represent a familiar kind of judicial expertise and reputation—not a means of providing arbitration in a courtroom setting.

Traveling judges are less numerous than international commercial arbitrators and less diverse along a variety of dimensions. By nationality, traveling judges are overwhelmingly English or from former dominions. Nearly a quarter of arbitrators are U.S. nationals, but hardly any traveling judges are.

Traveling judges are also likely older, on average, than arbitrators. While we lack specific age demographics, the fact that so many traveling judges had retired from a prior judicial post, often due to a mandatory retirement age of seventy (or older) in their home jurisdictions, suggests that the median age of traveling judges is above the average arbitrator's age of fifty-four.

One may attribute these demographics to historical trends in home jurisdictions' judiciaries in which women and racial minorities have been underrepresented.²⁹⁷ A host government concerned about such matters, however, could try to counter these effects. The “tap on the shoulder” method of inviting individuals to serve as traveling judges gives courts opportunities to “tap” more diverse judges.²⁹⁸ As diversity among retired English judges may be lacking, courts could look beyond this narrow group, for example hiring senior barristers who have not been judges or judges from a wider variety of jurisdictions. Notably, the one woman judge on the AIFC is a younger barrister with no previous judicial experience. Once again, these demographics reveal the influence of both colonial history and the perceived superiority of the English legal model—including its courts, judges, and historical demographics—in providing attractive legal environments for business.²⁹⁹

²⁹⁴ Franck, Freda, Lavin, Lehmann & van Aaken, *supra* note 81, at 43.

²⁹⁵ *Id.* at 49.

²⁹⁶ *Id.*

²⁹⁷ Many judiciaries today have higher female representation. In the UK, for example, 34% of court judges are women. Ministry of Justice, *supra* note 141. Since those numbers were lower historically, there is likely a lower percentage of women among the ranks of *retired* English judges.

²⁹⁸ Cf. Lijnzaad, *supra* note 292 (discussing appointment mechanisms as key to addressing gender diversity). We were unable to identify any individuals who were offered and declined a traveling judge position, although anecdotes suggest that has happened. We have no information to suggest that women declined more often than men, although that is possible. Both male and female traveling judges suggested that they preferred part-time traveling judge positions in part because it afforded them greater time with their families.

²⁹⁹ See Michaels, *supra* note 266.

2. *Examining the Courts Individually*

The diversity picture changes, however, when one looks at individual courts instead of traveling judges as a whole. Some courts, such as the DIFC courts and the SICC, have more diverse benches. These courts also have substantial rosters of local judges sitting alongside traveling judges. The AIFC and ADGM courts, by contrast, have benches with 100 percent traveling judges, the vast majority of whom are white men from England and former dominions.

One might argue that these courts do not need diverse benches because of the international commercial nature of the disputes before them. This view may reflect a philosophy of the judicial role as that of a technocrat who brings a certain kind of expertise,³⁰⁰ or a view that commercial law has private but not public implications.³⁰¹ In that context, one might think that the skills required to adjudicate international commercial disputes are more important than, or unrelated to, the benefits of diversity.

This view is at odds with the recognized need for gender, racial, and regional diversity among international commercial arbitrators, even though the same arguments about technical expertise could apply.³⁰² Nevertheless, prevailing mores—or hiring jurisdictions' perceptions of them—seem to reveal that diversity is not as important to some hiring jurisdictions as mirroring existing, minimally diverse, judicial institutions.

The landscape of traveling judges' identity, therefore, may show that these hiring jurisdictions are optimizing for something else: either familiarity or a certain kind of hybridity. For example, the judges on the AIFC and ADGM courts bring a particular, unified perspective, not a wide variety of perspectives. These judges seem intended to steer the jurisdictions toward convergence on certain shared principles based in English common law. The most homogeneous courts seem not intended as “international courts” with broad international representation but as replicas of English courts, whose benches look a certain way.

The SICC, by contrast, seems to cater to the most diverse international audience (of these courts), offering not only many local and foreign common law judges, but also judges from civil law legal cultures and from less-well-represented home jurisdictions like Delaware and Delhi. Their judges seem intended to provide a range of judicial approaches, offering many options to a more broadly conceived international business community, not a method for wholesale legal transplantation. This roster reflects the SICC's marketing of itself as a regional or even global litigation destination.

These courts—or at least some of them—do not serve only international audiences, however. The DIFC's roster of local judges may be valuable for establishing local legitimacy and for interactions with local courts. In Qatar, where there is one judge each from Qatar, Kuwait,

³⁰⁰ Anna Dzedzic, *Foreign Judges on Pacific Courts: Implications for a Reflective Judiciary*, 5 FEDERALISM.IT 63, 64 (2018) (noting that foreign judges “might . . . be characterised as technical experts who provide an impartial, strictly legal form of judicial decision-making”).

³⁰¹ Cf., e.g., David Schneiderman, *The Place of International Economic Law in Constitutional Interpretation*, in RESEARCH HANDBOOK ON CONSTITUTIONAL INTERPRETATION (Carlos Bernal, Sujit Choudhry & Kate O'Regan eds., forthcoming 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4015757.

³⁰² See, e.g., Franck, Freda, Lavin, Lehmann & van Aaken, *supra* note 81; Cole, *supra* note 289; Joshua Karton, *Diversity in Four Dimensions: Conceptualizing Diversity in International Arbitration*, in SUSTAINABLE DIVERSITY IN INTERNATIONAL ARBITRATION (Giorgio Colombo, Joshua Karton, Filip Balcerzak & Shahla Ali eds., 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4054031; Schultz & Bachmann, *supra* note 15, at 71.

Cyprus, and Singapore, and the remaining eight are from the UK or former dominions, the local representation and greater regional representation may likewise be important for local or regional audiences.

C. Court Aspirations and Constraints

This Article has primarily focused on drawing conclusions about traveling judges as a group. This Section focuses on the multiple differences between the hiring courts—they may have different reasons for having traveling judges, different status within the judiciary (e.g., as trial courts or apex courts), and different relationships to local government power and local political economies. These differences, in turn, affect traveling judges' ability to facilitate investment, promote the rule of law, or transplant their home courts' legal traditions into a foreign context.

First, jurisdictions hire traveling judges for different reasons. Some may seek to reassure investors by providing familiar law and familiar judges. Others may seek to attract regional or international litigation business itself. Different types of investors or potential litigants may have different needs, moreover, so a court that reassures investors in an SEZ may look different and have a different volume of work than a court that reassures investors looking to take advantage of local tax laws.

Second, hiring courts have different status within a local judiciary. Traveling judges may enter a local legal system as trial-court, appellate court, high-court, or apex court judges, and thereby inhabit the differing roles that accompany those posts. Traveling judges may hear cases once a year or less, or may come to serve on full-time trial courts, even if non-resident in the hiring jurisdiction. Courts in the Caribbean with traveling judges are an integrated part of the domestic legal infrastructure. Traveling judges on SEZs arrive to help establish a new legal system. Traveling judges in Singapore serve only on international commercial cases within a common law system. And those in Hong Kong sit on the apex court with broad subject-matter jurisdiction. Hiring jurisdictions may be sovereign states (Singapore), but many are sub-national jurisdictions including Hong Kong, the oil states' SEZs, and British Overseas Territories. Courts in these jurisdictions have different relationships with the relevant legislators that may prescribe the courts' procedures and the laws they apply; with the state authorities that may have authorized the courts' creation and that continue to fund them and pay their judges; and with other parts of the government infrastructure.

All of these differences—and more—distinguish these courts from each other and thus distinguish the context in which traveling judges work. A full-time trial court judge in the Caribbean has a different local impact than a once-a-year appearance by an apex court judge in Hong Kong. The former may do more on-the-ground work and the latter may do more for the jurisdiction's perception internationally. The two judges' impact on law development may also differ.

Third, these courts—and these jurisdictions—also exist in the context of different local political economies, including different, and potentially changing, levels of government support for the court and for hiring traveling judges and expanding or contracting the court's jurisdiction. Likewise, other domestic courts or divisions may have different levels of willingness to transfer cases or recognize judgments.

Traveling judges—and their opportunities for success, however defined—are shaped by history and confined by context. Unlike the ne'er-do-wells of the colonial service who

were sent abroad to impose English law on colonies and to establish outposts of English law in protectorates, today's traveling judges represent elite (mostly) retired judges. They are hired by the host jurisdiction rather than assigned by a distant colonial power.³⁰³ Their status as invited elites might mean that they bring with them even more potential influence. (In the Caribbean, judicial appointment follows a more bureaucratic process.³⁰⁴)

Just as stark, however, are the differences in who wields the ultimate authority over traveling judges' posts and conditions of work. Although Hong Kong's overseas CFA judges state an intention to contribute to the rule of law,³⁰⁵ for instance, they do not participate in decisions to grant or deny leave to appeal, a lack of docket control that blunts their influence.³⁰⁶ In most of the jurisdictions, the judges serve short, renewable terms of a few years. This dynamic raises the question of where and with whom the judicial power rests and what keeps it in check—questions we can raise here but not answer fully.

International commercial courts seem to reassert the sovereignty of the host state, offering a new perspective on modern narratives that private governance (like arbitration) has overtaken public governance (in courts).³⁰⁷ Katharina Pistor has argued that the decentered nature of global law today means that “global commerce and finance can thrive without a global state or a global law”³⁰⁸ because of states' commitments to enforce parties' forum and governing law choices. Through the rise of international commercial courts and their traveling judges, states—particularly market-dominant small jurisdictions—go a step further. Beyond enforcing party preferences, these states seem to instantiate them in their judicial institutions.

The solicitude for party preferences gives the impression that these courts serve the parties much like arbitration does, essentially providing a dispute resolution service. Most traveling judges have experience as arbitrators. At the same time, rhetoric around the courts promotes them as public institutions committed to the public interest and capable of developing law.³⁰⁹ And traveling judges have a history as judges in home jurisdictions with traditions dedicated to open justice and public service—although some see their traveling judge role primarily as dispute resolvers. Nevertheless, traveling judges are brought in not only to shepherd English common law's incorporation into the local legal structure (in the SEZs) or to adjudicate disputes under familiar common law principles, but also to signal a commitment to the rule of law as it is understood in their home jurisdictions.

These courts ultimately operate on the hosts' terms, however, applying local law, confined by the courts' jurisdiction and the limitations on judges' tenure on the court or on assignments to cases.³¹⁰ Unlike arbitration, where private parties form the private tribunal for

³⁰³ In this sense, these courts are more like the mixed tribunals outside the British empire than their colonial antecedents. See Theus, *supra* note 35 (describing treaties that established mixed tribunals).

³⁰⁴ See note 154 *supra* and accompanying text.

³⁰⁵ See note 6 *supra*.

³⁰⁶ Hong Kong Court of Final Appeal Ordinance, Cap. 484, § 18(1) (H.K.).

³⁰⁷ See, e.g., Poul F. Kjaer, *From the Private to the Public to the Private? Historicizing the Evolution of Public and Private Authority*, 25 *IND. J. GLOB. LEGAL STUD.* 13, 14 (2018); *THE POLITICS OF PRIVATE TRANSNATIONAL GOVERNANCE BY CONTRACT* (A. Claire Cutler & Thomas Dietz eds., 2017).

³⁰⁸ PISTOR, *supra* note 37, at 9.

³⁰⁹ See Schultz & Bachmann, *supra* note 15.

³¹⁰ This may not be true in the Caribbean, where final appeal remains with the Privy Council and the UK has the ability.

themselves, these courts are instruments of a state. That status brings with it certain indicia of legitimacy that private arbitration may lack.³¹¹ It also brings with it a reliance on the host state. Traveling judges may be intended to mitigate concerns about local judiciaries and local control over them, but the Hong Kong example from the Introduction demonstrates the ways that that balance can be delicate and ultimately upended.

Over time, different goals for the courts and different political environments may lead to greater divergences both in which traveling judges a given court seeks to hire and who will accept traveling judge positions. Our study suggests a variety of reasons why individuals accept invitations to serve as traveling judges in addition to compensation, including a desire to do challenging legal work and promote the rule of law. Other factors provide disincentives, however, including home jurisdiction conflict laws that make retired judges choose between lucrative legal careers and serving as traveling judges. The Hong Kong example, however, reveals an additional countervailing force: traveling judges may face opposition from civil society in their home jurisdiction to their serving in particular locations. Conversely, in some jurisdictions, changing political economies that favor localization or regionalization of the judiciary can dissuade courts from inviting traveling judges. In the Caribbean, for instance, relations with the UK and concerns about colonialism are perennial topics of political debate.³¹²

Parallel shifts can be seen in the history of foreign judges on other courts. Those shifts have showcased how political context can both undermine traveling judges' efforts to judge as they might at home and change the traveling judges' desire to serve. As a dramatic example, in 2009, foreign judges on Fiji's Court of Appeals held that the leader of the interim government had illegally gained power through a 2006 military coup. The Fijian government reacted by abrogating the Constitution and revoking nearly all judicial appointments.³¹³ Afterward, the governments of Australia and New Zealand banned travel by Fijian officials, including judges, and lawyers' associations in both countries advised their members against accepting appointments in Fiji.³¹⁴ Fiji, needing foreign judges, turned to the Sri Lankan judiciary, and now has judges from several other regional jurisdictions, but not the traditional home jurisdictions of Australia and New Zealand.³¹⁵ Some may argue that traveling judges on *commercial* courts will not face such stark political cases—but public and private law may not be able to remain so clearly severed.

CONCLUSION

Traveling judges embody the link between the idea of a global community of courts, colonial judiciaries, and modern international arbitration. Their identities demonstrate the

³¹¹ See Schultz & Bachmann, *supra* note 15.

³¹² Patrick Wintour, *Caribbean States Warn Against Direct Rule of British Virgin Islands*, GUARDIAN (May 3, 2022), at <https://www.theguardian.com/world/2022/may/03/caribbean-states-warn-against-direct-rule-of-british-virgin-islands>.

³¹³ DZIEDZIC, *supra* note 12, at 32.

³¹⁴ *Id.* at 33.

³¹⁵ *Id.*

continued influence of the United Kingdom and former dominions in commercial law, but they also demonstrate how today's judges differ markedly from the colonial judges of the past. They are far more elite and specialized. Hired, rather than sent, they trade on reputations built in their home jurisdictions' judiciaries. Who these traveling judges are reveal much about the hiring jurisdictions, their perceptions of the desires of the international community, and the landscape of post-colonial judicial power. This Article begins a conversation about who traveling judges are, what they do, and where they are going.

Much work remains to be done to investigate court-specific and regional trends, networks between courts created by judicial travel, traveling judges' relationship to international arbitrators, and their effects on law development. Hiring retired judges from other jurisdictions to serve on commercial courts appears to reflect not a rejection of international commercial arbitration so much as a reinvention of it within the context of the state. The implications of that re-invention also deserve further study.³¹⁶ Likewise, whether traveling judges will drive increased harmonization keyed to English substantive and procedural law will also require additional research.

One might further track how judicial demographics change over time. Our study took a snapshot of June 2021. June 2031 may look much different. In February 2022, Bahrain opened an on-shore, English-language commercial court with traveling judges following an entirely different model—with a bench comprised of individuals with histories as arbitrators rather than judges, from civil and common law backgrounds, who held multiple nationalities and practiced in multiple home jurisdictions.³¹⁷ This court could shake up the phenomenon or perhaps fizzle into insignificance.

There are also ethical implications to traveling. As we write these final words, the status of traveling judges and their ability to reassure international audiences of the stability of the host government's rule of law, and thus to encourage foreign business in the jurisdiction, is being put to the test. Recall that Lords Reed and Hodges resigned from Hong Kong's CFA in March 2022, but they were not the first.³¹⁸ An Australian judge resigned in light of the Nationality Security Law in 2020.³¹⁹ A UK judge declined to renew her post in 2021, citing personal reasons and expressing confidence in the continued rule of law in Hong Kong, “at least as far as commercial law is concerned.”³²⁰ Other judges have chosen to remain.³²¹ Civil unrest

³¹⁶ See Pamela K. Bookman, *Traveling Judges Dealing in Virtue* (draft on file).

³¹⁷ BCDR, *Appointment of Judges Dedicated to Hearing BCDR Section One Cases in English* (Jan. 31, 2022), at <https://bcdr.org/appointment-of-judges-dedicated-to-hearing-bcdr-section-one-cases-in-english>. The Brussels International Business Court also would have been a civil law court with traveling judges. See Part IV.A.4 *supra*.

³¹⁸ Lord Reed, the current president of the UK Supreme Court who also sat on the Hong Kong CFA, said in November 2021 that the overseas “judges could give ‘practical support’ to the Hong Kong judiciary,” while “[t]heir withdrawal would be ‘a matter of regret to the Chinese authorities, not to say the loss of face’ but would ‘achieve nothing for Hong Kong.’” Alvin Lum & Ben Rigby, *Hong Kong's Foreign Judges Can Hear National Security Cases, Says City's Chief Justice*, GLOB. LEGAL POST (Jan. 31, 2022), at <https://www.globallegal-post.com/news/hong-kongs-foreign-judges-can-hear-national-security-cases-says-citys-chief-justice-39849009>. By March, the calculus had changed. Statement, *supra* note 5.

³¹⁹ Greg Torode & Swati Pandey, *Australian Judge Quits Hong Kong Court, Citing National Security Law*, REUTERS (Sept. 18, 2020), at <https://www.reuters.com/article/us-hongkong-security-judges/australian-judge-quits-hong-kong-court-citing-national-security-law-idUSKBN26912R>.

³²⁰ Catherine Baksi, *Hale Quits Hong Kong Judicial Post*, L. SOC'Y GAZETTE (June 4, 2021).

³²¹ See Lau & Cheung *supra* note 6.

in Kazakhstan in January 2022, during which hundreds were killed,³²² likewise raises questions about the future of the nation's special economic zone (SEZ), and its bench of 100 percent English judges.³²³

While many have noted the rise of international commercial courts, few have asked what social order they promote, "who would benefit from it," and how it might "impact the interests and values of all affected people."³²⁴ This research begins to address these questions.³²⁵ Traveling judges seem poised to promote a social order that continues the legacy of English common law empire and a coding of capital based in English (not New York) common law by instantiating it through the state sovereignty of certain small jurisdictions. This Article provides a jumping off point for a fuller contemplation of whom that social order will benefit and what role traveling judges will play in perpetuating or mitigating today's global and globalized problems.

DATA AVAILABILITY

To view supporting data for this article, please visit <https://borealisdata.ca/dataset.xhtml?persistentId=doi:10.5683/SP3/ZY8NY5>.

APPENDIX

Table 1. SIFOCC Member Courts with Traveling Judges—June 2021.

Table 2. Home Jurisdictions of All Traveling Judges—June 2021

Table 3. Home Jurisdictions of All Judges per Court Excluding Non-commercial ECSC and The Gambia—June 2021

Table 4. Country of Legal Education of Traveling Judges Excluding Non-commercial ECSC and The Gambia—June 2021

³²² See Agneiszka Pikulicka-Wilczewska, *Mixed Feelings as Kazakhstan Looks Back on a Bloody January*, DIPLOMAT (Jan. 31, 2022), at <https://thediplomat.com/2022/01/mixed-feelings-as-kazakhstan-looks-back-on-a-bloody-january>; Georgi Kantchev & Christopher M. Matthews, *Huge U.S. Investments at Risk in Kazakhstan Unrest*, WALL ST. J. (Jan. 13, 2022), at <https://www.wsj.com/articles/huge-u-s-investments-at-risk-in-kazakhstan-unrest-11642070688>; *Kazakhstan Unrest: Troops Ordered to Fire Without Warning*, BBC NEWS (Jan. 7, 2022), at <https://www.bbc.com/news/world-asia-59907235>.

³²³ See, e.g., Daniel Dalton, *Karim Massimov: The Canary in the Coalmine for Kazakhstan*, PARLIAMENT MAG. (Feb. 3, 2022), at <https://www.theparliamentmagazine.eu/news/article/karim-massimov-the-canary-in-the-coalmine-for-kazakhstan> (discussing uncertainty about the charges that will be leveled against Massimov, a detained former Kazakh prime minister, who may have been arrested "for not actioning the shoot to kill order against protestors").

³²⁴ Schultz & Bachmann, *supra* note 15, at 69 (raising these questions).

³²⁵ See also, e.g., Bookman & King, *supra* note 18.

TABLE 1:
SIFOCC MEMBER COURTS WITH TRAVELING JUDGES—JUNE 2021

	Type of Court & Subject-Matter Jurisdiction (SMJ)*	Year Established	# of Traveling Judges	# of Local Judges
Eastern Caribbean Supreme Court (ECSC) (court for the Organization of Eastern Caribbean States, including 6 independent states and 3 British Overseas Territories)	High court (major trials and appeals) SMJ (ECSC): Broad SMJ (Commercial divisions): Commercial	1967 Commercial (trial) court in BVI: 2009 St. Lucia: 2016	ECSC: 8 BVI: 1 St. Lucia: 0	ECSC: 28 BVI: 1 St. Lucia: 1
Hong Kong Court of Final Appeal (CFA)[†]	Apex appellate court SMJ: Broad	1997	13	7
Supreme Court of The Gambia	Apex appellate court SMJ: Broad	New constitution: 1997	2	7
Dubai International Financial Centre (DIFC) Courts (courts for the DIFC, a special economic zone (SEZ) in Dubai, UAE)	Court of First Instance and Appellate Court SMJ: Civil and commercial disputes	2004	8	5
Qatar International Court (QIC) (courts for the Qatar Financial Centre, an SEZ in Qatar)	Court of First Instance and Appellate Court SMJ: Civil and commercial disputes	2006	11	2
Grand Court of the Cayman Islands (Financial Services Division (FSD))	Trial court division SMJ: Certain financial and commercial disputes	FSD: 2009	4	3
Singapore International Commercial Court (SICC)	Division of the General Division of the High Court (International Judges may also sit on the Court of Appeal) SMJ: International commercial disputes	2015	16	26
Abu Dhabi Global Market (ADGM) Courts (courts for the ADGM and other SEZs in Abu Dhabi, UAE)	Court of First Instance and Appellate Court SMJ: Civil and commercial disputes	2015	8	0
Astana International Financial Centre (AIFC) Courts (courts for the AIFC, an SEZ in Kazakhstan)	Court of First Instance and Appellate Court SMJ: Civil and commercial disputes	2019	9	0

*These rough subject-matter jurisdiction categories are intended to distinguish between courts focused on civil and commercial disputes and those with general jurisdiction, for example, encompassing civil and criminal matters. These designations do not precisely describe the scope of these courts' jurisdiction. In addition, courts in SEZs may have separate administrative chambers.

†The Hong Kong SAR judiciary as a whole is a SIFOCC member, but to our knowledge the lower courts did not have traveling judges in June 2021.

TABLE 2:
HOME JURISDICTIONS OF ALL TRAVELING JUDGES—JUNE 2021*

Home Jurisdiction	Number of Traveling Judges	Percentage of All Traveling Judges
UK-England and Wales	36	50%
UK-Scotland	5	7%
Aus-New South Wales	5	7%
Aus-Western Australia	2	3%
Cayman Islands	2	3%
Hong Kong	2	3%
New Zealand	2	3%
Trinidad & Tobago*	2	3%
Aus-Victoria	1	1%
Barbados*	1	1%
Bermuda	1	1%
Can-British Columbia	1	1%
Can-Ontario	1	1%
Cyprus	1	1%
France	1	1%
India - Delhi	1	1%
Isle of Man	1	1%
Kuwait	1	1%
Malaysia	1	1%
Nigeria-Kaduna*	1	1%
Sierra Leone*	1	1%
Singapore	1	1%
South Africa	1	1%
USA- Delaware	1	1%

*Table corresponds to [Figure 1](#). Jurisdictions with an asterisk are not included in [Figure 2](#). Percentages do not sum to 100 due to rounding.

TABLE 3:
HOME JURISDICTIONS OF ALL JUDGES PER COURT EXCLUDING NON-COMMERCIAL ECSC AND THE GAMBIA—
JUNE 2021*

ECSC-All Commercial Divisions

Home Jurisdiction	Count	%
ECSC jurisdictions	2	75%
England and Wales	1	25%
	3	

Hong Kong CFA

Home Jurisdiction	Count	%
Hong Kong	7	35%
England and Wales	7	35%
New South Wales	2	10%
Scotland	2	10%
Western Australia	1	5%
British Columbia	1	5%
	20	

DIFC

Home Jurisdiction	Count	%
Dubai	5	38%
England and Wales	4	31%
Western Australia	2	15%
Malaysia	1	8%
New South Wales	1	8%
	13	

QIC

Home Jurisdiction	Count	%
England and Wales	5	38%
Qatar	2	15%
Kuwait	1	8%
Cyprus	1	8%
South Africa	1	8%
Scotland	1	8%
Singapore	1	8%
New Zealand	1	8%
	13	

Cayman Islands Grand Court (FSD)

Home Jurisdiction	Count	%
England and Wales	2	29%
Isle of Man	1	14%
Bermuda	1	14%
Cayman Islands	3	43%
	7	

SICC

Home Jurisdiction	Count	%
Singapore	26	62%
England and Wales	7	17%
New South Wales	3	7%
Delaware	1	2%
Western Australia	1	2%
France	1	2%
British Columbia	1	2%
Hong Kong	1	2%
National Capital Territory of Delhi	1	2%
	42	

ADGM

Home Jurisdiction	Count	%
England and Wales	3	38%
Scotland	2	25%
Hong Kong	1	13%
New Zealand	1	13%
Victoria	1	13%
	8	

AIFC

Home Jurisdiction	Count	%
England and Wales	9	100%
	9	

*Percentages do not sum to 100 due to rounding.

TABLE 4:
COUNTRY OF LEGAL EDUCATION OF TRAVELING JUDGES EXCLUDING NON-COMMERCIAL ECSC AND THE GAMBIA—
JUNE 2021*

Country	First law degree	Percent first degree	At least one degree	Percent at least one degree
United Kingdom	45	71%	46	66%
Australia	8	13%	8	11%
United States	1	2%	7	10%
New Zealand	2	3%	2	3%
Canada	1	2%	1	1%
France	1	2%	1	1%
Greece	1	2%	1	1%
India	1	2%	1	1%
Kuwait	1	2%	1	1%
Malaysia	1	2%	1	1%
South Africa	1	2%	1	1%
	63		70	

*Percentages do not sum to 100 due to rounding. Table 4 corresponds to Figure 3.