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Article

New international commercial courts: a delocalized approach

Sean David Yates *

ABSTRACT

New international commercial courts can be analysed by examining how their features differ from those of their domestic counterpart courts and from those of international commercial arbitration. This conceptual tool is termed delocalization. Higher and lower levels of featural differences, or delocalization, may affect a new court's reception, whether local actors can participate in the new court and the new court's relations with the domestic courts. These factors influence the extent and speed of a new court's integration into the legal landscape as an institutional transplant. A delocalization analysis can also help track the new and domestic courts' continuing influence over each other and the adoption, sharing or abandonment of features over time.

INTRODUCTION

The emergence of new international commercial courts (New Courts) in the past decade and a half has significantly influenced international dispute resolution. The new venues provide options to disputing parties beyond those offered by their state domestic courts, including features usually associated with international commercial arbitration. These New Courts present themselves as 'international' not only in name but also by emphasizing features that distinguish them from their domestic or local court counterparts. The New Courts' self-designated international status warrants further consideration, however, to determine what 'international' really means. Is it an absolute characteristic, indicating complete autonomy from any nation-state, the sense in which international commercial arbitration is sometimes considered to be international; for example, by not being part of or administered by any particular state legal system, but rather being underpinned by and drawing legitimacy from international soft law, standards, and practices?[1] Or does international refer to the New Courts having features considered international, such as jurisdiction over cases involving foreign parties, or possessing a bench that includes foreign judges? Alternatively, is international a marketing tag or just a convenient description to distinguish between the New and the domestic

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[1] International Commercial Arbitration's claims in this respect can be challenged and are briefly considered in part two of this article.

State Courts?[2] Are the New Courts in fact merely 'domestic judicial institutions, albeit with specialist jurisdictions and distinct procedural rules?'[3] Further, can we say that the New Courts are all international in the same way, or are some more international than others?

This article proposes a new conceptual tool that provides deeper insight into the creation and operation of new international commercial courts. It uses the concept of delocalization, a term previously deployed in a narrow sense in the discussion of international commercial arbitration's independence from state courts,[4] and reformulates it to denote the extent of a New Court's differences from its local or domestic commercial court equivalent. Repurposed in this broader sense, delocalization becomes a measurable, feature-based tool providing the basis for a comparative analysis of a New Court's relations with its domestic counterpart, and with other New Courts.

In examining how the New Courts differ from their domestic counterparts, that is, how 'delocalized' they are, rather than how 'international' they are as compared to other New Courts, differences are identified that directly impact the New Courts and the legal landscapes into which they are introduced. International and delocalized are not suggested to be mutually exclusive characteristics as they attach to features. Rather, they are distinguished as different approaches towards comparative measurement, 'delocalized' having a more clearly defined anchor point—the local court—and being concerned with the differences between the two.[5] These differences directly affect factors which shape each New Court's development and ultimate integration,[6] including: the value of local stakeholder consultation both before and after the New Courts have been established; domestic legal actors' ability to participate in the New Courts; relations between the New Courts and the local courts; the New Courts' dependency on foreign legal actors and foreign law for their operation; the need for changes to domestic legislation for a New Court's creation; requirements to supplement legal education and training; and the effect on the enforceability of judgments.

The article, and the broader context of the research thesis from which it is drawn, purports to fill a gap in the academic literature surrounding the New Courts, by providing opportunities to gain further insight into traditional positions found in disciplines such as legal transplants, law family traditions, legal pluralism and comparative dispute resolution. It is hoped that this will, in turn, critically engage further interdisciplinary study, particularly among socio- and politico-legal scholars.

The article starts by considering what is meant by international, what metrics are relevant, and why the concepts of 'international' and 'delocalized' must be distinguished. The third

[2] The problematic nature of 'international' is acknowledged to require further consideration. Grout and Blair suggest this is due to their different judiciary, and different procedural rules from the domestic courts but also because they have been created to appeal to an 'international audience', typically parties beyond nationals of the jurisdiction in which they are established. Christopher Grout and Sir William Blair, 'The Role of International Commercial Courts in Commercial Dispute Resolution' in Stavros Brekoulakis and Georgios Dimitropoulos (eds), *International Commercial Courts: The Future of Transnational Adjudication* (CUP 2022) 29. The New Courts do not for instance come within the definition proposed by Wong for international judicial institutions: Denise H Wong, 'The Rise of the International Commercial Court: What is it and will it Work?' (2014) 33 CJQ 205 215. Walker suggests the international nature of London's Business and Property Courts attaches not to an external international standard of bench, procedure or law, but 'because they themselves have set the standard for international commercial litigation.' Janet Walker, 'A Comparative Perspective on International Commercial Courts' in Stavros Brekoulakis and Georgios Dimitropoulos (eds), *International Commercial Courts: The Future of Transnational Adjudication (Studies on International Courts and Tribunals)* (CUP 2022) 118.

[3] Grout and Blair ibid.

[4] Jan Paulsson, 'Delocalisation of İnternational Commercial Arbitration: When and Why it Matters' (1983) 32 ICLQ 53; Jan Paulsson, 'Arbitration Unbound: Award Detached from the Law of its Country of Origin' (1981) 30 ICLQ 358.

[5] A delocalized feature, for example, may or may not be international and vice versa.

[6] See Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies' (1998) 61 MLR 11, 28. Teubner better captures the continuing effect of legal reception in seeing the process as one of irritation, in which the incoming legal and existing social systems will irritate each other 'until an equilibrium is reached'. For Örücü, the mixing is always ongoing (Esin Örücü, *A General View of 'Legal Families' and of 'Mixing Systems*, vol 178 (Comparative law: A handbook, 2007) 177) and all legal systems 'forever in flux' (ibid.).

section will consider several New Courts to illustrate examples of different levels of feature-based delocalization. The fourth section draws from this analysis to identify the potential consequences of delocalization, including local legal actor participation and local court relations. In the concluding section, the proposition is made that at least two benefits flow from a focus on delocalization analysis.

DISTINGUISHING INTERNATIONAL AND DELOCALIZED

International commercial arbitration has historically been referred to as delocalized,[7] but critics of this position point to its ultimate reliance upon state courts at various stages of a dispute for its functionality and effectiveness. Mann suggested the attribution of 'international' to international commercial arbitration was a misnomer, because 'every arbitration is necessarily subject to the law of a given State'[8] and that '[w]hatever the intentions of the parties may be, the legislative and judicial authorities of the seat control the tribunal's existence, composition and activities.'[9] Brekoulakis highlights that,

> Almost every international and national legislation on arbitration is underpinned by the idea that an arbitration must be anchored in a state and that a national law must govern all aspects of the arbitration process.[10]

However, these observations question the use of international in the sense of statelessness, or absolute delocalization, devoid of any geographical connection, in the sense of complete autonomy from any state control, but this is not the sense in which it is used here to analyse the New Courts, all of which are situated within and ultimately subject to their host states.

The terms 'international' and 'delocalized' are not synonymous. Rather, in the context of the New Courts, and as used by them, 'international' appears to point to a combination of features deemed to characterize a venue as offering a dispute resolution process worthy of the title, albeit a combination which is very much open to interpretation, not least because the New Courts' offerings are not identical. In short, the New Courts use international in a deliberate act of plurisignation to suggest their sophistication, capability, jurisdictional reach and target user base. 'Delocalized', in contrast, is the measure of departure a New Court has taken from the features of its local court counterpart. Quantitative assessments of a court's international standing lead to definitional debate. For instance, Caserta and Madsen query whether the New Courts can truly be termed 'international' when they do not feature states or international organizations as parties.[11] This is again a narrow interpretation, limiting international to the Public International law sense. Ultimately, while limiting international courts to those dealing with states and international organizations, Caserta and Madsen concede that the international commercial courts do share a hybridity of features with those courts they believe to be truly international. There is less difficulty with the concept of delocalization, as it may accurately attach to any difference between the New Courts and their domestic court counterparts. More easily mapped, delocalization is conceptually measurable and produces an increased yield from a comparative analysis, particularly because it allows a

[7] Paulsson, 'Delocalisation of İnternational Commercial Arbitration' (n 4); Paulsson, 'Arbitration Unbound' (n 4).
[8] Francis A Mann, 'The UNCITRAL Model Law–Lex Facit Arbitrum' (1986) 2 Arb Intl 245.
[9] ibid.
[10] Stavros L Brekoulakis, 'International Arbitration Scholarship and the Concept of Arbitration Law' (2013) 36 Fordham Intl LJ 745, 28.
[11] S Caserta and M Madsen, 'Hybridity in International Adjudication: How International are International Courts?' (2020) SSRN 20.

measure to be taken at the point of entry of the New Court's establishment, and periodically thereafter to identify assimilation or continued differences between the courts' features.

Delocalization, as used in this article, is therefore concerned not with whether the New Courts are tied to or free from their host states but rather with how the New Courts' and local courts' features differ. To the extent that a New Court's feature differs from the local court's functional equivalent, I refer to such feature as having been 'delocalized'. For instance, if Arabic is the language of the local court, but the New Court uses English, the use of English is a 'delocalized' feature. It is by offering one or more delocalized features that the New Courts distinguish themselves from the local courts and seek to attract litigants. Not all differences between the New and local courts are of interest or would amount to delocalized features. For example, the number of courtrooms each has or whether or not they provide public WiFi would not constitute delocalized features, whereas the existence of pre-action injunctive relief provisions in the New Court's procedural rules, would be a delocalized feature were it not available in the local court. In any given study, differences between the New Courts and local courts become relevant and constitute delocalized features depending on the purpose and focus of the analysis.[12] Those delocalized features referred to in this article are offered as a starting point to illustrate the method's usefulness for casting a new perspective and providing the insights referred to above.

The definition can also be expanded to facilitate the tracking of changes within the local and New Courts. We thus have the starting point of local and delocalized features. Two additional uses of the terminology are proposed. First, where a delocalized feature, that is, a feature of the New Court that differs from the local court feature, is subsequently adopted by the local court, that feature is said to have been 'localized'. It is no longer a delocalized feature because the two courts now share the feature, but it should be distinguished from a 'local' feature because it was not present before the New Court was created and has subsequently been adopted for use in the local court. An example is seen in the Abu Dhabi Courts, which historically issued judgments only in Arabic, but following the New Court's establishment in Abu Dhabi,[13] now issue judgments in English if one or more parties are non-Arabic speaking.

The second additional usage applies to an instance where a New Court's delocalized feature is modified such that it mirrors or moves closer towards a local court feature, a reversion to the local standard. In such a case, I refer to the feature as having been 're-localized', so for instance, in the Dubai International Financial Centre (DIFC) Courts, the presence of foreign judges is a delocalized feature, but the subsequent increase in Emirati judges amounts to re-localization. The localized and re-localized tags attach to local and New Courts' features to indicate that they are similar but were once different. The use in this sense of the terms local, delocalized, localized, and re-localized allows for an initial mapping of featural differences between the New Courts and their local court counterparts and the subsequent tracking of these same features to see how the two courts influence each other. It is also a way to examine the outcomes of the New Court's introduction on the host state's wider legal landscape. In the legal transplants context, this terminology accommodates both Teubner's legal irritants metaphor and Örücü's concept of legal systems being in a state of constant flux.

Delocalization is therefore a relative conceptual tool for measuring differences between two courts within the same state[14] and is interested in identifying levels of difference between New and local courts and using this data to inform analyses of relations between

[12] Identifying differences is largely an objective exercise, whilst selecting data and their use is a more subjective process.
[13] The Abu Dhabi Global Markets Courts (ADGM Courts).
[14] Technically many of the New Courts are established in Trade-free zones, which are considered separate jurisdictions, but they are within the same State as the local courts they are being compared to.

courts, such as correlations between high levels of delocalization and low levels of local actor participation within the New Courts. Feature-based delocalization as a new conceptual tool for analysis goes beyond the geographical discussion, heeding Mattei's warning of the potential pitfall of reducing comparative law to 'a mere listing of more or less different black letter rules'.[15] Delocalization data may inform successful strategies by court architects for establishing New Courts and their successful integration within existing target legal environments.

THE NEW COURTS

The New Courts have provoked discussion, especially from practitioners in international law firms, extolling their 'expertise', who examine the features of a particular court, compare one or more New Courts and contrast their features with those of international commercial arbitration, with which the New Courts compete and, according to some commentators, which they complement.[16] Such comparative exercises increase awareness for the potential user-base and typically promote the New Courts as well as the writers, but the discussion for the most part remains positivist and doctrinal. Broader engagement applying delocalization as a measuring tool and applied across disciplines, I suggest, facilitates a contextual analysis of the New Courts, bringing into focus the wider stakeholders of the local legal regime. The importance of this is in the acknowledgement that users require not only a range of services and innovation but also a stable dispute settlement platform where legitimacy is underpinned by good domestic relations with local courts and their actors. Further, the analysis reveals major differences between the New Courts and that, behind their common aim of attracting litigating parties to their fora, they have fundamentally different starting points that render the playing field far from even.

The Gulf Courts and the SICC

Consider the following example. The Dubai International Financial Centre (DIFC),[17] Abu Dhabi Global Markets (ADGM),[18] and Qatar Financial Centre (QFC)[19] courts operate in English[20] and with common law-based procedural rules, whereas the domestic courts of their respective jurisdictions are civil law-based and use Arabic. The Singapore International Commercial Court (SICC)[21] also uses English language and common law-based procedures, but so does the Singapore High Court, of which the SICC is a Chamber.[22] The SICC is therefore less 'delocalized' than its Gulf counterparts in its use of English, as this is already an established feature of Singapore's domestic higher courts.

Another example can be seen in the New Courts' approach to representation by foreign counsel. In the SICC, foreign lawyers can only appear in offshore cases,[23] where a case has no connection to Singapore, largely preserving the restrictive rights of audience found elsewhere in the Singapore High Court. In the more delocalized Gulf Courts, in contrast, foreign-qualified lawyers with rights of audience in their home jurisdiction can appear before

[15] Ugo Mattei, 'Legal Systems in Distress: HIV-contaminated Blood, Path Dependency and Legal Change' (2001) 1 Glob Jurist Adv 3.
[16] Michael Hwang, 'Commercial Courts and İnternational Arbitration—Competitors or Partners?' (2015) 31 Arbitr Int 193.
[17] The Rules of the Dubai International Financial Centre Courts 2014 ('RDC 2014') Rule 2.2.
[18] ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015 ('ADGM Regulations 2015') pt 6, ch 1, Regulation 99(1).
[19] The Qatar Financial Centre Civil and Commercial Court Regulations and Procedural Rules, ('QFC Regulations') art 3.2.
[20] In the QFC, Arabic may also be used but English is the default.
[21] SICC Procedural Guide art 11.5.
[22] The SICC's procedural rules are a modified version of those used in the main Singapore Courts, but they are still common law based.
[23] ss 10.4.1 and 3.5.1 SICC Procedural Guide.

the New Courts, and indeed the majority of cases in the early years were advocated by foreign lawyers, given lower levels of professional English and common law procedural knowledge then possessed by local advocates. In the local courts of the UAE[24] and Qatar, rights of audience are restricted to locally qualified advocates, who must be nationals of the state.[25] The question might be asked whether a low level of delocalization really amounts to a New Court in anything other than name. If the parties will get the same judges, use the same counsel, and language, with slight changes to the standard procedural rules, could the same effect not have been achieved through an addendum to the existing procedural rules? Low levels of delocalization in New Courts might therefore be categorized more as a marketing strategy than innovative change.

An in-depth delocalized analysis must also identify those features of the local courts that are not found in the New Courts. These are particularly significant because, as elements of the local court framework, their absence may constitute a barrier to local actors' ability to participate in the New Court, just as much as features in the New Courts that are not part of the local courts (ie, delocalized features). For example, the local court expert system in the UAE involves the appointment of one or more experts from a register maintained at the Ministry of Justice in cases where the court deems such evidence will help it to reach a determination.[26] In practice, the appointment of such experts is extremely common, with evidence typically proffered beyond the expert's discipline and extending to opinions of fact and law. The transition for a lawyer or judge used to such an expert system to one in which experts, if used at all, will usually be party-appointed, independent and restricted to providing opinion evidence related to their discipline, is a significant one requiring a paradigm shift. The use of experts in the two systems is very different. This also of course impacts the expert community, used to working alongside the courts, finding there is a new environment where their findings are routinely tested by cross-examination.

Similarly, trials before the UAE local courts, typical of civil law systems, involve a series of hearings over the course of months in which documents and memoranda are submitted to the court by the parties, an expert is appointed and provides a report, following which the court deliberates and then issues a judgment. The condensed presentation of evidence, oral submissions, and live witness evidence in a single event found in common law systems is anathema to the local commercial dispute resolution process.[27] The two mechanisms for determining the disputes are therefore entirely different at a conceptual level, with manifest procedural differences necessarily resulting. Again, a legal actor, even if she acquires the requisite skills, cannot transfer the experience she has gained to date in the local court environment and is disadvantaged.

A final observation is to consider the value of distinguishing in some cases between delocalized features of a New Court that have a functional equivalent in the local courts, and those that do not. This helps answer the question of whether the first category should in fact be counted twice, once as a new, delocalized feature of a New Court and, secondly, as the absence of a local court feature in the New Court. An example of a functionally equivalent

[24] Effective from 2 January 2023, the UAE's new Civil Procedure Law, Federal Law 42 of 2022, may change this position, as it paves the way for 'specialist' mainland Courts to conduct proceedings in English. The new Advocacy Law, Federal Law 42 of 2022, also effective from 2 January 2023 envisages non-UAE nationals having rights of audience before the UAE local courts. Implementing Regulations are required to be issued by the Dubai Government to confirm the extent of their adoption of the Federal legislation.

[25] Local advocates are increasingly developing these skills but the majority of cases, as can be seen from law reports, involve foreign lawyers. See the DIFC Courts' Register of practitioners: <https://eregistry.difccourts.ae/#practitioners> accessed 21 January 2023.

[26] UAE Federal Law No 7 of 2012 On the Regulation of Expertise Before the Judicial Authorities.

[27] John H Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (SUP 2018) '[W]hat common lawyers think of as a trial in civil proceedings does not exist in the civil law world.' ch XVI, 115.

delocalized feature might be a different system of document discovery—each court has one, but they are different. Other delocalized New Court features may have no local court equivalent, such as a remedy of injunctive relief not found in the local court. Where there is functional equivalence between a delocalized feature of the New Court and a local court feature not present in the New Court, there is arguably a double barrier to local actor participation. Not only must the local actor learn the delocalized feature, but she must also come to terms with not being able to rely upon the local court feature with which she is familiar. The local feature must be 'unlearned'. In contrast, where there is no functional equivalence, the need is to learn the New Court's delocalized feature, and where there is an absence in the New Court of a local court procedure, the need is to learn to do without it. Where there is functional equivalence, it is necessary to do both of these things. The additional demands on local court advocates include possessing expertise in two systems and frequently switching between them, something foreign practitioners are not subject to, having no right to appear before the local courts. In the UAE, this adds to the already significant barrier of having to be bi-lingual to a professional level in both Arabic and English where New Courts operate in a different language.

How are existing local practitioners to acquire the requisite new skills? If local legal education prepares trainee lawyers for the local court process, must they travel abroad to train or should training in both systems be a mandatory requirement of local legal qualification? These are significant issues, and identifying relevant local court features that are absent from the New Courts is therefore an essential part of the delocalized analysis that can be used to augment legal education.

The Chinese International Commercial Courts

A brief analysis of several other New Courts' features reveals differing levels of delocalization between New Courts and their local court counterparts. The Chinese International Commercial Courts (CICC) provide an example of a low level of delocalization, despite their title.[28] Albeit some evidence may be given in English in the CICC,[29] proceedings are in Chinese, only Chinese licensed lawyers may represent parties,[30] and judges are drawn from the Supreme People's Court [31] of which the CICC is part.[32] As Holloway says of the CICC,

> The early announcements augur that an element of flexibility has been introduced to issues of language and evidence, but these do not suggest fundamental departures from the norms of Chinese procedural law.[33]

Chaisse and Qian suggest the CICC serves to multiply and diversify the dispute resolution fora in China but does not significantly alter the international landscape of dispute resolution.[34] This implies that in practical terms, the CICC goes little beyond offering a designated court for Belt and Road Initiative disputes, and an additional court to deal with an increased

[28] See Julien Chaisse and Xu Qian, 'Conservative Innovation: The Ambiguities of the China International Commercial Court' (2021) 115 AJIL 17 and Wei Cai and Andrew Godwin, 'Challenges and Opportunities for the China International Commercial Court' (2019) 68 ICLQ 869.

[29] Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court, issued by the Supreme People's court, 25 June 2018 and effective 1 July 2018, (CICC Regulations), art 9.

[30] Administration Regulations regarding Representative Offices of Foreign Law Firms in China, Art. 15 promulgated by the State Council on 22 December 2001 and effective as of 1 January 2002.

[31] Judges Law of the People's Republic of China, promulgated by the Standing Committee of the National People's Congress on 28 February 1995 and revised on 23 April 2019, art 12(1).

[32] CICC Regulations, art 1.

[33] David Holloway, 'The New Chinese International Commercial Court and the Future of Dispute Resolution in the Belt and Road Initiative' in Lei C and A Janssen (eds) *Dispute Resolution in China, Europe and World* (Springer 2020) vol 79, 51.

[34] Chaisse and Qian (n 28).

number of anticipated disputes, although as a marketing tool, it also plays a role in confidence-building, by signalling particularly to non-Chinese parties that disputes arising out of Belt and Road Initiative contracts can be determined according to more preferable procedures than found in the Chinese mainland Courts. The CICC example, with its low level of delocalization, again looks more like a repackaging of existing court offerings. Whether these courts and claimed new features are used by disputing parties will be the clearest indicator of whether the targeted international business community has been convinced.

International Chamber of the Court of Appeal of Paris

The International Chamber of the Court of Appeal of Paris (the Chambre Internationale de la Cour d'appel de Paris (CICAP)) was established following 41 proposals to effect changes to the current Courts made by a working group comprising 18 people,[35] under the supervision of Guy Canivet, former president of the French Supreme Court and member of the French Constitutional Court, published on 3 May 2017 and entitled 'Préconisations sur la mise en place à Paris de chambres spécialisées—pour le traitement du contentieux international des affaires'[36] ('the Canivet Report').[37] The CICAP, like the CICC, has a low level of delocalization. There is no provision for foreign judges or judges with common law experience to sit on the Courts. Parties can be represented by foreign lawyers before the new Chamber, but a member of the French Bar must accompany them at any hearing.[38] The party will, therefore, pay twice if availing of a foreign lawyer. Inside France, a similar mechanism was applied between the Tribunal de Grande Instance (or 'TGI' courts) and the Higher District Civil First Instance Courts. Rights of audience before the CICAP are not therefore delocalized, as they mirror those before the domestic courts in their adoption of the avocat postulant system. The reason for creating a New Court when so few changes are made may be found in the significance of the change itself, in this case, that there be some English language adoption in the CICAP.

The use of English before the new Chamber is considered in the Canivet Report[39] and identified to be subject to Article 2.1 of the French Constitution confirming French to be the language of the Republic, and also to Articles 110 and 111 of the Ordonnance de Villers-Cotterêts of 25 August 1539, which requires that court documents in legal proceedings are drafted in French.[40] The Court of Cassation treats the Ordonnance as a legislative act according to its developed case law in which it has determined that court judgments be provided in French. This is a public policy requirement and non-derogable. Accordingly, both CICAP and CDI[41] Protocols confirm that submissions and judicial decisions will be issued only in the French language, with an official English translation to be available at the losing party's cost.[42]

[35] Canivet Report, Annex 4. art 203-1 of Decree No 091-1197 of 27 November 1991, Organizing the Legal Profession. See also Guide to Procedure, 116.

[36] 'Recommendations for the Creation of Special Tribunals for International Business Disputes'.

[37] 'Rapport sur les chambres commerciales internationales' <http://www.justice.gouv.fr/rapport-chambres-commercialesinternationales/> accessed 30 September 2023.

[38] arti 203-1 (n 35).

[39] at paras 34–39.

[40] The original intention was to ensure court documents were provided in French as opposed to Latin, to make them accessible, and not to render one party disadvantaged before the Courts. See Canivet Report para 35.

[41] The High Court level chamber within the *Tribune de commerce de Paris*, the *Chambre de Droit International*.

[42] Protocols, arts 7. In Germany, an initiative in Frankfurt for an international commercial court faces similar issues as a result of German Law, which provides that the German language shall be the court's language, and only provides for a foreign language to be used in hearings. S.185 the Gerichtsverfassungsgesetz (GVG) <https://www.gesetze-im-internet.de/englisch_gvg/englisch_gvg.html#p0490> accessed 21 January 2023. The Frankfurt's International Chamber for Commercial Disputes likewise hears evidence in English but it otherwise follows the German Civil Procedure Code <https://ordentliche-gerichtsbarkeit.hessen.de/landgerichtsbezirk-frankfurt-am-main/landgericht-frankfurt-am-main/chamber-for-international-commercial-

The progress made by the Canivet Report, presented following significant public and stakeholder consultation, should not be underestimated, in the context of a conservative system unlikely to embrace swift reform, particularly in the use of English or the participation of foreign actors. The changes introduced in the CICAP may pave the way for further progressive reform but presently represent a low level of delocalization when compared with some New Courts. As arguably the least delocalized New Court considered in this article, might the CICAP's creation exemplify a practical solution to introduce some English usage into the French legal process that was too difficult to implement directly into the domestic courts?[43]

The Netherlands Commercial Court

The Netherlands Commercial Court (NCC), comprising the District Court and the Court of Appeal, are chambers of the Amsterdam District Court and the Amsterdam Court of Appeal. They conduct hearings and provide judgments in English, though the use of English is not as delocalized as may at first appear. There is no statutory provision requiring litigation before the Dutch courts to be conducted in the Dutch language.[44] Further, according to Bauw, 'In practice, courts already allow the use of other languages in proceedings, and judges regularly conduct hearings in German or English if required by a case.'[45] While it remains significant that NCC proceedings will, by default, be conducted in English, the parties may agree for proceedings to be in Dutch, an elective re-localizing provision.[46] In addition, the Rotterdam District Court already has special procedures for maritime, transport of international sale of goods contracts where proceedings are to be conducted in English.[47] For these reasons, the introduction of English is not as delocalized a feature as, for instance, it would be in France or Germany.[48] For judgments to be delivered in English, legislative change was, however, required.[49]

Similarly, NCC procedural rules changes, although promoted as international, embody a low level of delocalization. The Dutch Civil Procedure Code applies in full with some additional special rules.[50] Parties can agree to vary some standard rules regarding the value of certain categories of evidence,[51] for instance, the value given to a party's witness statement.[52] They may also agree on how costs should be dealt with in the case.[53] When considering whether the NCC Rules will influence the domestic civil procedure and practice in the Netherlands, Bauw observes,

disputes> accessed 21 January 2023. There is also in Germany the Cologne English Speaking Senate <https://www.olg-koeln.nrw.de/beh_sprachen/beh_sprache_EN/004_english-speaking_senate/index.php> accessed 21 January 2023. 'The Hamburg English-Speaking Civil and Commercial Divisions' <https://justiz.hamburg.de/gerichte/landgericht-hamburg/englischsprachige-verhandlungen> accessed 30 September 2023 and Berlin's International Chambers of the Regional Court <https://www.berlin.de/gerichte/landgericht/das-gericht/zustaendigkeiten/internationale-kammern/artikel.1039251.en.php> accessed 21 January 2023.

[43] Links between highly delocalised New Courts and non-democratic jurisdictions should be considered further but are outside the scope of this article.

[44] Eddy Bauw, 'Commercial Litigation in Europe in Transformation: The Case of the Netherlands Commercial Court' (2019) 12 Erasmus L Rev 15, 17.

[45] ibid.

[46] art 2.1.1. NCCR. In contrast, in the DIFC and ADGM Courts, the use of English is mandatory.

[47] 'Procedure Rules when opting to conduct legal proceedings in English' <https://www.rechtspraak.nl/SiteCollectionDocuments/Procedure-Rules-for-proceedings-in-English.pdf#search=civil%20procedure> accessed 21 January 2023.

[48] Subsequently, several German Courts have opened that can conduct proceedings in English. For example, the Stuttgart and Mannheim Commercial Court Stuttgart and Mannheim Commercial Court, 'Germany's first Commercial Court opens in Stuttgart and Mannheim' (*Stuttgart and Mannheim Commercial Court*, 2020) <https://commercial-court.de/en/press-news/detail?tx_news_pi1%5Baction%5D=detail&tx_news_pi1%5Bcontroller%5D=News&tx_news_pi1%5Bnews%5D=2&cHash=054d88ff3e6b110b41a4543367de7323> accessed 21 January 2023.

[49] art 31r of the Dutch Code of Civil Procedure.

[50] Bauw (n 44).

[51] art 8.3 NCC Rules of Procedure (NCCR).

[52] art 8.5.5 of the NCCR.

[53] art 10.2 NCCR.

> Since the turn of the millennium, modernisation of Dutch procedural law has already been heavily influenced by the civil procedural law of England and Wales, prompted mainly by the introduction of the so-called 'Woolf reform' of 1999.[54]

Procedural developments with a common law leaning were already, therefore, being adopted by the national courts. From a linguistic and procedural perspective, NCC's offering is difficult to distinguish from the domestic chambers.

The NCC has ten judges, six in the District Court and four in the Court of Appeal, all of whom are Dutch. Representation by foreign lawyers is limited to members of the Bar of an EU or EEA Member State or Switzerland. These categories of foreign lawyers can perform the same tasks as a Dutch lawyer, except acts of process, such as submission of a claim or defence, but they must work 'in conjunction with' a lawyer registered with the Netherlands Bar Association.[55] Other foreign lawyers may not represent parties before the NCC, 'but the court may allow them to speak at any hearing.'[56] Existing roles of judges and legal representatives therefore remain largely preserved, and so the NCC, it is suggested, demonstrates a low level of delocalization in the area of procedural changes. This is supported by an addition to the second edition of the procedural rules, which came into effect on 1 January 2021:

> The NCC applies the same laws as any other Dutch court. The proceedings are not that different from other courts in the Netherlands. However, the NCC relies more on case management in complex civil litigation, and is focused on international practices. All is done in English. A digital portal, eNCC, is used for all communication.[57]

The CICAP and NCC illustrate the benefit of the delocalized perspective over the 'international' nomenclature, as it highlights the extent to which they have departed from their local courts' practices to achieve their self-proclaimed international status. While the NCC's adoption of English for proceedings may appear to have gone beyond CICAP's offering, both venues represent low levels of delocalization.[58] This can be contrasted with the DIFC and ADGM Courts which, by adopting English Language as the sole language of proceedings, exemplify a high level of delocalization. All four courts therefore use English, but its significance in each case is different. Put another way, we might ask how far the New Court creator has gone to compete in this market for international disputes. Where a New Court's creation amounts to a restatement of existing local court features, is this best seen as a marketing exercise of a kind witnessed in several jurisdictions? Additionally, as I suggest in the case of the CICAP, can a New Court's creation be a means of implementing desired changes too difficult to achieve directly in the domestic courts? A further example of a New Court, seen through a delocalized analysis, is the AIFC Courts.

Astana International Financial Centre Court

In the Astana International Financial Centre Court (AIFC Court) the procedural rules are the AIFC Court Regulations, based on English Civil Procedure Rules, but the court

[54] Bauw (n 44).
[55] art 3.1.2 NCCR.
[56] ibid.
[57] The Netherlands Commercial Court, *Rules of Procedure for the International Commercial Chambers of the Amsterdam District Court (NCC District Court) and the Amsterdam Court of Appeal (NCC Court of Appeal)* (The Netherlands Commercial Court 2020) Annex I.
[58] Alcolea suggests Paris, Frankfurt and NCC have all opted for minor tweaks rather than major revisions of their judicial systems. Lucas C Alcolea, 'The Rise of the International Commercial Court: A Threat to the Rule of Law?' (2022) 13 J Int Disput Settl 413, 418.

has the flexibility further to adapt these to suit the facts and circumstances of the dispute.[59] Further potential for delocalization (or re-localization) is provided by the power given to the Chief Justice to issue, amend and revoke Court Rules and Practice Directions.[60] The AIFC Court Justices comprise English former judges and barristers.[61] Requirements for appointment include 'significant knowledge of the common law and experience as a lawyer or judge in a common law system'[62] and that 'the person can fluently speak and write in the English language.'[63] Justices are not required to be Kazakh nationals nor to reside in Kazakhstan and may hold other employment.[64] In contrast, judges in the national courts of Kazakhstan must be Kazakh nationals.[65]

All proceedings before the AIFC Court are in English.[66] In the local courts, the Kazakhstan Constitution stipulates that all state institutions use both Kazakh and Russian.[67] In the AIFC Court, rights of audience are given to qualified lawyers with a valid practicing certificate, and in some circumstances, only a law degree is required,[68] whereas only Kazakh-qualified lawyers, who must be Kazakh citizens, can conduct litigation and advocacy before the national courts of Kazakhstan.[69] Language, rights of the audience and the constitution of the judiciary are all therefore highly delocalized in the AIFC Court.

An unusual delocalized feature of the AIFC Court is the express declaration that it is not part of the Kazakhstani judicial system,[70] a factor with at least two apparent consequences. First, the AIFC Court's existence appears to be contrary to the Kazakhstan Constitution, which disallows any courts not established under the Constitution.[71] Secondly, this may have the consequence that holders of AIFC Court judgments are unable to avail of enforcement treaties entered into by the Republic of Kazakhstan.[72]

The AIFC Regulations also stipulate a 6-year limitation period in which claims must be brought,[73] which breaks from the 3-year period found in the Kazakhstan Courts. This may have the effect of diverting disputes away from the national courts if dominant parties to a transaction wish to impose the longer limitation option. The AIFC therefore displays a high level of delocalization, closer to that of the UAE New Courts than those of France, the Netherlands or Singapore. The two groupings are indicative not only of the New Courts' architects' intentions but also perhaps of the limits of what was feasible in their various jurisdictions.

This brief overview of a delocalized topography differentiates the New Courts in a novel way. They have hitherto been viewed in terms of their similarities and differences, both between themselves and with international commercial arbitration, which has the effect of artificially grouping them together in the same competition for international disputes, as if they had a common starting position. Rather, their successful participation in this race will be

[59] s 29(1)(c) AIFC Court Regulations (AIFC Regulations).
[60] s 30(1) and 30(2) AIFC Regulations.
[61] 'Who we are' <https://court.aifc.kz/en/who-we-are/> accessed 30 September 2023.
[62] s 12(6)(b) AIFC Regulations.
[63] ibid.
[64] ibid.
[65] art 79 The Constitution of the Republic of Kazakhstan (the 'Kazakhstan Constitution').
[66] s 31(2) AIFC Regulations.
[67] art 7.2 of the Kazakhstan Constitution.
[68] 'Rights of Audience' <https://court.aifc.kz/en/rights-of-audience/> accessed 30 September 2023.
[69] 'Doing legal business in Kazakhstan' <https://www.lawsociety.org.uk/topics/international/doing-legal-business-in-kazakhstan> accessed 30 September 2023.
[70] art 13(2) AIFC Constitutional Statute. In contrast, the DIFC Courts are part of the Dubai legal system, being Courts of original jurisdiction. See Dubai Cassation No 8/2020 (Judicial Tribunal).
[71] art 75(4) of the Constitution of Khazakhstan. An amendment to the Constitution was made to allow the creation of the AIFC, but did not refer to the Courts. Ilias Bantekas, 'The Rise of Transnational Commercial Courts: The Astana International Financial Centre Court' (2020) 33 Pace Intl LR 1, 21.
[72] ibid.
[73] s 36 AIFC Regulations.

determined not only by their variety of features but also by the course of each New Court's integration into its domestic legal landscape. In short, to help attain stability which can in turn increase commercial certainty, the New Courts must cultivate, form and maintain positive relations with domestic courts and other dispute resolution fora, such as international commercial arbitration, to achieve their own optimal functionality. The next section considers how the management of delocalization levels plays a significant part in shaping these relations.

THE EFFECTS OF DELOCALIZATION

We have seen how comparing international features of various New Courts gives an impression of overall similitude, but how contrasting the extent of their delocalization gives a more granular insight into how differently they are likely to function within their domestic environments from the local courts. This may impact how much support they receive from the local courts, and how predictable and straightforward the process of obtaining and enforcing a judgment might be.

Language and law family type

Language and law family tradition differences between a New Court and its domestic counterpart significantly impact the constitution and early operation of a New Court. Delocalization, particularly of language, may preclude the participation of local actors in the New Courts, creating a dependency on foreign judiciary and legal practitioners for their operations, as well as undermining the New Court's legitimacy in the eyes of domestic legal stakeholders. In the Gulf New Courts as well as in the AIFC Courts, where proceedings are conducted in English, many local advocates do not have the requisite English language skills to advocate or deal with English language sources of law. The acquisition of a new language to the professional standard required to conduct proceedings, or to sit and hear cases, is unrealistic for most who would otherwise have looked to participate in the New Courts.

Similarly, a lack of familiarity with a common law-based procedural environment involving oral advocacy, witness handling and case law precedent restricts access to a New Court until formal training is undertaken, an exercise amounting to legal re-qualification. Even where there is a willingness to undergo such training, this is dependent upon the availability of relevant courses aimed at civil law-trained practitioners, that can be taken while they continue to practice before the domestic courts.

In the case of the DIFC Courts, it was many years before training was offered for local practitioners looking to acquire common law and advocacy skills. The DIFC Court's 'first Emirati lawyers' event' was held in 2012, some 6 years after the DIFC Courts opened.[74] This is despite earlier calls for such a move.[75] The event introduced Emirati lawyers to the DIFC Courts and to the common law system, and coincided with a memorandum of understanding being signed between the DIFC Courts and the Judicial Training Institute of the Ministry of Justice 'to provide training in common law system for Emirati lawyers as part of their qualification process'.[76] Criticism was made that the organizers did not address the use of Arabic, even though it was debated amongst the attendees. The two Arabic-speaking DIFC Court

[74] Habib Al Mulla, 'Arabic Deserves a Fair Hearing in DIFC Courts' *Gulf News*, UAE (13 March 2012) <https://gulfnews.com/business/analysis/arabic-deserves-a-fair-hearing-in-difc-courts-1.993433> accessed 21 January 2023.

[75] Diana Hamade, 'Expansion of DIFC Courts Introduces a New Set of Choices' (*The National*, 2011) <https://www.thenationalnews.com/expansion-of-difc-courts-introduces-a-new-set-of-choices-1.595774> accessed 21 January 2023. '[T]he DIFC courts should engage with the local courts and practitioners in building the awareness of judges, lawyers, legislators and academics about the distinct legal traditions of each system.'

[76] Al Mulla (n 74).

judges are said to have supported the idea of introducing Arabic. An Emirati practitioner with experience of representing clients in both the Dubai and DIFC Courts identified language and education as key reasons for the 'chasm' between local and international practitioners and their differing systems.[77]

More recently, established New Courts have learnt from this experience and have provided training to local practitioners much earlier. For example, the AIFC Academy of Law and the Kazakhstan Bar Association signed a memorandum of understanding on 12 December 2019 as background for further cooperation and presently offer education programs for undergraduate students to familiarize them with the AIFC legal framework, dispute resolution, financial services regulation, the Astana International Exchange and Islamic finance.[78]

Delocalization of language and law family tradition must therefore be sensitively managed; otherwise, relations between the New and domestic courts may cause functional problems for both courts. There may typically still be reliance by standalone courts on domestic courts for local enforcement purposes, as the infrastructure for the execution of judgments often remains with the state court system. Management of relations may include a genuine stakeholder consultation before the New Court is established and should continue once it is in operation. The DIFC Courts did not undertake such an exercise, perhaps because they were initially intended to have jurisdiction only within the economic free zone in which they are situated. However, when their jurisdiction expanded to include opt-in participation,[79] again without any publicly disclosed prior consultation, they were in direct competition with Dubai's onshore domestic courts, and domestic practitioners were understandably affected. Opposition was acknowledged by a local practitioner in the national press, recording local lawyers' views that the DIFC's opt-in jurisdiction was 'unnecessary' and 'unfair to local courts' and, moreover, suggested 'inadequacy' of the general judiciary.[80] In contrast, those New Courts demonstrating a low level of delocalization, and that engaged in prior public consultation appear to have avoided such criticism.

Local relations between new and existing courts

The DIFC Courts further sought to expand their function by purporting to act as a conduit jurisdiction whereby foreign judgments and awards could be recognized, paving the way for subsequent enforcement in the local Dubai Courts onshore.[81] In the case of judgments, this circumvented the limited ability of foreign judgment holders to enforce within Dubai and the UAE under domestic legislation,[82] and in the case of awards, denied the Dubai Court its prerogative to refuse enforcement under the New York Convention Article V exceptions, including that of public policy, which had previously been exercised. This led to some disputing parties seeking to avoid determination by the DIFC Courts by issuing proceedings in the Dubai Courts to challenge the DIFC Courts' jurisdiction. The effect was to pitch the DIFC and Dubai Courts directly against each other.[83] Consequently, the Joint Judicial Tribunal was established in 2016 to determine which court had jurisdiction[84] in a given case and as at

[77] Diana Hamade, 'Lawyers have to Bridge the Gap in a Split Legal System' (*The National*, 2011) <https://www.thenationalnews.com/opinion/comment/lawyers-have-to-bridge-the-gap-in-a-split-legal-system-1.415469>accessed 21 January 2023.

[78] 'AIFC Foundations Programme' <https://aol.aifc.kz/en/aifc-foundations-programme/> accessed 30 September 2023.

[79] Dubai Law No 16 of 2011, amending Dubai Law No 12 of 2004 by introducing the new art 5A(2).

[80] Hamade (n 75).

[81] Under art 7(6) of the Judicial Authority Law and art 24(1)(a) of the DIFC Court Law (DIFC Law No 10 of 2004).

[82] art 235 of the UAE Civil Procedure Law, to be read in conjunction with art 235(2)(a).

[83] Erie describes DIFC Courts' approach as showing an element of 'cultural hubris', adding to an already volatile mix: 'All of the qualities that have made the DIFC Courts stand out as a venue-its cosmopolitan bench, drive for technology, and global visibility, in short, its elitism-are fodder for discontent.' Matthew S Erie, 'The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution' (2019) 60 Va J Intl L 225.

[84] Established pursuant to Decree No 19 of 2016.

the end of March 2021, it had issued 37 determinations in just 5 years. The Joint Judicial Tribunal comprises three DIFC Courts judges and four Dubai Courts judges, with the Chairman being a Dubai Courts' judge. Its composition ensures that if there is a disagreement between the courts' representatives along institutional lines, the Dubai Courts will prevail. The development has caused a high level of uncertainty for parties using the DIFC Courts, which might have been avoided if the two Dubai Courts had worked together to clarify jurisdictional limits. This illustrates how a high level of delocalization, if unmanaged, can lead to direct conflict that interferes with the normal operations of both courts. A detailed analysis of the Judicial Tribunal's decisions is outside the scope of this article.[85] However, the nature of jurisdictional demarcation that has arisen from its decisions is such that it could have been set down in foundational or co-authored guidance for users much earlier, saving cost and uncertainty over half a decade.

This position arose despite an apparent awareness of the need to involve the domestic courts and practitioners in decision making. Amna Al Owais is said to have been particularly aware of the need to secure local 'buy-in'.[86] The question posed by the DIFC Courts is whether its experience is an inevitable consequence of a high level of delocalization or if it has more to do with the process of implementing the New Court and sensitivity towards the existing legal landscape.

The DIFC Courts have also experienced significant re-localization. In 2018, three people responsible for steering the DIFC Courts' strategy up to that time, left their roles. Chief Justice Michael Hwang and Deputy Chief Justice Sir David Steel both retired and the Chief Executive of the DIFC Courts and former Registrar, Mark Beer, also left; he had previously been superseded in his long-term role of Registrar by the Deputy Registrar, Amna Al Owais, a UAE National. The view is recorded that, given the DIFC Courts are part of the Dubai Courts' system and, as UAE actors now have more familiarity with common law practices, 'the Courts should have Emiratis in-charge':

> For those in support of this position, it is ultimately a matter of sovereignty. While the Dubai government respects, values, and welcomes those from other countries, there is a feeling among some that a better balance must be struck so that the Emirate can remain strongly independent, prosper, and, in this situation, administer its own judicial affairs with its own citizens leading the way.[87]

On 8 February 2021, four new judges were appointed to the DIFC Courts, two to the DIFC Court of Appeal, Lord Glennie from the Scottish Court of Session and Sir Peter Gross a former English Court of Appeal judge, and two Emirati judges to the DIFC Court of First Instance, Nassir Al Nasser and Maha Al Mheiri, both formerly Small Claims Tribunal judges in the DIFC Courts.[88] In the same press release, two new initiatives were announced, the Advocates Mentorship Programme, and the Emirates Development of Judicial Excellence (EDJE),designed specifically to fulfil a three-tier strategy of:

[85] See P Coates, 'Further Development of the Judicial Tribunal jurisprudence' (*Clifford Chance*, 2019) <https://www.cliffordchance.com/content/cliffordchance/briefings/2019/09/further_developmentofthejudicialtribuna.html> accessed 21 January 2023, 9.

[86] ibid.

[87] Jayanth K Krishnan, *The Story of the Dubai International Financial Centre Courts: A Retrospective* (Books & Book Chapters by Maurer Faculty, 2018) 104. <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1199&context=facbooks>

[88] The DIFC Courts' founding laws assume one class of 'judge', who may be assigned on any case to either the Court of First Instance or the Court of Appeal.

i) increasing the number of Emiratis within the organization;
ii) developing and retaining talent, and
iii) incubating new talent through graduate programmes.

This development followed 'extensive feedback from practitioners and stakeholders' and 'will serve to develop the UAE national workforce and enhance the competitiveness of Emirati legal professionals.'[89] The question can again be asked whether the re-localization drive is a consequence of a too high level of initial delocalization or is triggered by the way the initial implementation took place. Alternatively, is there no connection between them?

The DIFC Courts now have 14 justices, five of whom are Emirati. The career experience difference between the foreign and Emirati judges is stark. Among the foreign judiciary are three former Chief Justices (of Malaysia and Australia), three Court of Appeal Judges (England, Scotland, Australia), and two senior English High Court Commercial Judges, each with over 40 years of professional experience. Three Emirati judges were promoted from the DIFC Courts Small Claims Tribunal, their first judicial appointment, the other two are former Public Prosecutors with, respectively, 7 and 10 years as Dubai Court judges before their appointments as DIFC Courts Justices. What impact this will have on the quality of decisions and the perception of independence among DIFC Courts' users remains to be seen, particularly when judicial quality is a primary motivator in dispute venue selection.[90] One possibility is that it will push disputing parties back towards international commercial arbitration, where more control can be retained over who sits on the case, and appointees can be selected according to criteria including past experience and reputation.

Finally, further re-localization of the DIFC Courts took place when in April 2021, Dubai Law 5 of 2021[91] was issued, replacing the DIFC Founding Law[92] under which the DIFC and its principal entities, including the DIFC Courts, are established. This created the new role of Director of the DIFC Courts,[93] and from 1 September 2021, the role was filled by the Deputy Chief Justice, the Emirati Judge, HE Justice Omar Al Mheiri.[94] The new law further declared the Courts to be composed of separate judicial and administrative bodies[95] and gave general supervision of the Courts' administrative affairs to the Director,[96] the Chief Justice retaining general supervision of all judicial affairs.[97] Hitherto, no distinction had been made between the Courts' administrative and judicial functions, with the Chief Justice discharging both.[98] Significantly, this included the appointment of all relevant staff,[99] which would include senior roles such as the Courts' Registrar. However, under Dubai Law 5 of 2021, the Director now has the power to appoint and terminate administrative staff and senior executives, which includes the Registrar.[100]

[89] <https://www.difccourts.ae/media-centre/newsroom/ruler-of-dubai-appoints-new-judges-to-the-difc-courts> accessed 21 January 2023.
[90] In the 2005 UK Ministry of Justice Report, 'Factors Influencing International Litigants' Decisions to Bring Commercial Claims to the London Based Courts' key findings as to why London was used included 'First and foremost, the reputation and experience of English judges' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/396343/factors-influencing-international-litigants-with-commercial-claims.pdf> accessed 21 January 2023, 2.
[91] Law No (5) of 2021 Concerning the Dubai International Financial Centre ('Dubai Law 5 of 2021').
[92] The Law of the Dubai International Financial Centre No (9) of 2004.
[93] Dubai Law 5 of 2021, art 14(h).
[94] 'Deputy Ruler of Dubai H.H. Sheikh Maktoum Bin Mohammed Al Maktoum appoints new Director to the DIFC Courts' <https://www.difccourts.ae/media-centre/newsroom/deputy-ruler-dubai-hh-sheikh-maktoum-bin-mohammed-al-maktoum-appoints-new-director-difc-courts> accessed 30 September 2023.
[95] Dubai Law 5 of 2021, art 14(b).
[96] Dubai Law 5 of 2021, art 16(a).
[97] Dubai Law 5 of 2021, art 15(a).
[98] Dubai Law 9 of 2004, art 8 – Second.
[99] Dubai Law 9 of 2004, art 8 – Second, 5(e).
[100] Dubai Law 5 of 2021, art 15(a).

Whether these changes are aimed at functional streamlining, to allow the Chief Justice to focus on the judicial function is not stated. Nor is it known whether selective administrative duties were in reality already being delegated by the Chief Justice, though the power to delegate is also expressly provided under a separate provision, should the need arise.[101] The legislative changes introduced by Dubai Law 5 of 2021 therefore represent a significant reduction of the Chief Justice's overall powers over the Courts' operations. The 'running' of the DIFC Courts (including the fees charged to the public)[102] has effectively been descoped from the Chief Justice's remit and is now Emirati led, by the bestowal of the Director role onto one of the local judges, who retains his judicial function. Krishnan's observations of the view that 'the Courts should have Emiratis in-charge'[103] appear prophetic. The tracking of these changes over time using the delocalization analysis introduced in this article may identify isolated regional dynamics that are unlikely to recur, but may also augur predictable outcomes given identifiable triggers once sufficient data is available, as found by Berkowitz and others in their study of how legal transplants were implemented across multiple jurisdictions.[104]

The direction of the DIFC Courts is toward re-localization or absorption, not (yet) in procedure or language, but certainly in judicial nationality balance and court operations. This contrasts with the ADGM, AIFC, and QFC Courts, all of which maintain an entirely foreign bench and foreign Registrars.[105] Whether this re-localization was always planned by the DIFC Courts or has been influenced by the historically fraught relations between the two Dubai courts can be debated, but the DIFC Courts' trajectory evidences significant re-localization not yet seen in other New Courts. The possible reasons for this might be the subject of further study, along with a review of how re-localization should be achieved or managed. For instance, it should be considered whether the re-localization of any court feature should also be subject to prior public consultation. It is, after all, a featural change affecting the New Court's user base and community as much as the delocalization occurring when the New Court is formed. The new delocalization analysis allows us to see this appointment of local judges as a re-localization event and to measure its effects on the courts' relations and changes to the overall landscape that follow.

BENEFITS OF A FOCUS ON DELOCALIZATION

A large body of academic discourse considers legal tradition differences to be diminishing, and points to international codification, model laws, and dispute systems blending to the extent that any residual differences have little significance.[106] Previous sections of this article illustrate law family differences continue to operate, for instance, by limiting participation in the New Courts when delocalization includes adopting foreign procedural law. The differences between systems are therefore still relevant.

A second way in which legal tradition differences are still relevant is in acknowledging that delocalization levels constantly change, and are frequently renegotiated and shifting, in keeping with Örücü's view that all legal systems are essentially mixed and in a permanent state of

[101] Dubai Law 5 of 2021, art 15(b). There was no corresponding provision under Dubai Law 9 of 2004.
[102] Dubai Law 5 of 2021, art 16(a) 5.
[103] Krishnan (n 87).
[104] Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, 'Economic Development, Legality, and the Transplant Effect' (2003) 47 Eur Econ Rev 165.
[105] In June 2020, however, the ADGM Courts announced a programme to help Emirati lawyers become judges <https://www.thenationalnews.com/uae/courts/adgm-courts-rolls-out-programme-to-help-emirati-lawyers-become-judges-1.1031809> accessed 21 January 2023. This may be seen as a re-localisation but it is not at the accelerated pace seen in the DIFC Courts.
[106] James Gordley, 'Common law und civil law: eine überholte Unterscheidung' (1993) 1 Zeitschrift für Europäisches Privatrecht; Holger Spamann, 'Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law' (2009) BYU LR 1813, 1814; Mariana Pargendler, 'The Rise and Decline of Legal Families' (2012) 60 AJCL 1043.

continued mixing.[107] The New Courts may also influence local court practices. In 2018, the Abu Dhabi Courts' procedures were amended to require plaintiffs in civil and commercial cases involving non-Arabic-speaking defendants to translate case files into English for the defendants' benefit.[108] According to the report, English was added as 'a second official language', which acknowledged that seventy per cent of the UAE population are non-Arabic speakers and that the Emirate wished to encourage foreign investment. Specific reference was also made to the existence of the ADGM Courts as English-language courts established in the previous year.[109]

Further study should be made into the new mimetic effect of local courts adopting features of the New Courts (localization), and whether its presence is more prevalent where there are high levels of delocalization. This would seem intuitive given that in low delocalization scenarios the New and local courts already have similar features, but equally possible is that high levels of delocalization keep the two systems operating in different spheres, with different trajectories.

The New Courts also provide insight into legal transplants, both of law and institutions. For example, we might revisit the findings of Berkowitz and others, who, in a study of 49 countries that had historically experienced legal borrowing, concluded that 'the way in which the law was initially transplanted is a more important determinant of legality than the supply of a particular legal family.'[110] Can high levels of delocalization be successfully managed? What part can language and law school play in this discussion? Does a higher level of delocalized features correlate merely to an extended time for integration, or can it disrupt a legal system's path dependency, perhaps creating a new one?

The realization that both civil and common law-style approaches have merit and that individual cases may benefit from a hybrid approach of traditional methods may start in legal education, where individual and collective preferences are typically formed. Some courses, such as the Chartered Institute of Arbitrators' training modules, now introduce comparative examples 'to consider both common and civil law jurisdictional principles to give a solid grounding to all practitioners.'[111] The challenge for legal education is to prepare future practitioners for practice not just in the domestic context or within the confines of a single tradition but for integration into an increasingly international context. An increase in delocalized content, that is increased consideration and awareness of other legal systems, may help achieve this aim, enabling legal professionals to operate more effectively across jurisdictions.

Further consideration should be given to Örücü's view that all legal systems are in perpetual flux. What limitations does this place on delocalization's ability to measure differences if they are constantly changing? It also questions whether Teubner's idea of eventual equilibrium can be attained, or even identified. Continuous change does not however preclude snapshots being taken at the point of entry when a New Court is established. Further, subsequent delocalization measurements allow for continued mapping of the New and domestic courts' co-evolution, assimilation or continued divergence.

As a measurement tool, delocalization can also assist the analysis of outcomes and impact of a New Court's creation on the wider legal context. Attempts to declare the 'success' of a transplanted body of law or institution face definitional uncertainty as to what is meant by success, as well as problems with the identification and quantification of relevant metrics.

[107] Örücü (n 6).
[108] 'Abu Dhabi courts to introduce compulsory English translations in first for region' <https://www.thenationalnews.com/uae/courts/abu-dhabi-courts-to-introduce-compulsory-english-translations-in-first-for-region-1.789440> accessed 21 January 2023.
[109] ibid.
[110] Berkowitz, Pistor and Richard (n 104).
[111] CIArb Law of Obligations handbook, 2018. Copy on file with the author.

The reductionism involved in narrowing these metrics, such as how many cases the court has dealt with or how profitable it has become, leads to statistics that may interest economists, but which leave other factors unexamined, such as the new law or institution's impact on the legal profession or pre-existing legal landscape.

Delocalization may look at assimilation levels and measure elements of convergence and divergence of identified features. Assimilation in the case of a New Court may take place by existing courts adopting or moving towards the New Court's newly introduced features, localizing them, or the opposite, by the New Court re-localizing its features over time. Alternatively, the New and existing courts may remain distinct and separate, assimilation being evidenced by the integration of the New Court into the new context by a reshuffling of jurisdictional lines and roles. More commonly, all of these changes might be seen. Delocalization as a tool allows the tracking of shifting differences which, over time, may reveal a broader overview of a New Court's impact and whether similar patterns can be observed in other jurisdictions. We have seen how in the case of the highly delocalized DIFC Courts, observable re-localization has taken place in respect of some of the Courts' operations and of its judicial composition. Over time, consideration might be given not only to whether other highly delocalized New Courts experience similar re-localization shifts, but also whether New Courts with low levels of initial delocalization, such as CICAP, the NCC, and SICC offer further delocalized features.

Finally, legal systems manifest a high degree of path dependency tied to language, as in the case of the French Courts, by precedent in common law systems and long-standing codes in civil systems.[112] A delocalized analysis of a New Court can reveal over time whether its introduction caused or contributed to any break in the path-dependent features of the local court, and consequently upon sources of law, legal training and regulation of the legal profession. These data can assist architects of future New Courts, as well as custodians of local court reform to accelerate necessary changes to other aspects of the legal system which elsewhere have proven necessary or even advantageous.

CONCLUSION

This article has suggested that we should consider how delocalized New Courts are compared to the national courts or chambers of their host states. The conceptual analysis method introduced is more measurable than an account of a New Court's international features, and a better predictor of the support it is likely to receive from local actors. It also considered what steps should be taken to mitigate the potential effects of a high level of delocalization. As a case study, the UAE New Courts present both positive and negative exemplars of how supportive local relations might be maintained even with high delocalization. The DIFC Courts may be especially valuable in future studies because they have been established longer and so provide most data concerning their local relations. Whether other New Courts experience the same or different dynamics might be reviewed to identify predictable patterns and trigger causes.

How a delocalized perspective of the New Courts can add to existing scholarship was also considered, and examples were provided, including opportunities to reconsider legal transplants and the continued relevance of different legal traditions. The necessity of imparting multi-jurisdictional awareness to future international lawyers as part of legal education and training or emerges as one of the lessons of the highly delocalized Courts of the Gulf and Kazakhstan.

[112] Teubner suggests legal institutions' resistance to legal transfer is connected to extra-legal factors, such as links to economic processes, technology, health, science, or culture, all constituting different social worlds. Teubner (n 6).

Timing is also important, with the opportunity to review empirical data immediately before and upon formation of the New Courts providing primary evidence of initial and subsequent attitudes of local actors on the new delocalized institutions. Legal diffusion may take place quickly or slowly over years or decades but seldom in so focused a manner as the New Courts provide. Opportunity should therefore be taken to record snapshots before absorption takes place and Teubner's 'equilibrium' is reached.[113]

The proliferation of New Courts, as standalone entities or as distinct chambers within existing courts, suggests more widespread adoption of similar models will soon not only be seen as acceptable but as an essential feature of a state's legal regime. As the number of international commercial disputes continues to rise, courts must evolve, and rather than overhaul large parts of an existing system, a discrete court or chamber achieves change for a state while placating conservative elements that might resist the same changes being made in the domestic courts. This prospect of further delocalized venues within states makes engagement with some of the issues raised in this article even more valuable, to achieve cogency in terms of outcome analysis that might otherwise be lost if we spend all of our energy determining who is winning the race.

[113] ibid.