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Feature Articles

Student Articles

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International Focus at
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Curriculum

Loyola University Chicago School of Law provides an environment where a global perspective is respected and encouraged. International and Comparative Law are not studied only in theoretical, abstract terms but primarily in the context of values-based professional practice. In addition to purely international classes, courses in other disciplines – health law, child and family law, advocacy, business and tax, antitrust, intellectual property – have strong international and comparative components.

International Centers

The United Nations has designated Loyola Chicago School of Law as the home if it's Children's International Human Rights Initiative. The Children's International Human Rights Initiative promotes the physical, emotional, educational, spiritual, and legal rights of children around the world through a program of interdisciplinary research, teaching, outreach and service. It is part of Loyola's Civitas ChildLaw Center, a program committed to preparing lawyers and other leaders to be effective advocates for children, their families, and their communities.

Study Abroad

Loyola's international curriculum is expanded by its foreign programs and field study opportunities:

International Programs

- A four-week summer program at Loyola's permanent campus in Rome, Italy, the John Felice Rome Center, focusing on international and comparative law
- A two-week summer program at Loyola's campus at the Beijing Center in Beijing, China focusing on international and comparative law, including a semester long course in the spring to educate students on the Chinese legal system

International Field Study

- A ten-day, between-semester course in London on comparative advocacy, where students observe trials at Old Bailey, then meet with judges and barristers to discuss the substantive and procedural aspects of the British trial system. Students also visit the Inns of the Court and the Law Society, as well as have the opportunity to visit the offices of barristers and solicitors.
- A comparative law seminar on *Legal Systems of the Americas*, which offers students the opportunity to travel to Chile over spring break for on-site study and research. In Santiago, participants meet with faculty and students at the Law Faculty of Universidad Alberto Hurtado.
- A one-week site visit experience in San Juan, Puerto Rico, students have the opportunity to research the island-wide health program for indigents as well as focus on Puerto Rico's managed care and regulation.
- A comparative law seminar focused on developing country's legal systems. The seminar uses a collaborative immersion approach to learning about a particular country and its legal system, with particular emphasis on legal issues affecting children and families. Recent trips have included Tanzania, India, Thailand, South Africa, and Turkey.

Wing-Tat Lee Lecture Series

Mr. Wing-Tat Lee, a businessman from Hong Kong, established a lecture series with a grant to the School of Law. The lectures focus on an aspect of international or comparative law.

The Wing-Tat Lee Chair in International Law is held by Professor James Gathii. Professor Gathii received his law degree in Kenya, where he was admitted as an Advocate of the High Court, and he earned an S.J.D. at Harvard. He is a prolific author, having published over 60 articles and book chapters. He is also active in many international organizations, including organizations dealing with human rights in Africa. He teaches International Trade Law and an International Law Colloquium.

International Moot Court Competition

Students hone their international skills in two moot competitions: the Phillip Jessup Competition, which involves a moot court argument on a problem of public international law, and the Willem C. Vis International Commercial Arbitration Moot, involving a problem under the United Nations Convention on Contracts for the International Sale of Goods. There are two Vis teams that participate each spring in an oral argument involving an international moot arbitration problem. One team participates in Vienna, Austria against approximately 255 law school teams from all over the world, and the other team participates in Hong Kong SAR, China, against approximately 80 law school teams.

Acknowledgments

We would like to recognize friends and alumni of the law school who have contributed within the past year to our international law program at Loyola University Chicago by their support of the Willem C. Vis International Commercial Arbitration Moot Program:

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Effects of European Soft Law at National Administrative Courts

Andras Kovacs, Tihamer Toth, Anna Forgacs*

Introduction

The aim of this article is to analyze the extent to which soft law issued by the European Union ("EU") Commission is 'hardened' in administrative court procedures at a Member State level, whether national courts recognize the legal effects of soft law, and whether national courts can properly deal with the coexistence of

* The authors are Andras Kovacs, Tihamer Toth, and Anna Forgacs. The authors would like to thank to Ernő Várnay and Sebastian Ishiguro for their comments.

soft and hard law.[1] References to EU soft law instruments at national level are most common in administrative law cases, especially in cases involving competition law, regulated markets, environmental law, and consumer protection law.[2] Most of our professional experience with EU soft law derives from Hungarian administrative law jurisprudence, however, we will examine similar cases from other EU Member States for comparison.

The first part of the study provides a brief overview of the definition, classification and legal effect of various EU soft law instruments, while the second part explores whether formal and informal soft law instruments produce different legal and practical effects through an examination of telecommunication regulatory cases and experience gained in EU competition law enforcement. We will observe the extent to which law enforcers and judges can deviate from soft law norms. These sector specific insights will lead us to conclude that EU soft law is practically treated as binding law before national administrative courts.

Finally, we suggest that the constitutional problems arising from this hardened role of EU soft law in national administrative courts could be cured by extending and improving the preliminary ruling procedure.

1. The Definition and the Legal Nature of Soft Law

1.1. Hard and Soft Law

When law enforcers, especially judges in the courts of EU Member States, come to decide cases, they are accustomed to considering various legal document involving: (hard) law, soft law, and sometimes other official policy documents that do not even reach the level of soft law. Obviously, these documents may vary in their impact on the decision they make. Whilst trying to avoid the delicate issue of defining hard law, we will focus on the role which soft law plays in judicial procedures involving the review of administrative decisions at a national level.

Soft law has its origins in international law, where it can have two meanings.[3] On the one hand, in a formalistic way, soft law is not a source of international law, although regulated individuals follow it as if it was law. On the other hand, it is acknowledged as a source of law, but without normative content; meaning that neither rights nor obligations may be conferred by it.[4]

For the purposes of this paper, we will focus on the distinctive features between hard and soft law from the perspective of national judicial decisions. In referring to soft law, we mean non-binding legal norms that usually cannot be

[1] See Oana A. Stefan, Soft Law in Court: Competition Law, State Aid and the Court of Justice of the European Union 242 (2013), for further research topics and recommendation.

[2] See, for example, *id.* at 162-65, 275-324, these fields of administrative law are largely determined by EU substantive rules; additionally, in some of these fields, the Commission has strong competences in law enforcement (e.g. competition law).

[3] Laszlo Blutman, *In the Trap of a Legal Metaphor: International Soft Law*, 59 Int'l & Comp. L.Q. 605, 606 (2010) (starting our inquiry with recalling international legal principles is reasonable, since EU law, although it had evolved into a separate legal order, has its origins in international law).

[4] *Id.*; Lori F. Damrosch et al., International Law Cases and Materials 34 (4th ed. 2001).

enforced through judicial proceedings. This does not mean, however, that they do not have a role in judicial proceedings.[5] This interpretation is also supported by EU law, since Article 263 of the Treaty on the Functioning of the European Union (TFEU) explicitly excludes non-binding legal acts (recommendations and opinions) under Article 288 from the scope of the European Court of Justice's (ECJ) authority.[6]

1.2. The Formal Classification of EU Soft Law Instruments

1.2.1. Official Soft Laws: Recommendations and Opinions

An obvious method of classifying EU soft law instruments is to inquire whether the given document was adopted in a form recognized by the TFEU itself. Accordingly, an act that was not adopted through an officially recognized procedure cannot become an official source of law.

Article 288 of the TFEU mentions recommendations and opinions as legal acts of the EU. These are adopted in a regulated procedure by certain institutions based on the delegation of authority in the TFEU. Their soft law nature derives from the fact that according to the TFEU, they shall have no binding force. In this article we will focus on recommendations, as the application of this type of official soft law is prevalent both in the ECJ's and the national courts' jurisprudence. By contrast, opinions possess features of individualized documents relating to a specific legislative, accession or other decision, thus their legal effect on third parties is not obvious.[7]

1.2.2. Unofficial Soft Laws

The various types of annual reports, published legislative agendas, white books, green books, or guidelines to the interpretation of hard law provisions, notices, communications, etc. all constitute documents that are not official legal acts under the TFEU, yet they may have normative content. Since their creation is not regulated, their title is somewhat arbitrary, even though EU institutions

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[5] See *infra* Section 2.2.2, for example, in competition law procedures soft law documents read in conjunction with legal principles may even create rights for third parties that courts should protect.

[6] *See, e.g.*, Francis Snyder, *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, 56 MOD. L. REV. 19, 32 (1993); Linda Senden, *Soft Post-Legislative Rulemaking: A Time for More Stringent Control*, 19 EUR. L. J. 57, 57 (2013) (noting that although soft law has no legally binding force, it nonetheless may produce practical effects); Christine Chinkin, *Normative Development in the International Legal System*, *in* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 23, 30 (Dinah Shelton ed., 2003) (arguing as an element of the definition of soft law that soft laws are based solely upon voluntary adherence, or rely upon non-juridical means of enforcement); STEFAN, *supra* note 1, at 242-43.

[7] *See Commission Opinion on the Application for Accession to the European Union by the Republic of Croatia*, COM (2011) 667 final (Oct. 12, 2011); *see also Commission Opinion of 30.9.2011 on the Requests for the Amendment of the Statute of the Court of Justice of the European Union, Presented by the Court*, COM (2011) 596 final (Sep. 30, 2011); *Commission Opinion on the Request from the United Kingdom to Accept Regulation (EC) No. 593/2008 of the European Parliament and the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I)*, COM (2008) 730 final (Nov. 7, 2008).

publishing them try to title them to match their content. In the following, we will refer to these as communications.

Building on Senden's approach,[8] communications may be classified into four groups based on their legal effect. There are communications that are explicitly binding and confer rights and obligations, others interpret hard law (interpretative communications), other documents restrict the discretionary powers of law enforcement held by EU or Member State authorities (decisional communication), and there are some which do not contain any general rule of conduct, thus they cannot possess any legal force. For the purposes of this article, we will focus on interpretative and decisional communications.

1.3. Exploring the Legal Nature of Soft Law

1.3.1. Is Soft Law Legitimized by Courts?

The key to understanding the existence and legal impact of soft law lies in the stance that courts take in relation to soft law as legal instruments. Should courts disregard them as no-law, simple policy documents issued by over-activist authorities, they would either disappear or become limited in their scope, regulating only inter-institutional relations within an authority. The ECJ elaborated its views on the legal effects of soft law in the *Grimaldi v. Fonds des Maladies Professionnelles* case.[9] The ECJ acknowledged that recommendations are not intended to produce binding effects even with regards to the person to whom they are addressed; consequently, they cannot create rights upon which individuals may rely before national courts.[10] However, national courts are *bound to take recommendations into consideration* (emphasis added by authors) in order to decide disputes submitted to them, in particular where they cast light on the *interpretation* of national measures adopted to implement them or where they are *designed to supplement* binding community provisions.[11] This still valid definition of "*no binding effect*" is regarded as the essence of soft law, under which "non-binding" means, for a national judge, that the given legal rules are not enforceable in the courts.[12] Two possible judicial, constitutional law approaches could evolve towards soft law, based on this lack of binding effect.

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[8] Senden, *supra* note 6, at 57-75; Linda Senden, *Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?*, 9.1 ELECTRONIC J. COMP. L. 1, 23-24 (2005); *see also* Vàrnay Ernő & Tihamér Tóth, *Közlemények az Uniós Jogban* [*Communications in the Law of the EU*], 4 ÁLLAM ÉS JOGTUDOMÁNY [JOURNAL OF THE HUNGARIAN ACADEMY OF SCIENCES] 417, 417-18 (2009).

[9] Case C-322/88, Grimaldi v. Fonds des maladies professionnelles, 1989 E.C.R. 4407 (noting that although the judgment is about recommendations, the legal literature interprets it generally for the legal effect of soft law); *see also* PAUL CRAIG & GRAINNE DE BURCA, EU LAW: TEXT, CASES, AND MATERIALS 210 (2nd ed. 1998); JOEL RIDEAU, DROIT INSTITUTIONNEL DE L'UNION ET DES COMMUNAUTÉS EUROPÉENNES 162-66 (La Librairie générale de droit et de jurisprudence ed., 4th ed. 2002); Joined Cases 253/78 & 1/79-3/79, Procurer de la République v. Giry, 1980 E.C.R. 2329 (noting that, related to comfort letters, the ECJ had reached a decision even before the Grimaldi case, stating that national courts must take them into account); Case C-99/79, SA Lancome v. Etos BV, 1980 E.C.R. 2513; *see also* STEFAN, *supra* note 1, at 162.

[10] *Grimaldi*, 1989 E.C.R. ¶ 16

[11] *Grimaldi*, 1989 E.C.R. ¶ 18.

[12] See *infra* Section 2.2.4, also cannot create obligations, as will be seen later.

On the one hand, the jurisprudence of the Hungarian Constitutional Court provides an example of a cautious approach to soft law. In a matter involving circulars and guidelines of various authorities, the Court ruled that the existence of such documents, which are not regulated as sources of law in the Act on Legislation, was in violation of the Constitution.[13] However, the Court did not annul the documents, even though it made clear that they cannot have any legal effect. While this interpretation resulted from an overly strict application of the principle of separation of legislative and executive powers,[14] it paradoxically lead to a weakening of the separation of these state functions. If these documents are not public and accessible to the affected individuals,[15] then the authority not only fails to fulfil its duty to provide information, but also creates a situation endangering the rule of law and legal certainty. Legal certainty is increased whenever the decision-making authority provides information on its decision-making practice(s) and on the conduct it expects undertakings and other persons to follow.[16]

On the other hand, under the current approach of the ECJ, the phrase "*bound to take into consideration*" is in need of some further explanation. It means that in the course of law enforcement, a recommendation or a communication must be taken into consideration, regardless of whether the underlying hard law rule mandates this or not.[17] This legal effect of soft law, probably not limited to formal soft laws like recommendations,[18] could be described as a vertical indirect effect, the same as is attributable to directly effective rules in an unimplemented directive. Individuals may rely on soft law provisions that limit the EU Commission's discretionary powers, for example, in the context of competition law, where significant reductions of fines are afforded to leniency applicants or companies that prefer to settle their case with the European competition authority. Just as with

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[13] *See, e.g.*, Alkotmánybíróság (AB) [Constitutional Court] Mar. 24, 2009, AK, III.27 35/2009 (Hung.) (finding unconstitutional 8001/2004 IHM guideline on principles that the authority must use when determining the relevant market and SMP service providers and their obligations½), Alkotmánybíróság (AB) [Constitutional Court] Mar. 24, 2009, AK, III.27 35/2009 (Hung.) (discussing the normative nature of the circular published by National Police Force on how to apply wheel clamps); Alkotmánybíróság (AB) [Constitutional Court] Apr. 16, 2007, AK, IV.19 23/2007 (Hung.) (discussing the guidelines of the National Tax Authority on certain tax reliefs); Alkotmánybíróság (AB) [Constitutional Court] October 5, 1993, AK, X.7 52/1993 (Hung.) (discussing generally non-binding norms).

[14] This approach is understandable in light of historical experiences in Hungary, as during the communist regime the doctrine of separation of powers was completely ignored.

[15] In this context we will not deal with the cases where only references to such documents are prohibited, or where such documents are not accessible event though references can be made to them.

[16] Case C-98/78, Racke v. Hauptzollamt Mainz, 1979 E.C.R. 69 (providing an example of the principle of legitimate expectations in the context of EU law); *see also* Joined Cases C-205/82 through C-215/82, Deutsche Milchkontor GmbH v. Germany, 1983 E.C.R. 2633; Case C-24/95, Land Rheinland-Pfalz v. Alcan Deutschland GmbH, 1997 E.C.R. I-1607. In the Hungarian context this principle is detailed in the hard law provisions of the 2004. évi CXL. törvény a közigazgatási hatósági eljárás és szolgáltatás általános szabályairól [Act CXL of 2004 on the General Rules of Administrative Proceedings and Services] (Hung.).

[17] These delegations can be phrased in various ways. The study does not differentiate between 'take into account' or 'take the utmost account of,' although it may show some distinctions in legal effect based on hard law. However, this could be the subject of a separate analysis.

[18] CRAIG & DE BÚRCA, *supra* note 9, at 210; RIDEAU, *supra* note 9, at 162-66.

directives, third parties can rely on these soft rules against the EU authorities, but not in private (horizontal) disputes.

The ECJ stated that as far as informal soft law acts (communications) are concerned, an action for annulment is not available in cases where the adopted legal measure is not intended to have legal effect on third parties.[19] The same applies to recommendations under Article 263 of the TFEU.[20] However, when a communication is binding or aims to create an obligation not existing in EU hard law, then, based on a functional approach, it should be the subject of an annulment procedure.[21] This means that if the wording of the document implies binding force, then regardless of the form thereof, it can be subject to an action for annulment available for hard law acts.[22]

More than one conclusion can be drawn from this practice. First, no obligations on third parties should ever be created by soft law. Second, even if a national judge were to conclude that the soft law at hand included a provision with such binding effect, the national judge could not disregard this provision as long as the European Court of Justice has not annulled it. This derives from the logical necessity that, if a soft law document can be the subject of an action for annulment, then there must be an implied acknowledgment of its binding effect, as otherwise an annulment would not be necessary. The same conclusion can be drawn from a recent preliminary ruling procedure in the field of the regulation of electronic telecommunications.[23]

Thus, the question of whether soft laws are enforceable as law by national courts depends on the effectiveness of the procedure leading to their potential annulment. The efficiency with which national judges can refer soft law documents for preliminary rulings challenging their validity or clarifying their interpretation is of crucial importance. This is also true in cases where the binding soft law norm is not in conflict with any hard law rules.

It is worth noting that in *Grimaldi v. Fonds des Maladies Professionnelles*, the ECJ held that a hard law rule may be substituted with a soft law rule.[24] Thus it

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[19] Case C-301/03, Italy v. Comm'n, 2005 E.C.R. I-10217, ¶¶ 19, 24.

[20] *See* Grimaldi e Associati, Comments of Grimaldi e Associati on the DG Competition Best Practices for Antitrust Proceedings, Submission of Economic Evidence and Guidance on the Role of the Hearing Officers 4 (2010), http://ec.europa.eu/competition/consultations/2010_best_practices/grimaldi_associati_en.pdf.

[21] Case C-22/70, Comm'n v. Council, 1971 E.C.R. 263, ¶ 42; Case C-366/88 France v. Comm'n, 1990 E.C.R. I-03571, ¶ 8; Case C-303/90, France v. Comm'n, 1991 E.C.R. I-05315, ¶ 24; Case C-325/91, France v. Comm'n, 1993 E.C.R. I-03283, ¶¶ 14, 22-23, 31 (showing that it also cannot create obligations, substituting binding rights); Case C-57/95, France v. Comm'n, 1997 E.C.R. I-01627, ¶ 23 (addressing interpretative communications); Case C-27/04, Comm'n v. Council, 2004 E.C.R. I-06649, ¶ 44; *see also* Joined Cases C-189/02 P, C-202/02 P, C205/02 P to C208/02 P & C213/02 P, Dansk Rørindustri v. Comm'n, 2005 E.C.R. I-05425.

[22] France v. Comm'n, 1991 E.C.R. ¶¶ 25-26.

[23] *See* Case C-28/15, Koninklijke KPN NV v. Autoriteit Consument en Markt (ACM), 2016 ECLI:EU:C:2016:692, ¶¶ 39-42, http://curia.europa.eu/juris/document/document.jsf?text=&docid=183366&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=315159. http://curia.europa.eu/juris/document/document.jsf?text=&docid=183366&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=315159.

[24] Case C-322/88, Grimaldi v. Fonds des maladies professionnelles, 1989 E.C.R. 4407, ¶ 19.

can be concluded that where a soft law creates or clarifies an existing right in relation to the authority issuing such soft law, the soft law is not in violation of hard law, whereas any soft law which creates obligations on the part of individuals would be unlawful.

1.3.2. To Deviate or Not to Deviate: That is the Question

According to the settled case law of the ECJ, the Commission can be bound by its published communication or other types of soft law instruments.[25] This *self-binding effect* is in line with general legal principles of non-discrimination, legal certainty, and protection of legitimate expectations. Yet, unlike with hard law, deviation from published soft law is allowed, if it is well reasoned and does not contradict any of the above mentioned legal principles.[26] This line of reasoning by the ECJ makes soft law documents binding through general legal principles.

The binding nature of soft law on national authorities is a more delicate question. Given the carefully balanced share of sovereign powers between national and EU institutions, even if legal certainty and the unity of the single market would demand that national authorities follow the path of the EU Commission, it is far from obvious that national authorities are bound to do so. Without the special legal powers of the Commission, this would not work in practice.

Recommendations issued within the framework of telecommunications regulations aim to bind not only the issuing institution, but also national authorities applying those regulations. Just as the Commission can deviate from its own soft laws, national authorities can also deviate from such recommendations if they have good reasons to do so.[27] This rule is also valid when soft law does not expressly allow for any deviation.[28]

EU competition law communications interpreting TFEU Articles 101 and 102 often include a provision along the line that "[a]lthough not binding on them, this Notice is also intended to give guidance to the courts and competition authorities

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[25] *See* Francis Snyder, *Soft Law and Institutional Practice in the European Community*, *in* THE CONSTRUCTION OF EUROPE: ESSAYS IN HONOUR OF EMILE NÖEL 197, 199-201 (Stephen Martin ed., 1994) (stating that this is called regulation by publication in the jurisprudence).

[26] *See* Case C-167/04, JCB Servs. v. Comm'n, 2006 E.C.R. I-08935, ¶ 207 (referring to Joined Cases C-189/02 P, C-202/02 P, C205/02 P to C208/02 P & C213/02 P, Dansk Rørindustri v. Comm'n 2005 E.C.R. I-05425); *see also* Case T-210/01, Gen. Electric v. Comm'n, 2005 E.C.R. II-05575, ¶ 516 (noting that it cannot deviate from rules binding itself); Case C-397/03, Archer Daniels Midland Co. v. Comm'n, 2006 E.C.R. I-04429 (analyzing the Lizin cartel case on the conditions of deviation); Case C-112/77, August Topfer & Co. GmbH v. Comm'n, 1978 E.C.R. 1019 (analyzing legitimate expectations); Case T-15/02, BASF v. Comm'n, 2006 E.C.R. II-00497; Joined Cases T-71/03, T-74/03, T-87/03, T-91/03, Tokai Carbon v. Comm'n, 2005 E.C.R. II-00010; Case T-279/02, Degussa v. Comm'n, 2006 E.C.R. II-00897; Case T-52/02, Société nouvelle des couleurs zinciques SA v. Comm'n, 2005 E.C.R. II-05005; *see generally* Case C-3/06, Groupe Danone v. Comm'n, 2007 E.C.R. I-1331 (discussing the conditions of deviation); STEFAN, *supra* note 2, at 201-27 (providing a comprehensive analysis, including principles of non-retroactivity, rights of defense, human rights and transparency, the conflict of which may lead to the deviation from soft law documents).

[27] Case C-207/01, Altair Chimica SpA v. ENEL Distribuzione SpA, 2003 E.C.R. I-08875.

[28] *Archer Daniels*, 2006 E.C.R. at 4481-83 (analyzing the Lizin cartel case on the conditions of deviation); Joined Cases C-80/81-83/81 & C-182/82-185/82, Adam v. Comm'n, 1984 E.C.R. 3411, ¶ 22; Joined Cases C-181/86 to 184/86, Sergio Del Plato v. Comm'n, 1987 E.C.R. 4991, ¶ 10; Case C-171/00 P, Liberos v. Comm'n, 2002 I-00451, ¶ 35; *see also* STEFAN, *supra* note 2, at 139.

of the Member States in their application of Article 101 of the Treaty."[29] These soft law instruments are well-structured, detailed, and lengthy documents[30] that often rely on the case law of the EU Courts and are subsequently finalised following a public consultation. In practice, it is hard not to take them seriously. This *'not binding, but guiding'* wording of communications can be understood to reflect a *soft binding effect*. The Commission finds it important to expressly mention national law enforcers as targets of the communication and makes it clear that the Commission is in a position to guide them through the maze of EU competition rules. Certainly, the Commission cannot avoid mentioning that the communication is not binding on them, which is nothing new as long as we understand 'binding' in its traditional hard law sense: an absolute prohibition on deviation from the rule.[31] According to our understanding, soft law instruments have a soft binding effect: law enforcers should do their best to follow them, but can exceptionally deviate from them as long as such deviation is explained in the decision and does not infringe general principles of EU law.

Apparently, the ECJ gives a wider margin of appreciation to national courts. The Court held in *Expedia Inc. v. Autorité de la Concurrence and Others*, responding to the French Court of Cassation, that national authorities are not bound to apply EU soft law instruments, and they have complete discretion to take the thresholds mentioned in the *de minimis* notice into consideration.[32] The Court rightly referred to the wording of the notice and that it was published not in the L, but the C series of the Official Journal. However, the Court should have acknowledged the importance of the general principles of EU law in the same way as it does for any member of the European Competition Network. Otherwise the coherent application of EU competition law would be endangered.[33]

The difference between hard law and soft law becomes evident when either the issuing authority or a third party contravenes the rules established therein. Any conduct infringing hard law will be regarded as unlawful behavior with legal consequences as prescribed by law. On the other hand, soft law cannot formally

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[29] *See, e.g.*, Communication from the Commission (EC) Notice on Agreements of Minor Importance Which Do Not Appreciably Restrict Competition Under Article 101(1) of the Treaty on the Functioning of the European Union, 2014 O.J. (C 291) 1, 1-2 (noting generally that the communication is without prejudice to any interpretation that may be given by the Court of Justice of the European Union).

[30] See Commission Notice (EC) Guidelines on the Application of the Specific Rules Set Out in Articles 169, 170 and 171 of the CMO Regulation for the Olive Oil, Beef and Veal and Arable Crops Sectors, 2015 O.J. (C 431) 1, for the latest agricultural guidelines, which occupy 37 pages in the Official Journal.

[31] *See, e.g.*, Communication from the Commission (EC) Notice on Agreements of Minor Importance Which Do Not Appreciably Restrict Competition Under Article 101(1) of the Treaty on the Functioning of the European Union, 2014 O.J. (C 291) 2, 5. ("Although not binding on them, this Notice is also intended to give guidance to the courts and competition authorities of the Member States in their application of Article 101 of the Treaty.")

[32] Case C-226/11, Expedia Inc. v. Autorité de la Concurrence and Others, 2012 E.C.R. 1, ¶¶ 30-31.

[33] *Id.* ¶ 39 (arguing that, although national courts are not obliged to apply soft law, they should nevertheless consider the Commission's assessment and give reasons for any divergence); *see also* Oana A. Stefan, *Relying on EU Soft Law Before National Competition Authorities: Hope for the Best, Expect the Worst*, 7 Competition Pol'y Int'l Antitrust Chronicle (2013), https://www.competitionpolicyinternational.com/relying-on-eu-soft-law-before-national-competition-authorities-hope-for-the-best-expect-the-worst/.

be infringed. It will be the underlying hard law provision, as interpreted by a communication, or a general legal principle the infringement of which could be argued by a plaintiff. The issuing authority can be held liable for not respecting its own rules, but even this could diverge from its soft law if it gives explanation to that effect and does not infringe general legal principles, like the protection of legitimate expectations. Nevertheless, if the national authority always relies on a soft law rule in its decisions, then undertakings will also be practically bound by the soft law. Soft law norms can have practical binding force.

2. The Application of EU Soft Law in National Administrative Courts

In this section we will show that theoretical distinctions between hard and soft laws are not always significant for national judges in the context of the judicial review of administrative decisions. In fact, both soft and hard EU laws are considered to be practically binding rules.[34] Before looking at our telecommunications and competition law examples, it should be recognized that soft laws use various terms to persuade national law enforcers to follow the path laid down by the EU Commission.

The strongly worded recommendation in the field of telecommunications regulation expects regulators to "take the utmost account of" the soft provisions, which comes close to a clear obligation, especially if we take into consideration that the Commission can effectively challenge deviating national decisions. Soft laws in competition law apply less intrusive language.

2.1. Telecommunications

2.1.1. Regulatory Institutions in Europe

Companies providing telecommunications services are regulated by national authorities ("NRAs") implementing hard and soft rules with EU origins. Together with the Commission they form the Body of European Regulators for Electronic Communications ("BEREC").[35] This procedural control mechanism strengthens the application of soft law as a binding rule. It is interesting to note that, controversially, the stronger obligation ("take the utmost account of") is linked to the soft law published by BEREC, the institutional status and demo-

[34] This conclusion is based on the fact that the Grimaldi case only mandates national courts to take soft law into account, but the ECJ has not stated that this would be applicable to itself, which is also connected to the different levels of law enforcement. *See* Senden, *supra* note 6, at 361-99 (reaching the same conclusion based on several judgments of the ECJ). While this conclusion is highly probable, it is not accepted unequivocally. *See, e.g.*, STEFAN, *supra* note 1, at 161-65. *See* STEFAN, *supra* note 1, at 20-21 (critiquing Senden's conclusions, and stating that if a recommendation is binding for the courts, it cannot be soft and binding under Article 263 TFEU); Snyder, *supra* note 6, at 217. In our study, we aim to prove this proposition by analyzing not only the term "take into account" but also the logical analysis of ECJ case law.

[35] Commission Regulation 1211/2009 of Dec. 18, 2009, Establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office, 2009 O.J. (L 337) 1, 1 (noting that in order for the opinions or common positions of BEREC to have legal effect, they require wording different from a Commission soft law document).

cratic legitimacy of which is far more disputed than that of the Commission.[36] One might presume that the use of the stricter language is a direct result of the agency compensating for its secondary legal status, and that agency aims thereby to emphasize that the soft law published by BEREC should be taken into consideration regardless of its legal status. However, if there is a substantial difference between these terms used in hard law, then it is a worrying trend that lower institutional status triggers more stringent obligations.

The similar differences in the wording of hard law delegations would provide an interesting subject of study, however, they fall outside the scope of the present paper. One of the reasons for this is that the implementation of the provisions of the Framework directive into Hungarian law was carried out through a direct reference. The national law states that the NRA has to take the Commission recommendations based on Section 1, Article 19 of the Framework directive into account, while the related guidelines must be taken the utmost account of [Eht. 24.§ (2)], along with the common positions, recommendations and best practices of BEREC [Eht. 24.§ (3)].[37] Such differentiation may be difficult to justify with the text of the directive. As such, we will presume in the following that the national judge has to "take these into account," regardless of the specific wording.

2.1.2. The Scope of Regulation: the Process of Identifying Significant Market Players

Under the current regulatory framework applicable to the info-communications markets,[38] the NRAs impose obligations on service providers with significant market power ("SMP"), based on the Commission's recommendation[39] for determining the relevant markets. The rationale for this is that competition is not effective in circumstances where there is a service provider with significant market power, and that ineffective competition ought to be cured by specific obliga-

[36] *See* Anna Forgács, *The Regulatory Powers of Agencies in the United States and the European Union*, 3 EUR. NETWORKS L. & REG. Q. 11, 11-24 (2015); László Szegedi, *Challenges of Direct European Supervision of Financial Markets*, 4 PUB. FIN. Q. 347, 347-57 (2012).

[37] 2003. évi C. törvény az elektronikus hírközlésről (Act C of 2003 on Electronic Communications) (Hung.) §24 [hereinafter: Eht].

[38] The most important directive in the regulatory framework is Directive 2009/140/EC, of the European Parliament and of the Council of 25 November 2009 Amending Directives 2002/21/EC on a Common Regulatory Framework for Electronic Communications Networks and Services, 2002/19/EC on Access to, and Interconnection of, Electronic Communications Networks and Associated Facilities, and 2002/20/EC on the Authorisation of Electronic Communications Networks and Services, 2009 O.J. (L 337) 37 [hereinafter Framework Directive].

[39] Commission Recommendation of Feb. 11, 2003 on Relevant Product and Service Markets Within the Electronic Communications Sector Susceptible to Ex Ante Regulation in Accordance with Directive 2002/21/EC of the European Parliament and of the Council on a Common Regulatory Framework for Electronic Communication Networks and Services, 2003 O.J. (L 114) 45; Commission Recommendation of Oct. 9, 2014 on Relevant Product and Service Markets Within the Electronic Communications Sector Susceptible to Ex Ante Regulation in Accordance with Directive 2002/21/EC of the European Parliament and of the Council on a Common Regulatory Framework for Electronic Communications Networks and Services, 2014 O.J. (L 295) 79 (has yet to be applied).

tions determined by the NRA.[40] Since this rule was enacted in a directive, national judges do not apply the directive itself, but rather the national law implements it.[41] The obligation prescribed by the NRAs may involve mandating the cost orientation of prices under Article 13 of the Access Directive.[42] To achieve this aim, the NRA can determine the cost accounting methodology, and can supervise the cost orientation by using its own cost accounting method. If the NRA finds that prices are not cost-oriented, it can intervene and change the prices accordingly. The NRA reviews the SMP classification and the accompanying obligation every three years. The NRA either adopts a decision addressed to the SMP service provider, or if the SMP status is no longer justified, terminates the status and the obligation.[43] It follows that this "individualized regulation" has a three-year regulatory cycle, and the legality of each cycle may be reviewed by national courts separately.[44]

According to the Framework Directive, NRAs are required to take "the utmost account" of the recommendation and the guidelines published under the scope of the directive.[45] If an NRA chooses not to follow a recommendation, it shall inform the Commission explaining the reasoning for its position.[46] Under the notification procedure of Article 7, the Commission has a form of veto power, as regards to the definition of the relevant market. Procedural rules like these, which confer powers on the Commission, make the application of these originally soft rules practically mandatory for national authorities.

According to the Commission's recommendation, an NRA is allowed to derogate from the markets listed therein.[47] In order to do so, they must follow a certain procedure. The same option is now codified in the mandatory regulation.[48] The NRA can determine relevant markets in need of regulation beyond

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[40] It is a so-called asymmetric regulation, under which the SMP company has additional obligations compared to competitors, in order to counter-balance the distortions of competition caused by the significant market power. *See* Framework Directive, *supra* note 37, at art. 16 ¶ 4; *see also* Ralf Dewenter & Justus Haucap, *The Effects of Regulating Mobile Termination Rates for Asymmetric Networks*, 20 EUR. J.L. & ECON. 185, 186 (2005); Martin Peitz, *Asymmetric Access Price Regulation in Telecommunications Markets*, 49 EUR. ECON. REV. 341, 342 (2005).

[41] 2003. évi C. törvény az elektronikus hírközlésről (Act C of 2003 on Electronic Communications) (Hung.).

[42] Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive).

[43] Article 7 of the Access Directive and 2003. évi C. törvény az elektronikus hírközlésről (Act C of 2003 on Electronic Communications) (Hung.). §§62-65.

[44] 2003. évi C. törvény az elektronikus hírközlésről (Act C of 2003 on Electronic Communications) (Hung.). §65.

[45] Council Directive 2002/21, arts. 15, 16, 19, 2002 O.J. (L 108) 33, 44-46 (EC).

[46] Council Directive 2002/21, art. 19, 2002 O.J. (L 108) 33, 46 (EC).

[47] Commission Recommendation of Feb. 11, 2003 on Relevant Product and Service Markets Within the Electronic Communications Sector Susceptible to Ex Ante Regulation in Accordance with Directive 2002/21/EC of the European Parliament and of the Council on a Common Regulatory Framework for Electronic Communication Networks and Services, 2003 O.J. (L 114) 45, Preamble (19).

[48] 16/2004 (IV. 24.) (Ministerial Decree No. 16/2004 (IV. 24.) on the Hungarian Information and Telecommunication Ministry) (Hung.).

those identified in the annex of the regulation.[49] This makes clear that the legal effects of a non-binding recommendation can be identical to those of hard law allowing derogation.

This is also in line with our hypothesis that the real difference between hard and soft laws depends to a greater extent on the content rather than the formalities. The real dividing line is between imperative rules and rules allowing for derogations. However, we must keep in mind that the above-mentioned authorization of derogation is '*one-sided*', in the sense that it only allows the NRA to derogate from the rules. It is not clear to what extent interested third parties can make a claim before the authority or a reviewing court in order to challenge a non-deviation.

As far as administrative courts in Hungary are concerned, they can not only annul, but also amend the NRA's individual decisions, which can be of practical significance to ensure the continuity of regulation.[50] This is, however, a difficult choice for the judge when he or she intends to make use of the derogation option expressly provided for in the recommendation. It is not clear whether the court can itself amend the NRA's decision with the result of derogating from the recommendation, or whether it should rather annul and remand the decision to the NRA to provide an opportunity for the Commission to exercise its special control powers. It is also open to question whether in a new procedure, if the Commission did not agree with the reasoning of the court, the final decision ought to be taken by the court or the NRA. It can be argued that the Commission's decision in individual cases binds national courts, but in this special procedural setting, it is not clear whether this should be the case. If, nonetheless, the national courts are thus bound, then the question whether national judicial review procedures are basically ineffective arises.

It may be noted that the competences of the Commission and the national courts are clearly concurring, since there are more and more EU law provisions that give competence to the Commission, or sometimes even to national authorities over national courts. Article 16 of Council Regulation (EC) No 1/2003 states that, "when national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot make decisions which run counter to the decision adopted by the Commission. They must also avoid making decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings." Then, from the EU context, this type of regulation is transferred into national law, and the national court will be bound by the decision of the national competition authority (see for example Article 88/B(6a) of the Hungarian competition act), which for a national judge would be the same as if the Commission's decision would bound the ECJ. It is easy to see that this is a challenge to the rule of law, although a detailed discussion of this issue is beyond the scope of this paper.

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[49] *ibid.* § 2 Section 3.

[50] Eht. § 46.

2.1.3. A Dutch Case Study of the 2009/396/EC Recommendation

In order to demonstrate the practically binding nature of EU recommendations in an EU Member State, we would like to elaborate first on a Dutch telecommunication case, which reached the ECJ, and then on a recent administrative law case before the Curia, the Supreme Court in Hungary. Naturally, the scope and depth of judicial review differs in legal systems, which shall be taken into account in these case studies as well. Before turning to the particulars of the cases themselves, the main features of the regulatory framework should be introduced.

The EU Commission's Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU[51] established a common approach for NRAs to set termination rates on fixed and mobile termination markets. Points 1 and 2 of the recommendation states that "when imposing price control and cost-accounting obligations in accordance with [the Access Directive] on the operators designated by National Regulatory Authorities (NRAs) as having significant market power on the markets for wholesale voice call termination on individual public telephone networks (. . .) as a result of a market analysis carried out in accordance with Article 16 of [the Framework Directive], NRAs should set termination rates based on the costs incurred by an efficient operator. This implies that they would also be symmetric. In doing so, NRAs should proceed in the way set out below. It is recommended that the evaluation of efficient costs is based on current cost and the use of a bottom-up modeling approach using long-run incremental costs (LRIC) as the relevant cost methodology."[52]

Judge Heico Kerkmeester analyzed a recent Dutch case – referred to preliminary ruling – related to the recommendation.[53] The question in that case was whether the cost-oriented price is required to be achieved through a pure BU-LRIC model (involving only incremental costs) or a plus BU-LRIC model (also reflecting a mark-up for non-incremental fixed costs).[54] Only the issue of reasonableness plays a role here, namely the fact that a plus BU-LRIC model is closer to cost-oriented prices based on the economics literature. Even though the service providers claimed during the judicial procedure that the recommendation is in violation of Article 13 of the directive, the judge who referred the case to the ECJ did not accept this claim and instead only referred the question of whether, in circumstances where the plus BU-LRIC price is enough to achieve a cost-oriented price, the pure BU-LRIC method resulting in a lower price is applicable.

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[51] Commission Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (EC) No. 2009/396 of 7 May 2009, 2009 O.J. (L 124) 67.

[52] Commission Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (EC) No. 2009/396 of 7 May 2009, 2009 O.J. (L 124) 67 and Case C-28/15, Koninklijke KPN NV v. Autoriteit Consument en Markt (ACM), 2016 ECLI:EU:C:2016:692, 13.

[53] *See* Heico Kerkmeester, *The National Judges Position Towards Mobile Termination Rates*, http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=8370.

[54] The BU-LRIC model at issue is the model of a hypothetical, efficient operator's costs. In a general economic approach, the cost-oriented price is the equilibrium price on the competitive market at which the price is equal to the average cost and marginal cost. Of course, this is only a model and a rough simplification in case of multi-product companies or cost sub-additives.

In this regard the judge made national law references.[55] This case fundamentally differs from the later Hungarian example, because both models reflected cost oriented prices, thus compatibility of the recommendation with hard law was not an issue.[56] The Advocate General's Opinion issued in the case also emphasizes that the validity of the recommendation was not challenged in the case.[57]

According to the Dutch judicial practice, the reasonableness of a decision is evaluated based on the technical standards and the principle of the best possible approximation. So the method applied by the regulator can be held unreasonable, and thus unlawful if the undertakings concerned can prove the existence of a better method than the one used by the NRA.

The predecessor of the Dutch NRA ("OPTA") used the plus BU-LRIC model already in 2005 and adopted a 5.6 cents per minute mobile termination rate, which was amended to 7 cent per minute in 2007 based on a successful claim by the service providers.[58] In 2008, the NRA once more adopted a 7 cents per minute tariff, which was appealed by the operator, UPC.[59] As a result, the Trade and Industrial Appeals Tribunal (CBb)[60] reverted to a 5.6 cents per minute tariff, stating that this was the only possibility based on a plus BU-LRIC model. Following this, in 2009, the recommendation was adopted promoting the use of the pure BU-LRIC model, thus in 2010 the NRA determined the tariff at 1.2 cents per minute. This court overruled this decision in 2011, using the plus BU-LRIC model and fixing the tariff at 2.4 cents per minute.[61]

Reaching this decision, the court disregarded the recommendation, stating that it is not binding, without referring the case to a preliminary ruling procedure.[62] Thereafter, the new NRA ("ACM") determined the tariff at 1.019 cents per minute, applying the pure BU-LRIC model based on the recommendation.[63] Acting upon the request of mobile service providers, the Dutch court set 1.861 cents per minute as a temporary arrangement and in the main procedure the CBb referred questions for a preliminary ruling to the ECJ. The first referred question related

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55 Kerkmeester, *supra* note 53.

56 *See* Case C-28/15, Koninklijke KPN NV v. Autoriteit Consument en Markt (ACM), 2016 ECLI:EU:C:2016:692, ¶¶ 27-28, 73, 78 (admitting that more than one cost-orientated models are feasible).

57 Koninklijke KPN NV, 2016 ECLI:EU:C:2016:310 *at* 39,65 (emphasizing that if a recommendation is in violation of hard law, then a national judge could only reach a decision which goes against the recommendation in circumstances where such recommendation is annulled, thus deviation is not an option available to a national judge; additionally, it also suggests that this issue could be raised in relation to this particular recommendation).

58 *See* Heico Kerkmeester, *The National Judges Position Towards Mobile Termination Rates*, http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=8370.

59 *Id.*

60 The College van Beroep voor het bedrijfsleven (Trade and Industrial Appeals Tribunal) is a specialised appeal court for administrative law cases in trade, industry, competition and telecommunications law. *Special Tribunals*, DE RECHTSPRAAK, https://www.rechtspraak.nl/English/Judicial-system/Pages/Special-Tribunals.aspx.

61 *See* Heico Kerkmeester, *The National Judges Position Towards Mobile Termination Rates*, http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=8370.

62 *Id.*

63 *Id.*

to the deviation options of national courts.[64] The second question sought clarification as to the reasons on which a deviation may be justified: whether a deviation from the pure BU-LRIC method is allowed based on the principles of proportionality, appropriateness, and on its practical effects, in the light of the policy objectives and regulatory principles laid down in Article 8 of the Framework Directive.

The Advocate General's Opinion acknowledges that a national judge can, after giving appropriate reasons, deviate from a recommendation, since it is not binding.[65] In this respect, the proportionality and reasonableness of the price regulation must be examined, but the judge must be exceptionally cautious and can only deviate from the recommendation based on serious reasons. This exceptional character of a deviation is emphasized several times in the Opinion.[66] Additionally, the Advocate General's Opinion stated that in the relevant case there seemed to be no circumstances deriving from either EU or national law that could justify such a deviation.[67] The Opinion suggests that the right to effective appeal under Article 4 of the Framework Directive is fulfilled if the national court examines the option of deviation.[68] However, the court is not allowed to substitute the evaluation given by the national authority with its own. Thus deviation from the recommendation cannot be a general trend, only an exceptional and special instance. The limits of deviation are the requirement of cautiousness and the requirement of giving serious reasons. These limits run in parallel with the limited review powers of national judges in administrative cases, which precludes national judges from overriding administrative decisions within the margins of discretion, unless they are clearly unreasonable.[69] This "weak judicial control" hardens recommendations and soft law at national level in general and makes them practically binding. This is especially true if we consider how firmly Advocate General Mengozzi argues that there are no special circumstances in the Dutch case justifying such a deviation.[70]

The Court in deciding the *Koninklijke KPN NV v. Autoriteit Consument en Markt (ACM)* case mostly accepted the arguments of the Advocate General and concluded that "a national court may depart from Recommendation 2009/396. (. . .) Nevertheless, according to the Court's settled case-law, even if recommen-

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[64] Koninklijke KPN NV, 2016 ECLI:EU:C:2016:692 at 27 ("Must Article 4(1) of the Framework Directive, read in conjunction with Articles 8 and 13 of the Access Directive, be interpreted as meaning that, in principle, in a dispute concerning the lawfulness of a cost-oriented scale of charges imposed by the national regulatory authority (NRA) in the wholesale call termination market, a national court is permitted to make a ruling which does not accord with the European Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (2009/396/EC), in which pure BULRIC is recommended as the appropriate price regulation measure for call termination markets, if, in that national court's view, this is required on the basis of the facts in the case brought before it and/or on the basis of considerations of national or supranational law?").

[65] Koninklijke KPN NV, 2016 ECLI:EU:C:2016:310 at 53, 64, 66.

[66] Koninklijke KPN NV, 2016 ECLI:EU:C:2016:310 at 53, 64, 66.

[67] *Id.* at 72.

[68] *Id.* at 48.

[69] See *infra* Section 2.2.4, for a discussion on Hugarian judges.

[70] Koninklijke KPN NV, 2016 ECLI:EU:C:2016:310 at 72.

dations are not intended to produce binding effects, the national courts are bound to take them into consideration for the purpose of deciding disputes submitted to them."[71] For the reasons of such a deviation, the Court stated that a national court may only depart from the recommendation, if it is "required on grounds related to the facts of the individual case, in particular the specific characteristics of the market of the Member State in question."[72]

This case shows how uncertain national judicial practice is regarding the legal consequences of recommendations and other soft law norms, i.e. to what extent deviation from a recommendation is an option. The application of the plus BU-LRIC model is not explicitly forbidden by the recommendation, but it is subject to certain conditions which were not met in the given case.[73] The Dutch court basically accepted that the requirement to ensure the unity of the internal market is a principle which justifies the application of the recommendation. However, it also pointed out that this effect on the internal market was minimal (the percentage of international calls was 7-9% and they were mostly made to Germany, which operated with similar tariffs).[74]

2.1.4. A Hungarian Case Study of the 2009/396/EC Recommendation

The following Hungarian case study shows another example for the work of the same recommendation, which is followed by a hypothetical analysis in line with the above mentioned Dutch case and with the results of the Hungarian case.

Initially, based on a BU-LRIC model, the Hungarian NRA provided the same cost-oriented target price for all three mobile operators present on the Hungarian market, but with a three-year phased deployment period. This meant that, at the beginning of the regulatory cycle, the then largest operator had the lowest fees, and the highest fees were being charged by the smallest operator, which was also the last operator to have entered the market. These fees should have steadily converged until they became symmetric by the third year.

In an industry where the fixed (constant) costs are high, the marginal costs are tending towards zero, the unit cost (which, in the case of mobile termination rates, would be the per minute cost) will necessarily be volume and traffic dependent. This is the situation in the telecommunications sector and it means that in reality each operator's cost-oriented price is different. The unit cost of an operator with a 20% market share is necessarily higher than another operator's with a 40% market share. It is impossible not to notice that convergence to symmetric prices is a genuine possibility. However, this possibility can only occur if we assume during an ex-ante examination that the development of the operator's market shares tends towards equalization. So by the time the fees become sym-

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[71] Koninklijke KPN NV, 2016 ECLI:EU:C:2016:692 at 39-40.

[72] *Id.* at 42.

[73] *See* Commission Recommendation of 7 May 2009, *supra* note 51, at 70 (noting that the tariff cannot exceed the average of the tariffs determined by the NRAs using the pure BU-LRIC method, a requirement which was not fulfilled here).

[74] *See* Heico Kerkmeester, *The National Judges Position Towards Mobile Termination Rates*, http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=8370.

metrical, the operator's market share and turnover will be very much the same. This was the crux of the argument against the symmetric charges by Vodafone, the smallest Hungarian operator.

In 2006, the NRA issued its SMP decision for the second regulatory cycle, which required the gradual introduction of prices approved by the public authorities based on the BU-LRIC model.[75] The decision was challenged in court by all three entities to whom it was addressed. During the judicial review of the decision, the expert opinion supported the lawfulness of the NRA's decision. The court appointed expert explained that the trend towards market share equalization rests on a sound theory and, therefore, the setting of converging prices on the basis of a symmetric target price was plausible.[76] In the judgment, however, the court emphasized its concern that the authority had set the prices for three years even though the SMP decision was required to be reviewed and renewed every two years.[77] Consequently, the authority should not have set new lower symmetric prices for the third year in its decision; this ought to have been the subject of another decision. The court mandated the NRA to re-examine, prior to adopting a new decision, whether its assumption was correct and whether the symmetric prices are justified by converging market shares. The court held that the regulatory decision was lawful for the reason that the companies of different sizes were obliged to use different prices converging to cost-oriented prices in the next two years, and it was premature to examine whether the standardized cost-oriented price would be applicable in the third year.[78]

The 2009/396/EC Recommendation applicable at that time specified a four-year transitional period rule for the NRAs. Principally, the rates were required to be symmetric by the 1st of January 2014.[79] Recital 17 of the recommendation states: "[i]n the mobile market it can be expected to take three to four years after entry to reach a market share of between 15-20%, thereby approaching the level of minimum efficient scale."[80] In other words, this means that differences in economies of scale are not relevant if the market share is above 15-20%. This might be right, but due to the implementation of Article 13 of the Access Direc-

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[75] National Infocommunications Authority decision No. DH-9549-54/2006. and No. DH-664-33/2005.

[76] Fővárosi Közigazgatási és Munkaügyi Bíróság [Metropolitan Administrative and Labor Court] 17 April 2008 7.K.34.969/2006/96. (Hung.)

[77] Fővárosi Közigazgatási és Munkaügyi Bíróság [Metropolitan Administrative and Labor Court] 17 April 2008 7.K.34.969/2006/96. (Hung.)

[78] Fővárosi Közigazgatási és Munkaügyi Bíróság [Metropolitan Administrative and Labor Court] 17 April 2008 7.K.34.969/2006/96. (Hung.)

[79] Although the wording of the recommendation is not this strict, the imposition of certain conditions relating to deviations from the prescribed date of 1 January 2014, can be seen as binding. Commission Recommendation (EC) No. 2009/396 of 7 May 2009, §§ 17, 22, 2009 O.J. (L 124) 67 ("[a]ny such outcome resulting from alternative methodologies should not exceed the average of the termination rates set by NRAs implementing the recommended cost methodology.").

[80] Commission Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (EC) No. 2009/396 of 7 May 2009, 2009 O.J. (L 124) 67.

tive,[81] Hungarian law implementing the Directive obliged the operator to apply a cost-oriented price and not a price modeled on an efficient scale.

It follows from the recommendation that in the absence of a converging trend in market shares, the unit cost of an operator with a 20% market share will be constantly higher than that of an operator with a 40% market share. So, the price prescribed for operators in line with the recommendation would not comply with the newly articulated cost-orientation obligation.

2.1.5. National Law, and National Judgment Conflicting with EU Soft Law?

The Hungarian case study set out above raises a number of questions. First, the new recommendation is not in line with the prior national court judgment, which raises the question whether a recommendation published subsequent to a decision of a national court can have an effect on such decision, in a manner similar to a subsequently published binding legal norm. This question can be also phrased as whether a new recommendation can override national law, or at least a judgment of a national court. To answer this question, we need to consider the legal nature of EU soft law.

A recommendation, which is a kind of implementing measure relating to a hard law provision, should generally be taken into account by national law enforcers. Thus national law mandating the recommendation to be disregarded must be in violation of Article 288 of the TFEU. The ECJ does not seem to differentiate between binding and non-binding legal acts, when it asserts the primacy of EU law over national law. A recommendation as an EU legal act may override a national court judgment that is based directly on national law. Thus, a subsequently published recommendation exhibits the same features as hard laws do. This seems to be a strong argument for treating recommendations as binding norms at national level.

Stefan argues[82] that soft law is not binding on national authorities and noting that a general obligation to enforce soft law is not mandated pursuant to the loyalty clause of Article 4(3) of the TFEU, and Member States are also not bound according to the case law. However, the cases cited to support this argument[83] are related to informal soft law sources, namely communications (guidelines), and the same conclusions cannot be drawn for recommendations as a formal source of law. If an authority does not agree with a recommendation it will have to lobby for its amendment with the Commission, but would still have to apply such recommendation until it is amended, while in the case of a communication, the authority may decide whether or not to apply it.

Contrary to the prevalent views in the legal literature, it could be argued that the loyalty clause of Article 4(3) of the TFEU does create an obligation pursuant to which Member State authorities and courts are to some extent bound by soft

[81] *See, e.g.*, Fővárosi Közigazgatási és Munkaügyi Bíróság (BH) [Metropolitan Administrative and Labor Court] Nov. 20, 2013 Vj/74/2011 (Hung.).

[82] *See* STEFAN, *supra* note 1, at 175.

[83] Case C-360/09, Pfleiderer AG v. Bundeskartellamt, 2011 E.C.R. I-05161; Case C-410/09, Polska Telefonia Cyfrowa v. Prezes Urzêdu Komunikacji Elektronicznej, 2011 E.C.R. I-03853.

law sources of the EU, at least by recommendations as formal legal sources under Article 288. The loyalty clause is in a lex generalis-lex specialis relationship with the more specific provisions of the Treaty, so for example with Articles 288 and 197 of the TFEU related to the duty to respect, follow and implement the legal sources of the EU, in other words to ensure that EU law takes full effect. In this regard, it can be argued that recommendations as formally acknowledged by the TFEU fall into this obligation.[84]

The same, however, could not be said in relation to communications and guidelines as they are not formal sources of EU law and have no legal basis in the Treaties. This seems to be another major distinction between the different types of soft law documents. It has to be noted that in relation to communications the ECJ's practice is controversial.[85]

Even though a recommendation has the potential to prevail over a court judgment reviewing a previous administrative decision, the real problem in the above mentioned example was that the court believed that the recommendation was not in line with the directive as regards the obligation to set cost-oriented prices. So the question was not only whether derogation from the recommendation was possible, but rather whether the recommendation may contain binding rules that could violate Article 13(1) of the Access Directive prescribing the cost-oriented price obligation. In this case, a national court may only disregard the recommendation if the ECJ declares it unlawful in the course of a preliminary ruling procedure.

2.1.6. Re-establishing the Non-binding Nature of Recommendations at National Level

The most effective solution to avoid acknowledging the binding effect of recommendations on third parties would be if the national courts themselves could set aside the soft law norm with reference to certain legal principles. Courts are accustomed to weighing general legal principles. If the EU Commission (which issued the soft law) and the national regulator can deviate from the soft law norm after giving appropriate reasons, why should judges not be able to act in the same way?

A deviation benefiting the person regulated by the authority and also going beyond the provisions of the soft law act is only possible if the ECJ had annulled that soft law provision. Until then, the soft law rule is applied as a binding norm in practice. In order not to apply them as binding norms, deviations based on legal principles should be allowed, and to this end, national judges should have the opportunity of referring preliminary questions about such derogations to the ECJ.

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[84] Case C-350/93, Comm'n v Italy, 1995 E.C.R. I-00699; Case C-106/89, Marleasing SA v. La Comercial Internacional de Alimentacion SA, 1990 E.C.R. I-04135; Case C-94/00, Roquette Frères SA v. Comm'n, 2002 E.C.R. I-09011; *see also* MARCUS KLAMERT, THE PRINCIPLE OF LOYALTY IN EU LAW (2014).

[85] Case C-311/94, IJssel-Vliet Combinatie BV v. Minister van Economische Zaken, 1996 E.C.R. I-05023; Case C-288/96, Germany v. Comm'n, 1999 E.C.R. I-08237; STEFAN, *supra* note 1, at 176.

2.2. Re-establishing the Non-binding Nature of Recommendations at National Level

2.2.1. Types of EU Soft law in Competition Law

The Commission's competition directorate gives the following definition of soft law: "the Commission has adopted various non-regulatory documents, which may take various forms (notices, guidelines, etc). Documents such as these are intended to explain in more detail the policy of the Commission on a number of issues, either relating to the interpretation of substantive antitrust rules or to procedural issues, such as access to the file."[86]

Most of the communications relating to competition law set out the Commission's *explanation* (emphasis by author) of the law. Although it is well known that the final word rests with the EU Courts as to the correct interpretation of the law, due to the special role the Commission plays in the European Competition Network, its interpretation should be considered very seriously by national law enforcers.

Beyond interpretative communications, there are other soft laws that seem to *execute* hard law provisions. In the field of state aid soft law, the Commission approved a number of different instruments (e.g. frameworks, guidelines, communications, and notices) informing Member States and third parties how it intends to exercise its discretion when assessing the compatibility of state aid with the single market. Article 10 of the Regulation implementing the Treaty's state aid provisions calls upon the Commission to publish the reference interest rates it applies when it comes to recovering unlawful state aid.[87] The Commission adopts notices published in the C series of the Official Journal to this end.[88]

Formal soft law is unusual in EU competition law. Under Article 37 TFEU the Commission may adopt *recommendations* to invite Member States to phase out state monopolies of a commercial character.[89] However, it was back in 1988 that the EU Commission last resorted to this instrument to introduce competition in various petroleum product markets in Portugal.[90] In state aid law there is a recommendation defining macro, small and medium-sized enterprises which can have important legal consequences for the authorization of a planned aid mea-

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[86] Antitrust Legislation, EUROPEAN COMMISSION, http://ec.europa.eu/competition/antitrust/legislation/legislation.html.

[87] Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC)No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty OJ L 140, 30.4.2004, 1–134.

[88] *See* Commission Notice on Current State Aid Recovery Interest Rates and Reference/Discount Rates for 27 Member States Applicable as from 1 April 2010, 2010 O.J. (C 85) 11, 11 (EC).

[89] Consolidated version of the Treaty on the Functioning of the European Union OJ C 326, 26.10.2012, 110.

[90] Commission Recommendation of 22 December 1987 to the Portuguese Republic Concerning the Adjustment of the State Monopoly of a Commercial Character in Petroleum Products vis-à-vis the Other Member States, 1988 O.J. (L 56) 30, 32 (EC).

sure.[91] Article 1 of the recommendation "invites" Member States to comply with the provisions of the recommendation.[92] Who could resist such a friendly invitation? Hungary complied with the adoption of a law on small and medium-sized enterprises in 2004. The closing provisions recall that the legislation was meant to comply with the Commission's recommendation, just as if it was a directive.[93] This is a good example of how EU soft law can become binding for national courts through transformation into national hard law.

2.2.2. The Subject Matter and Wording of Communications

The form and the legal title of hard law instruments help to identify their position in the legal hierarchy of laws. It is hard to tell whether the same would be true for soft laws. In *Grimaldi v. Fonds des Maladies Professionnelles*, the Court stressed that the choice of form cannot alter the nature of a measure. It must be ascertained whether the content of a measure is wholly consistent with the form attributed to it.[94] We would argue that it is not the form, but rather the content that is relevant. Yet, the way the Commission's communication on the interpretation of Article 102 TFEU was published, may suggest that titles and headings can also be of relevance. The final version of the guidelines (the result of years of debating among stakeholders) was labeled as 'guidance,' allegedly explaining only the 'enforcement priorities' of the EU Commission.[95] However, a careful reading reveals that the text provides a cautious new, 'more economic' interpretation of the Treaty's prohibition of exclusionary abuses. The reason for this was that the Commission wanted to avoid the charge of re-writing old but well established case law focusing on the protection of market structures.

The wording of a communication reflects its binding nature, or the lack thereof. The right to rely on the principle of the protection of legitimate expectations applies to any individual in a situation in which it is clear that the EU, by giving him precise assurances, has caused him to entertain legitimate expectations.[96] So the precise wording of a communication is of high importance.

As an example, point 76 of the guidelines on regional aid expressly declares that operating aid is generally not allowed in the EU.[97] This seems to be a soft rule because of the phrase 'generally,' yet the following provisions make this sentence harder when exceptional circumstances in which operating aid can nevertheless be exempted from the prohibition are expressly enumerated. The more

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[91] Commission Recommendation of 6 May 2003 Concerning the Definition of Micro, Small and Medium-Sized Enterprises, 2003 O.J. (L 124) 36 (EC).

[92] *Id.* at Art. 1.

[93] 2004. évi XXXIV. törvény a kis- és középvállalkozásokról, fejlődésük támogatásáról (Act XXXIV of 2003 on the small and medium-sized enterprises) (Hung.) §20.

[94] Case C-322/88, Grimaldi v. Fonds des maladies professionelles, 1989 E.C.R. 4407, ¶ 14 (citing Case 147/83, Binderer v. Comm'n, 1985 E.C.R. 257).

[95] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (Text with EEA relevance) OJ C 45, 24.2.2009, 7–20.

[96] Case T-273/01, Innova Privat-Akademie GmbH v. Comm'n, 2003 E.C.R. II-01093, ¶ 26.

[97] Guidelines on regional State aid for 2014-2020. OJ C209, 23.07.2013.

detailed the provisions of a communication, the harder its legal nature will become.

The Commission successfully managed the state aid part of the financial and economic crisis by issuing soft law instruments. This soft regulation allowed a flexible way of regulation at a time when economic conditions were changing dramatically. One of the provisions of the temporary framework adopted in December 2008 declared that the Commission would consider state aid that exceeded the threshold indicated in the *de minimis* regulation compatible with the common market on the basis of Article 87(3)(b) of the Treaty, provided that all of the conditions listed are met (e.g. that the aid would not exceed 500,000 € and that it would be granted in a scheme).[98] This could be seen as a kind of extension to the existing *de minimis* regulation declaring that aid under 200,000 € would not fall under Article 107(1) TFEU. It is true that the legal consequences of a de minimis exception and an exemption from the notification obligation are not exactly the same, yet in practice the difference is not that significant.

In EU competition law, there are three soft law instruments that are *expressly addressed to judges* of Member States' courts. There are two co-operation notices, one for antitrust, and another one for state aid matters.[99]

The co-operation notice laying down the principles for in the effective functioning of the European Competition Network enjoys a special status among soft laws.[100] The annex includes a statement signed by competition authorities acknowledging that they will "abide by the principles" of the notice, with special regard to the handling of leniency applications. This could give way to claims even during subsequent court procedures arguing that a national competition authority did not obey the principles of the notice.[101]

The communication targeting national judges is a unique instrument giving guidance to national courts about the quantification of harm caused by infringements of EU antitrust rules. In the communication, the Commission recalls the main existing principles that may help courts and parties deal with this issue, such as the requirement that national rules on quantification should not make it excessively difficult to obtain compensation for the harm suffered.[102] The Commission's short communication is accompanied by a comprehensive Practical Guide drawn up by the Commission's services. The Guide provides an overview of the main methods and techniques available to quantify such harm in practice.

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[98] Communication from the Commission of Jan. 1, 2009, Temporary Community Framework for State Aid Measures to Support Access to Finance in the Current Financial and Economic Crisis, 2009 O.J. (C 16) 1, 5 (EC).

[99] Commission Notice of Apr. 9, 2009, on the Enforcement of State Aid Law by National Courts, 2009 O.J. (C 85) 1 (EC).

[100] Commission Notice of Apr. 27, 2004, on Cooperation Within the Network of Competition Authorities, 2004 O.J. (C 101) 43 (EC).

[101] *National Authorities which have Signed the Statement Regarding the Commission Notice on Cooperation within the Network of Competition Authorities*, EUROPA.EU, http://ec.europa.eu/competition/antitrust/legislation/list_of_authorities_joint_statement.pdf.

[102] Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, 2013 O.J. (C 167, 19).

The strength of these soft law instruments and its soft binding effect is weakened by the fact that the Commission might not be the best placed body to have perfect knowledge in this field. Neither does the Commission's competence cover awarding damages, nor has it developed a practice to investigate and quantify the harm caused by cartels or other anti-competitive practices as a method to impose fines on undertakings.

In contrast, communications covering subject matters where the Commission itself enforces EU law are more persuasive and may use stronger language. This is the case for the leniency, the settlement and the fining guidelines.[103] To put it differently, hard provisions like these limit the discretionary powers of the Commission, thereby creating rights for individuals. In our study we do not focus on these soft law instruments, because they cannot be considered in the context of national court procedures, rather they are applicable exclusively within the framework of Commission procedures.

Those communications which can be applied not only by the EU Commission, but also by national competition authorities tend to have more cautious wording. The Commission provides orientation, but does not bind the hands of other institutions applying EU law. The one exception to this is co-operation notice in which competition authorities were expressly invited to make a declaration that they will abide by its provisions. This is how the Commission can influence law enforcement within the ECN without enjoying hierarchical control powers. To conclude, national courts and, in most cases, national competition authorities are not bound by communications issued by the Commission, which set out its interpretation of substantive antitrust rules. These communications cannot therefore give rise to rights which ought to be protected by national judges.

On the other hand, if a national competition authority takes EU communications seriously by including extensive references to them in its reasoning, the content of these instruments could become subject to litigation before review courts. In an extreme case, one could argue that there would be good grounds for a party challenging national competition authority decision whereupon a non-application of a Commission communication results in a divergent outcome for such party. If a national competition authority comes to be seen as generally adhering to EU guidelines as if they were sources of hard law, a general legitimate expectation as to the automatic application of EU soft law could arise among legal and business stakeholders.[104]

[103] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. Official Journal C 210, 1.09.2006, 2-5. Commission notice on immunity from fines and reduction of fines in cartel cases, Official Journal C 144, 23.04.2016, 23–28. Commission notice on the conduct of settlement procedures, Official Journal C 167, 2.7.2008, 1–6.

[104] This argument has not been tested in Hungary yet, since as a rule, the Competition Council follows the Commission's communications.

2.2.3. EU Communications Applied by the Competition Council of the Hungarian Competition Authority (GVH)

The overall attitude of the Hungarian Competition Authority, GVH, has always been EU-friendly; the Competition Council had based its decisions on the principles derived from the case law of the EU courts and the soft law documents issued by the EU Commission, even before the country joined the EU. Diverging interpretations of EU and Hungarian competition norms only arose in exceptional circumstances, and were generally attributable to human factors as opposed to conscious resistance.[105]

An overview of the Competition Council's decisions since 2009 shows that the most often cited EU communication is the guidelines interpreting the effect on trade clause of Articles 101 or 102 TFEU.[106] The Competition Council quoted not only those parts of the notice which reproduced the case law of the EU Court, but also the numerical formulas elaborated by the Commission (i.e. the 5% market share and the 40 million Euro turnover threshold) have been followed as law. Várnay and Tóth conclude that this proves that the GVH was prepared to bring its practice in line not only with hard EU laws, but also with the policies of the EU Commission expressed in the form of various soft law documents.[107] The notices on vertical restrictions,[108] on horizontal anti-competitive agreements,[109] the *de minimis* anti-competitive agreements[110] and the definition of the relevant market[111] are also among the soft laws most often mentioned. A seminal case where the Competition Council based its reasoning on a soft law document issued by the EU Commission involved the evaluation of a non-compete clause.[112] The GVH imposed fines on a French-owned Hungarian newspaper distributor company and several other newspaper publishers in 2010. The infringement involved a special market allocation arrangement involving a non-compete clause attached to the privatization of the newspaper distribution business of the Hungarian Post back in 1998. The reasoning relied heavily on the communication on ancillary restraints of March 2005,[113] setting out conditions under which the

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[105] *See* Tihamér Tóth, *The Reception and Application of EU Competition Rules: An Organic Evolution,* THE LAW OF THE EUROPEAN UNION IN HUNGARY: INSTITUTIONS, PROCESSES & THE LAW 247, 251-52 (Márton Varju & Ernő; Várnay eds. 2014).

[106] Commission Notice of Apr. 27, 2004, Guidelines on the Effect on Trade Concept Contained in Articles 81 and 82 of the Treaty, 2004 O.J. (C 101) 81 (EC).

[107] *See* Várnay & Tóth, *supra* note 8, at 23.

[108] *See, e.g.*, Fővárosi Ítélőtábla (BH) [Metropolitan Court of Appeal] Sept. 19, 2012, Vj-57/2007 (Hung.).

[109] *See, e.g.*, Közigazgatási és Munkaügyi Bíróságnak (BH) [Administrative and Labor Court] Nov. 20, 2013, Vj/74/2011 (Hung.).

[110] *See, e.g., id.*

[111] *See, e.g.*, Közigazgatási és Munkaügyi Bíróságnak (BH) [Administrative and Labor Court] Dec. 12, 2014, Vj/98/2011 (Hung.).

[112] *See, e.g.*, Fővárosi Ítélőtábla (BH) [Budapest Court of Appeal] Nov. 4, 2012, Vj-195/2007/151 (Hung.).

[113] Commission Notice of Mar. 5, 2005 on Restrictions Directly Related and Necessary to Concentrations, 2005 O.J. (C 56) 24, 24-31.

Commission will evaluate a non-compete provision as a natural attribute to an authorized concentration, instead of finding that there was cartel-like behavior. The Competition Council ruled that since the conditions contained therein were not met, the agreement was a naked cartel apt to be sanctioned under EU and Hungarian law.[114]

The soft law document relating to the interpretation of Article 102 TFEU regarding exclusionary abusive practices raises special problems.[115] The publication of the document had been preceded by years of discussions involving all the stakeholders. However, the more economic approach reflected in the document was regarded as a new development in view of the more ordoliberal approach of the EU courts in protecting the structure of the competitive process. In order to minimize the potential conflict, the document was published with an unusual title: Guidance on the EU Commission's enforcement priorities in applying Article 102 TFEU to exclusionary abusive conduct ("the Guidance").[116] Despite its modest heading, the Guidance was much more than a listing of priorities, it provided a detailed explanation of how the Commission intends to interpret Article 102 TFEU for cases commenced after the date of its publication.

The Commission adopted its famous decision in the *Intel v. Comm'n* case[117] imposing record breaking fines shortly after it had published the Guidance. The reasoning of the decision was hybrid, relying on both established case law and an analysis of the facts of the case in light of the Guidance. The General Court avoided any reference to the Guidance in its judgment, quoting exclusively from previous judgments when describing the requirements of EU law regarding the rebate systems and more generally, the need to prove actual abusive effects. The General Court refused to analyze whether the contested decision was in line with the Guidance.[118] It was argued firstly, that the Guidance was applicable only for cases commenced following its publication, and secondly, that the Guidance set out enforcement priorities which could not have been applied in a procedure where the Commission had already decided that it would initiate an investigation as a matter of priority.[119] In the same vein, Advocate General Kokott refused to follow the Commission's more economic approach in *British Airways v.*

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[114] Commission Notice of Mar. 5, 2005, *supra* note 113, at 115.

[115] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (Text with EEA relevance) OJ C 45, 24.2.2009, 7–20.

[116] Communication from the Commission of Feb. 24, 2009, Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings (EC) 2009 O.J. (C 45) 7; *see also* Press Release IP/08/1877, European Commission, The Antitrust: Consumer Welfare at Heart of Commission Fight Against Abuses by Dominant Undertakings (Dec. 3, 2008).

[117] Case T-286/09, Intel v. Comm'n, 2014 EU:T:2014:547 (currently on appeal, the case is pending judgment on a procedural question under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (COMP/C-3/37.990)).

[118] *Intel v. Comm'n*, 2014 EU:T:2014:547 ¶¶ 156-157.

[119] *Id.*

Comm'n[120] and relied on the Court's traditional interpretation of Article 102 TFEU.

This is in sharp contrast with the Competition Council's approach taken in its most recent MasterCard decision imposing fines for exclusionary practices in the Hungarian debit card market. The decision making body of the competition authority quoted the Guidance several times as if it was the statement of the law as regards the correct interpretation of Article 102 TFEU.[121]

2.2.4. The Attitude of Hungarian Judges

A review of recently published court judgments shows that administrative courts have had no problem with the application of EU competition law communications so far. It seems that parties have accepted them as a useful framework for the legal evaluation of the cases at hand. For example, the Municipal Court's judgment in the above mentioned newspaper distribution cartel case mentions the Commission's ancillary restraint notice several times, despite stating that it was not of relevance for deciding the case.[122] This is interesting if we consider that the GVH's decision did include references to the ancillary restraints notice. One reason for this could be that the notice was issued in 2005, whereas the facts of the case dated back several years.[123] The appellate review court did not even mention the EU communication in its judgment upholding the decision of the Municipal Court.[124]

We would expect that cases decided based on the communication on exclusionary abuses[125] would be subject to some debate. This soft law sought to summarize the law on exclusionary abuses in the light of the mainstream, more economic approach which is not always reflected in the Court's jurisprudence. An interesting case could develop from the most recent Competition Council decision finding an infringement by MasterCard in relation to the setting of its multilateral interchange fees.[126] This is a negative decision imposing HUF 80 million in fines, so a court review, involving legal arguments challenging the Council's reliance on the communication, is to be expected. In addition to mentioning the communications on the effect on trade between Member States and the definition of the relevant market, the MasterCard decision includes more than thirty references to the Commission's priority guidance.[127] As a matter of fact, the Council quotes this as the "Dominance Communication," disregarding the special nature of this soft law instrument, which is also reflected in its title. The whole legal analysis of the Council is based on this soft law instrument, with

[120] Case C-95/04 P, British Airways v. Comm'n, 2007 E.C.R. I-2377, 2383-86.

[121] Vj/46/2012, decision of January 11, 2016.

[122] Fővárosi Ítélőtábla (BH) [Metropolitan Court of Appeal] Sept. 19, 2012, Vj-57/2007 (Hung.).

[123] Commission Notice of Mar. 5, 2005, *supra* note 113, at 15.

[124] *Id.*

[125] Communication from the Commission of Fed. 24, 2009, *supra* note 80, at 7-20.

[126] Közigazgatási és Munkaügyi Bíróságnak (BH) [Administrative and Labor Court] Jan. 11, 2016, Vj/46/2012 (Hung.).

[127] Vj/46/2012, decision of January 11, 2016.

some additional references to the case law of the EU courts,[128] including opinions of advocate generals, although previous GVH decisions are not even mentioned. This is perhaps the best example to show that national quasi-judicial bodies, like the Competition Council of the GVH, take EU soft law as seriously as the case law of the European courts or other hard law sources.

In theory, even if a national competition authority follows these communications, it seems that national courts can simply disregard them without an obligation to turn to the ECJ for a preliminary ruling. This could be a difference between formal soft law acts, like a recommendation, and other types of soft law that are formally not mentioned in the Treaties. In practice, however, the legality of EU competition law communications have not been challenged by parties before Hungarian courts yet. As a rule, administrative judges are accustomed to conducting a review of competition law cases, largely deferring to the position of the competition authority.[129] An administrative decision based on EU or national soft law used to reinforce applicable margins of discretion, would only be held unlawful if the conclusions were unlawful, unreasonable or logically wrong. So the authority always possesses a degree of discretion that is not capable of judicial review procedures.

Due to this weak judicial control, soft law that has only soft binding force at the level of a given authority hardens at court level, as it usually falls outside the scope of judicial control, unless there is a relevant violation of a hard law provision. In the post-Menarini world[130] this may gradually change to meet the expectations of the European Court of Human Rights. Still, administrative judges may feel more comfortable agreeing with the reasoning given by an expert or an independent competition authority in cases raising complex economic and policy issues. What makes a national judge more equipped than the highly competent EU Commission to determine what an exclusionary abuse is, or when trade between Member States is significantly affected?

The process of the hardening of EU soft law cannot be observed in civil law litigation where the plaintiff is seeking compensation for damages caused by anti-competitive conduct. Hungarian civil law courts deciding damages or contractual claims rarely, if ever, apply EU competition rules. If they cannot avoid making reference to competition rules, then they would rely on domestic ones. Since EU competition rules are not routinely enforced by civil law judges, we cannot evaluate their approach to EU soft law either.

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[128] *See, e.g.*, Case C-23/14, Post Danmark A/S v. Konkurrencerådet, 2015 E.C.R. 651 (EC); Case C-382/12, MasterCard v. Comm'n, 2014 E.C.R. 2201 (EC).

[129] Maciej Barnatt, *Transatlantic Perspective on Judicial Deference in Administrative Law*, 22 COLUM. J. EUR. L. 275 (2016) (providing excellent comparison of judicial deference in administrative law, including competition law).

[130] A. Menarini Diagnostics S.R.L. v. Italy, App. No. 43509/08, Eur. Ct. H.R. (2011), http://hudoc.echr.coe.int/eng?i=002-385.

3. Conclusions

In *Grimaldi v. Fonds des Maladies Professionnelles*, the Court acknowledged that recommendations can have *legal effects*.[131] The national courts are bound to take recommendations into consideration in order to decide disputes submitted to them. This is the case especially (i) where they help interpret national measures adopted in order to implement EU soft law or (ii) where they are designed to supplement binding Community provisions. This is because, unlike Article 263 of the TFEU, which excludes review by the Court of acts like recommendations, Article 267 confers on the Court jurisdiction to give a preliminary ruling on the validity and interpretation of *all acts* of the institutions of the Community without exception. However, we should bear in mind that in the context of the Court's ruling "bound to consider a recommendation" does not mean that soft law should be enforced in the same way as hard law.

The obligation to consider does not include an absolute obligation of adherence, nevertheless, in practice; national judges tend to defer to the EU Commission's interpretation of EU law published in soft law form. This is due to three reasons. First, traditional administrative judicial control does not make deviation from the Commission's position an easy option. Second, national judges often lack expertise in technical fields of EU law. Lastly, interpretation of EU law may require policy decisions to be made, which does not naturally fit judges.

Despite these difficulties we submit that Grimaldi's "bound to take into consideration" language should not prohibit a national judge from departing from Commission soft laws. However, a clear explanation should be put forward, considering any potential conflict with legal principles like the protection of legitimate expectations.

Nonetheless, under the traditional model of administrative judicial review, this is currently not the case, especially not in the telecommunications sector. As we have shown, based on the soft binding effect of soft law, only national regulators are able to deviate from EU soft law documents, but not national courts. If the authority deviates from the soft law, then, if such deviation resulted in an unlawful, unreasonable, or logically wrongful use of discretion, the court may override this decision based on the principle of legitimate expectations. However, unless a clear violation of legality is presented, a court may not override the position taken by the national authority simply because the authority's decision is contrary on EU soft law. If the authority applied the soft law document, then the principle of legitimate expectations dictates that the courts should not challenge EU soft law indirectly, through quashing the national administrative decision. A rare exception might be when the EU soft law is in violation of an EU hard law provision, but then it would be the ECJ's task to decide on the validity of the soft law act in the form of a preliminary ruling.

It is also likely that the national court's attitude may be different depending upon the nature of the legal field involved, as well as the competence and the expertise of the Commission. In *Grimaldi v. Fonds des Maladies Professionnel-*

[131] Case C-322/88, Grimaldi v. Fonds des maladies professionnelles, 1989 E.C.R. 4407.

les, the measures in question were "true recommendations," that is to say measures which, even as regards the persons they addressed, were not intended to produce *binding effects*.[132] This was because they related to social policy, belonging to the realm of Member State sovereignty. There was neither clear EU competence, nor Commission expertise gained through law enforcement. On the other hand, the EU Commission can be regarded as an experienced enforcer of competition rules in the EU. Why would a judge believe that he or she knows better, especially if the soft law instrument had been discussed with national competition authorities, and they reflect a complex, coherent interpretation of vaguely worded provisions of EU hard law?

We agree with the conclusion drawn by Ştefan that "soft law is seen by the European Courts as a particular type of norm, complementary to (hard) laws and part of the broader normative framework they consider when judging cases submitted to their jurisdiction."[133] Interpretative communications may have legal consequences even if they lack general binding force. Depending upon the circumstances, they may limit not only the discretionary powers of the Commission, but also national competition authorities, especially if the latter establish a practice of following EU communications as if they were law. Administrative courts, in turn, should protect legitimate expectations and check whether national authorities have adhered to those EU soft law instruments that were meant to generate legitimate expectations.

Beyond the general principles of EU law, the naturally limited depth of administrative judicial review, and the division of the executive branch and the judiciary, there is another driving force making national judges welcoming of, or at least tolerant towards, the application of EU soft law. Most national competition agencies, just like the GVH, also issue such communications under national law. If their content and wording gives rise to the protection of legitimate expectations, then courts will get accustomed to acknowledging the legal value of these national communications. In a system of parallel application of EU and national competition laws it is highly unlikely that the courts would differentiate between cases involving questions relating to adherence to an EU or a national communication. This is even truer in cases where national authorities enforce both EU and domestic competition rules. This evolving practice under domestic law also contributes to the 'hardening' of EU soft laws.

So where lies the difference between soft law and hard law from the perspective of a national judge? First, even though their binding effect is not absolute, if the authority relies on EU soft law in its decision then deviation at the level of the courts is only a rare option. Second, soft law should not create new obligations for undertakings subject to substantive EU rules.[134] Similarly, the legal principle prohibiting the introduction of stricter new rules with retrospective effect on third

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[132] Case C-322/88, Grimaldi v. Fonds des maladies professionnelles, 1989 E.C.R. 4407.

[133] Oana A. Ştefan, *European Competition Soft Law in European Courts: A Matter of Hard Principles?*, 14 Eur. L. J. 753, 767 (2008).

[134] *See e.g.*, Commission Directive 2006/111 of 16 November 2006 on the Transparency of Financial Relations Between Member States and Public Undertakings as well as on Financial Transparency Within Certain Undertakings, 2006 O.J. (L 318) 17.

parties is not applicable to soft law instruments. Nevertheless, the effect of some EU competition law communications with potentially hard provisions is restricted to new cases, i.e. where the Commission has not issued a statement of objections yet.

The possibility for deviation by authorities and the legal review of such arbitrary deviation from a soft law instrument is perhaps the most significant difference of soft law when compared to hard law norms. The option not to follow the soft law in exceptional circumstances softens their binding effect. The authority, and under even stricter conditions, the review court can decide not to follow the soft law instrument. For the telecommunications sector a special procedure is foreseen with the Commission enjoying veto powers over the decision of a national regulator. For competition law, law enforcers are expected to explain why their different approach does not contravene general principles of EU law (e.g. legal certainty and the protection of legitimate expectations). Co-operation between the EU Commission and national competition authorities applying EU law makes deviation from EU soft law fairly unlikely, even if a deviation benefiting individuals would not endanger the applicability of legal principles.

Our paper endeavored to prove that, despite the Treaty's and the ECJ's statement that they are non-binding norms, soft laws are often considered by national courts the same way as hard laws. Within soft law, a distinction can be made between formal acts like a recommendation and informal soft laws like a communication. If courts would find that a recommendation is in conflict with EU hard law since it creates a new obligation, they should refer the act to the ECJ for a preliminary ruling, to get a ruling on its validity. However, the Dutch telecommunications example showed that there is a fine line between genuine soft law content and the creation of new obligations, thus it would be reasonable if the ECJ could also be asked to interpret the content of soft law documents as well. On the other hand, interpretative competition law communications – within the above mentioned limits of judicial review – can simply be disregarded were the judges disagree with their content. We do not believe that this distinction between two different types of soft laws is warranted. Even if recommendations are expressly mentioned in the founding treaties, their legal effects should not be different from that of informal soft laws.

Such a hardening of soft law at national level creates the same conflicts between the Commission and national courts as the ones that exist between the Commission and the European Parliament or the Council at EU level.[135] In order to make legal control of soft laws issued by the Commission a reality, the preliminary ruling procedure should be made more effective. A way to achieve this would be if the ECJ, based on Articles 263 and 288 of the TFEU, would allow preliminary questions of interpretations for recommendations and for other soft law documents, thus it would encourage referrals for the annulment of norms binding third parties. Otherwise the legal effects of soft law will continue to differ at EU and national levels.

[135] *See* Resolution 2007/2028, of the European Parliament of 4 September 2007 on Institutional and Legal Implications of the Use of "Soft Law" Instruments, 2007/2028 (INI).

The Emergence of Hybrid International Commercial Courts and the Future of Cross Border Commercial dispute Resolution in Asia

Firew Tiba*

Abstract

The bulk of international commercial disputes are resolved by national courts. In Asia, regional international arbitration centres in places such as Shanghai, Hong Kong, Singapore, and Tokyo have also been partaking in these exercises albeit at varying levels of popularity. While commercial arbitrations remain popular, the influence of these bodies in driving convergence has been questioned. This has been in part due to the confidential nature of their awards and their *ad hoc* nature. The uptake of international commercial instruments in the region is growing, but the extent of harmonization of international commercial law remains weak. Even in countries such as Australia that have taken steps to adopt international commercial instruments, the efficacy of international law has been called into question. Application of these international rules have not been promising. In this regard, the lacklustre performance of the Convention for the International Sale of Goods (CISG) could be cited. There is no doubt that judicial institutions play a crucial role in achieving the lofty ideal of harmonisation. At

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the other end of the spectrum, the establishment of fully blown regional international courts for commercial disputes is further away. This has been hampered by the obvious sovereignty concerns and the relative success of international commercial arbitration.

It has been a little over a year since Singapore, a country that is already one of the most preferred arbitration destinations in the world, moved to establish an International Commercial Court, a unique institution that pushed the frontiers of cross border commercial dispute resolution. The Court heard its first case in May 2015 on a referral from the High Court. This case involved a dispute between Indonesian and Australian mining companies.[1] The court is unique in that it allows appointment of foreign judges and dispenses with the application of Singapore's Rules of Evidence. Naturally all Singapore regular courts are expected to apply the Singapore Rules of Evidence in disputes before them. However, an exception is made in regards to matters coming before the Singapore International Commercial Court (SICC), where on application of the parties the Singapore Rules of Evidence may be disapplied pursuant to Order 110, Rule 23.[2] As will be discussed later in this essay, this hybrid institution promises to combine the best of international commercial arbitration and that of judicial settlement of disputes. Elsewhere in Asia, we have had the Dubai International Financial Centre Courts of First Instance and Appeal, the Qatar International Court and Dispute Resolution Centre and, most recently, the Abu Dhabi Global Market Courts. The need for specialised commercial division has long been recognised in places like London, Delaware North, and Victoria in Australia. It is one thing to have a commercial division and yet another to make these divisions have an international orientation.

This paper seeks to put these developments in comparative perspectives and examine normative, procedural, institutional issues and practical challenges that such endeavours entail. It will also assess and critically examine the legal/legislative infrastructure required to accommodate the establishment of hybrid judicial organs for cross border commercial disputes.

I. Introduction

Asia is home to a population of over 4 billion. It consists of incredibly diverse group of countries whose legal systems are shaped by events spanning several centuries of their recorded history. Trade among Asian countries along the Silk Road, over land, and maritime route has been well documented. Major global economic hubs straddle the vast region. In West Asia, there exists the Middle East players with oil and emerging financial industries. In Central Asia, there are the vast expanse of ex-Soviet Republics with expanding resource economy. In South Asia, the Indian sub-continent is humming with activities with the emerging Indian economy acting as a driving force at its centre. In East Asia and South

[1] *BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another* [2016] SGHC(I) 01, http://www.sicc.gov.sg/documents/judgments/2016_SGHC(I)_01.pdf.

[2] SICC User Guide Note 5 Disapplication of Singapore Evidence Law, http://www.sicc.gov.sg/documents/docs/SICC_User_Guides.pdf.

East Asia lie some of the world's biggest economies. While it is impossible to generalise about the continent, it would be fair to assume that doing business in any of these subregions calls for an effective legal framework and dispute resolution mechanisms.

Effective international legal framework and dispute resolution mechanisms do not operate in isolation from other factors such as the extent of regional integration and culture of independent national dispute resolution mechanisms. Asia lags behind for its lack of a pancontinental economic and political integration movements compared to its regional counterparts that have established the European Union and African Union.[3] However, there are promising efforts at the sub-regional levels as exemplified by the work of ASEAN in South East Asia and the Gulf Cooperation Council (GCC) in West Asia. There is potential for under-utilised sub-regional organisations to be activated. Also, there is growing participation of Asian countries in the activities of institutions such as UNICTRAL whose main objective is to harmonise rules of international commercial law. The establishment of UNCITRAL's regional centre for the Asia Pacific in 2012 is one of the steps taken to bring about "certainty in international commercial transactions through the dissemination of international trade norms and standards, in particular those elaborated by UNCITRAL."[4]

Individual member-states in these two sub-regions are also taking encouraging steps in facilitating harmonisation of applicable rules and cross-border commercial dispute resolution mechanisms. These initiatives will be discussed later in this paper.

Thus, when one speaks of Asia, one is inclined to look at its sub-regional economic and political integration movements to see if there are developments in these sub regions with broader regional or continental implications. These sub-regional initiatives have the potential to outgrow their subregions just as the European Coal and Steel Community grew in to the ever-expanding European Union. In this regard, however, there is little to be shown. Likewise, in regards to the immediate focus of this paper, international commercial dispute resolution, the role of sub regional integration movements in Asia has been limited. Based on experiences from Europe, it can be hypothesized that development of regional or sub-regional commercial dispute resolution mechanisms are directly related to the extent of economic and political integration. Thus, for less politically integrated regions, the immediate concerns remain peace and security matters along with laying framework for economic cooperation. Agreements for harmonization of commercial laws, much less, mechanisms for resolving commercial dispute between private parties rarely figure as their priorities.

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[3] Sub-regional bodies include: Gulf Cooperation Council (GCC); South Asian Association for Regional Cooperation (SAARC); Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC); Economic Cooperation Organization (ECO); Shanghai Cooperation Organisation (SCO); Association of Southeast Asian Nations (ASEAN); Mekong-Ganga Cooperation (MGC).

[4] United Nations Commission on International Trade Law [UNCITRAL], *UNCITRAL Reg'l Ctr. for Asia and the Pac.*, http://www.uncitral.org/uncitral/tac/rcap.html; UNCITRAL, *UNCITRAL Reg'l Ctr. for Asia and the Pac.: Launch Event*, http://www.uncitral.org/uncitral/en/tac/rcap/launch.html.

While there are a number of sub-regional organisations in Asia, ASEAN takes the lead for being at the centre of it all both geographically and in terms of acting as a catalyst for regional cooperation. It is also acting as a magnet for further regional cooperation agreements as manifested in ASEAN+3+ [India +Australia +New Zealand] and other configurations. Whatever prospect there is for regional, economic, and political integration in greater Asia, ASEAN is likely to play a leading role. Its recent transformation into an economic community is a good indicator that it is following the trajectory followed by the European Steel and Coal Community several decades ago. Therefore, if there is going to exist a regionally-sponsored commercial dispute resolution mechanism, ASEAN would be the prime candidate. With these background discussions in mind, let us explore the state of international commercial dispute resolution in general and in Asia in particular.

II. The State of International Commercial Law Dispute Resolution

The discussion of international commercial dispute resolution is directly linked to the existence of a body of law that can be identified as international commercial law. Commercial laws and courts have been variously defined. Lord Thomas, Lord Chief Justice of England and Wales, defined the word commercial courts in his DIFC Academy of Law lecture as one that encompasses, "courts whose function is exclusively directed to dealing with dispute relating to markets, commerce and rights relating to them."[5] Thus, without there being the need to be more specific, commercial laws can be defined as those laws that relate to markets, commerce and rights relating to them.

International commercial laws are laws of international origin but mostly of national application.[6] The laws themselves owe their origin to different sources: international conventions, model rules, soft laws and the like.[7] Resolving disputes involves interpreting, applying, and enforcing these laws. Various actors are involved in these activities.

Arbitration and litigation are the two key forms of international commercial dispute resolution, with the former commanding a significant acceptance among businesses and practitioners. A 2015 International Arbitration Survey by Queen Mary Arbitration Centre, University of London, provides a number of useful insights into the state of international commercial arbitration and factors motivating

[5] The Right Hon. The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, Dubai International Financial Centre [DIFC] Academy of Law Lecture, Dubai: Commercial Justice in the Global Village: The Role of Commercial Courts (Feb. 1, 2016) (transcript available at https://www.judiciary.gov.uk/wp-content/uploads/2016/02/LCJ-commerical-justice-in-the-global-village-DIFC-Academy-of-Law-Lecture-February-2016.pdf).

[6] A number of UNCITRAL and UNIDROIT international commercial conventions are generally interpreted and applied by national courts as there are no international commercial courts given these responsibilities.

[7] In general, see the international harmonization efforts of international institutions such as UNCITRAL, UNIDROIT and a number of regional economic communities.

businesses and legal practitioners in their dispute resolution activities.[8] The findings of such surveys are important indicators of things to do and not to do in designing international commercial courts.

The survey showed that 90% of respondents stated that international arbitration is their preferred dispute resolution mechanism; either as a stand-alone method (56%) or together with other forms of ADR (34%).[9] Enforceability of arbitral awards, avoiding specific legal systems, along with flexibility and selection of arbitrators were cited, in decreasing order, as the most valuable aspects of arbitration.[10] On the other hand, cost, lack of sanctions during the arbitral process, lack of insight into arbitrator's efficiency, and lack of speed are cited, in decreasing order, as some of the unfavourable features of arbitration.[11] Similar observations cannot be made about litigation since there are no equivalent international commercial courts. However, disputes with transnational commercial significance are being brought to national courts and hybrid international commercial courts. The latter is the subject matter of this paper.

In regards to national courts, it has been a long held belief that international parties are very reluctant to submit to the jurisdiction of the national courts of the other party to the dispute. F. Peter Phillips summarises the reasons as follows:

> Most companies doing business internationally are reluctant to enter their customers' courts. They fear corrupt or protective judges; they are unfamiliar with (and therefore sceptical of) local law; they seek to avoid inconsistent outcomes; they prefer private conflict resolution to public trial; they may be unfamiliar with local language and custom; they wish to pursue uniform agreements rather than modifying their contracts to comply with the sometimes obscure requirements of scores of jurisdictions.[12]

The contradiction between the global outlook of business and the introspective localised commercial dispute resolution is eloquently captured by W. Laurence Craig in the following words:

> While trade and investment were becoming increasingly transnational, and the multinational corporation was developing with an interest in promoting business and profits without regard to national boundaries, national courts, at least from the foreign trader's or investor's point of view, remained resolutely local in outlook. In many jurisdictions the judiciary

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[8] Paul Friedland & Professor Loukas Mistelis, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* 2, Queen Mary Univ. of London School of Int'l Arb., http://www.arbitration.qmul.ac.uk/docs/164761.pdf (according to the researchers, the survey was conducted over a six-month period and comprised two phases: an online questionnaire completed by 763 respondents (quantitative phase) and, subsequently, 105 personal interviews (qualitative phase)).

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] F. Peter Phillips, *The Challenges of International Commercial Dispute Resolution*, CPR: The Int'l Inst. for Conflict Prevention and Resolution, http://www.businessconflictmanagement.com/pdf/BCMpress_01.pdf.

> was slow to change, ill-informed about modem commercial and financial practices, and hesitant to abandon local traditions and procedures that often seemed arcane or unbusinesslike to outsiders. Moreover, judicial procedures and formalities built on accepted national traditions have a very different impact on foreign persons and entities, to whom not only the procedure but frequently the language is foreign, than they do on their local contracting partners. Finally, there is always the possibility, or at least the perception, that local courts will be biased in favor of domestic parties and less protective of foreign interests"[13]

Such assessment of the shortcomings of judicial settlement of commercial disputes by local courts has helped international arbitration to grow in prominence. As W. Laurence Craig summarises:

> In short, while speed, informality, and economy have had some influence on the growth of international commercial arbitration, the essential driving force has been the desire of each party to avoid having its case determined in a foreign judicial forum. Parties seek to avoid these forums for fear that they will be at a disadvantage due to unfamiliarity with the jurisdictions language and procedures, preferences of the judge, and possibly even national bias.[14]

There is no denying the assumptions that such perceptions about domestic litigation may have led to the outcome that international arbitral bodies are the most preferred entities to deal with transnational commercial disputes. That is not to say that there are no domestic courts that have managed to overcome this perceived shortcoming and endeared themselves to international litigants. In this regard, one can mention the London Commercial Court. The Court was established in 1895.[15] This Court attracts significant proportion of litigants where one or both parties to the disputes do not have any real or significant connection to the United Kingdom.[16] It is suggested that 80% of work before the London Commercial Court has, at least, one party who is based outside the jurisdiction.[17]

There are a number of reasons why this type of national court is preferred to other national courts in resolving international commercial disputes. One of the significant advantages of the London Court is its ability to understand the busi-

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[13] W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 50 TEX. INT'L. L. J. 699, 700 (2016).

[14] *Id.*

[15] Hon. L.J. Rupert M. Jackson, *Review of Civil Litigation Costs: Preliminary Report*, 1 ROYAL CTS. OF JUST. 277 (2009), http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-23/Amicus%20brief/AnnexOJacksonvolume1.pdf.

[16] Hon. C.J. Marilyn Warren AC & Hon. J. Clyde Croft, *An International Commercial Court for Australia: Looking Beyond the New York Convention*, SUP. CT. OF VICT., 17, https://www.monash.edu/__data/assets/pdf_file/0009/467658/Com-CPD-April-2016-Paper.pdf.

[17] Warren & Croft, *supra* note 16, at 18.

ness and commercial world.[18] London's link to the financial and business community dates back to the 18th century under Lord Mansfield.[19] Currently, the London Commercial Court's Financial List keeps abreast of developments through "the provision of market seminars by an independent body originally established by the Bank of England, the Financial Markets Law Committee."[20] It is said that this ensures that "senior members of the judiciary, and particularly the judges of the Commercial Court and the Financial List, are provided with regular and well-informed updates on changing market practices and the development of new financial products."[21] There are, of course, the well-known reasons of judicial independence, respect for rule of law and the commercial friendliness of the English Common Law. This cemented London's place as an attractive venue for international commercial dispute resolution, whether it is litigation or arbitration.

It is a well-known fact that states are less likely to cede sovereignty on matters of civil and commercial nature. This fact militates against the establishment of a truly international commercial court for the foreseeable future. Consequently, individuals and businesses engaged in cross-border commercial transactions are left to their own devices when it comes to dispute resolution. This is not to say states have not taken steps to mitigate the adverse impact of complex legal webs that businesses have to navigate in cross border transactions.

One of such steps is to work towards harmonisation of substantive rules applicable to commercial transactions. Intergovernmental bodies such as United Nations Commission on International Trade Law (UNCITRAL) and the Hague Conference on Private International Law have spearheaded the harmonisation efforts. Others, such as, the International Chamber of Commerce have also been making contributions towards harmonisation. In the dispute resolution realm, UNCITRAL's New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards remains one of the stellar contributions to cross-border commercial dispute resolution. This Convention has been ratified by almost all Asian countries except North Korea, Iraq, Yemen and Turkmenistan.

Similar success achieved in the arbitration sphere has not been replicated in the realm of judicial settlement of cross border commercial disputes. To date, only four countries have ratified the 1971 Convention on the Recognition and Enforcement of Foreign Judgment.[22] The 2005 Choice of Courts Agreement Convention seems to have escaped similar fate as a result of its ratification by the

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[18] *See* The Right Hon. The Lord Thomas of Cwmgiedd, *supra* note 5, at 15. ("[A] court must understand the markets and the commercial world. The London Commercial Court has developed and adapted its links with the financial and business community.").

[19] *Id.* ("In the 18th Century Lord Mansfield, the creator of the basis of modern English commercial and insurance law, often used special juries drawn from experts in the field: being, for instance, commercial merchants, insurance brokers, traders and so on.").

[20] The Right Hon. The Lord Thomas of Cwmgiedd, *supra* note 5, at 15-16.

[21] *Id.*

[22] *See* HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *Principles on Choice of Law in International Commercial Contracts* (March 19, 2015) https://assets.hcch.net/docs/5da3ed47-f54d-4c43-aaef-5eafc7c1f2a1.pdf [hereinafter *Principles on Choice of Law*]; *see also* HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *16: Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, https://www.hcch.net/en/instruments/conventions/sta

US and the European Union.[23] From Asia, Singapore is the first and only country to accede to the Convention at the time of this writing.[24] It is to be seen whether the ratification process will be accelerated by these developments. But commentators are already asserting that the 2005 Choice of Courts Agreement Convention is set to do for litigation, what the 1958 New York Convention did for arbitration.[25]

At this stage, harmonisation of most aspects of international private laws as applied to commerce is a remote prospect. Harmonisation of substantive laws is a product of a number of factors one of which is political integration. Since, South East Asian economies are more integrated, should there be an economic crisis in one country, it is inevitable that the other East Asian markets will be effected.[26] It needs to be noted that even in regions that achieved the highest degree of regional integration, such as Europe, cross-border dispute resolution is not as developed as one would like to see.

At the same time, existence of uniform substantive law does not guarantee uniform interpretation and application of these laws. But businesses across Asia would benefit from clarity on issues of conflict of jurisdiction, choice of law and recognition and enforcement of foreign judgements. With this background discussion in mind, let us have a look at some of the approaches to cross-border commercial dispute resolution with specific reference to judicial settlement of disputes.

III. Overview of Approaches to Cross-Border Commercial Dispute Resolutions

A. The Private International Law Model (The Default Model)

National courts remain the most important forum for resolution of cross border commercial disputes. These courts rely on rules of private international law (conflict of law rules) to address transnational/foreign elements of disputes before them. Rules of private international law are essentially national laws.

tus-table/?cid=78 [hereinafter *Recognition and Enforcement of Foreign Judgments*] (discussing Albania, Cyprus, Netherlands, and Portugal).

[23] *See* HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *§ 14: Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (June 30, 2005) https://assets.hcch.net/docs/f4520725-8cbd-4c71-b402-5aae1994d14c.pdf [hereinafter *Convention on the Service Abroad of Judicial and Extrajudicial Documents*]; *see also* HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *§ 37: Convention of 30 June 2005 on Choice of Court Agreements*, https://www.hcch.net/en/instruments/conventions/status-table/?cid=98 [*Convention on Choice of Court Agreements*] (Status Table defines the countries established in the 2005 Choice of Courts Agreement Convention).

[24] For the ratification status table for Convention of 30 June 2005 on Choice of Court Agreements see https://www.hcch.net/en/instruments/conventions/status-table/?cid=98.

[25] *See* Michael Hwang, *Commercial Courts and International Arbitration-Competitors or Partners?*, 31 ARB. INT'L 193, 207 (2015) (discussing the meaning of the word dispute in an arbitration clause and highlighting the word differences in the 1958 New York Convention. "Article II(1) mandates recognition of 'an agreement . . . to submit to arbitration all or any differences . . . . ").

[26] The 1997 Asian financial crisis is a prime example.

These rules, among others, determine questions of jurisdiction, applicable laws, recognition, and enforcement of foreign judgements. This is the default regime for resolution of cross border disputes including commercial disputes. In the absence of international rules laying down common principles, there is bound to exist divergent positions among countries in any of these key areas of private international law. Let alone between two or more countries, the applicable rules may even vary between jurisdictions in the same country, such as Australia or United States that have a federal state structure.[27] In the following paragraphs, we will briefly consider the participation of countries in South East Asia in private international law initiatives aimed at harmonising rules applicable in the areas of jurisdiction, applicable laws and recognition and enforcement of foreign judgements.

As noted, only four countries, none of which are from Asia, are parties to the Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. Israel is the only country that signed Convention of 25 November 1965 on the Choice of Court. On the other hand, the Convention of 30 June 2005 on Choice of Court Agreement, has steadily acquired a number of significant signatories, including Mexico, the European Union, the United States of America, and Singapore.

Singapore's ratification is likely accelerated by its increasing prominence in cross-border commercial dispute resolution and its recent establishment of a hybrid Singapore International Commercial Court as a division of its high court. In an era of choice, where litigants have the option and, in most cases, preference for international arbitral bodies, the ratification of this Convention has significant ramifications for the reassertion of the role of national courts in cross-border commercial disputes. It is a commonly-held belief, as stated by the International Chamber of Commerce, that the Convention has "the potential to achieve for litigation what the New York Convention has achieved for arbitration."[28]

The three basic rules of the convention as summarized by the Hague Conference on Private International Law are: 1) the chosen court must in principle hear the case (Article 5); 2) Any court not so chosen must decline to hear the case (Article 6); 3) Any judgment rendered by the chosen court must be recognised and enforced in other Contracting States, except where a ground for refusal applies (Articles 8 and 9).[29]

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[27] Hon. James Allsop & Daniel Ward, *Incoherence in Australian Private International Laws*, FED. CT. OF AUSTRL., (Apr. 11, 2013), http://www.fedcourt.gov.au/publications/judges-speeches/chief-justice-allsop/allsop-cj-20130410 (discussing whether the principle surrounding jurisdiction where relevantly cases ought to be treated similarly actually occurs. The article eludes to the lack of unity in upholding certain provisions ultimately makes a foreign party's "answerability before Australian courts appear arbitrary.").

[28] INTERNATIONAL CHAMBER OF COMMERCE, ICC calls on governments to facilitate cross-border litigation, (Nov. 29, 2012), http://www.iccwbo.org/News/Articles/2012/ICC-calls-on-governments-to-facilitate-cross-border-litigation/ ("[T]his Convention is a necessary tool towards effective cross-border dispute resolution. It has the potential to achieve for litigation what the New York Convention has achieved for arbitration.").

[29] HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, O*utline of the Convention 30 Jun. 2005 on Choice of Court Agreements*, 1 (May 2013), https://assets.hcch.net/docs/89be0bce-36c7-4701-af9a-1f27be046125.pdf.

In regards to choice of law, there are no conventions in force. However, Principles on the Choice of Law in International Contracts that were approved on 19 March 2015 could someday gain widespread acceptance.[30] The overriding aim of these principles is to entrench the notion of party autonomy in choice of law.

B. The OHADA Model (Intergovernmental Approach)

Common Court of Justice and Arbitration (CCJA) is the court of the Organization for the Harmonization in Africa of Business Laws (OHADA).[31] OHADA is the French acronym for Organisation pour l'Harmonisation en Afrique du Droit des Affaires.[32] This organisation was established in 1993 with the purpose of harmonising business laws.[33] This means it has been in existence for over two decades. OHADA currently has 17 member states, mainly from West and Central Africa.[34] Uniform acts adopted by its Council of Ministers become an integral part of the legal system of its member states. The uniform acts adopted so far include a commercial code, company law, law of secured transactions, arbitration, simplified recovery procedures and measures of execution, bankruptcy and collective discharge procedures, accounting, carriage of goods by road, and cooperatives.[35]

CCJA is given three key roles. The first role is certifying consistency of draft Uniform Acts with OHADA treaties.[36] This has a gate keeping impact which ensures that future Acts do not conflict with OHADA's constitutive documents. The second role is the supervision of arbitration conducted under its auspices.[37] Its supervision role is limited to naming and confirming the arbitrators, to be informed of the progress of the proceedings, and examine decisions, in accordance with Article 24.[38] According to Article 24 of the Treaty, before signing a partial or final award, the arbitrator shall submit the proposed decision to the CCJA, which may suggest any formal amendments to such a decision. The third and very significant role from dispute resolution perspective is ensuring the consistent interpretation of the treaty.[39] In this capacity it can give advisory opinions and hear appeals from the highest courts of the member states. Its decisions are final and conclusive, and the execution and enforcement shall be ensured by the

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[30] *Principles on Choice of Law*, *supra* note 22, at 17 (stating it was created on 17 October 1993 in Port Louis, Mauritius).

[31] *See* Organization for the Harmonization of Business Law [Ohada], *CCJA* at a Glance, http://www.ohada.org/index.php/en/court-of-justice-and-arbitration/ccja-at-a-glance.

[32] *See* Ohada, *General Overview,* http://www.ohada.org/index.php/en/ohada-in-a-nutshell/general-overview.

[33] *See generally Treaty on Harmonisation of Business Law in Africa*, OHADALegis.com (Oct. 17, 1993) http://www.ohadalegis.com/anglais/traiteharmonisationgb.htm.

[34] *See id.* arts. 13-26.

[35] *See* OHADA, *Achievements*, http://www.ohada.org/index.php/en/ohada-in-a-nutshell/achievements.

[36] *Treaty for Harmonisation of Business Law in Africa*, *supra* note 33, arts. 6, 7.

[37] *Id.* art 21.

[38] *Treaty for Harmonisation of Business Law in Africa*, *supra* note 33, arts 21.

[39] *See id.* art. 7.

Contracting States on their respective territories.[40] There are thirteen judges appointed for one non-renewable term of seven years.[41] The court does not have an appellate body and its decisions have a force of *res judicata* in a territory of member states.[42]

It is worth noting that the membership of OHADA consists of both Civil Law and Common Law legal systems as in South East Asia, although the balance overwhelmingly tilts in favour of the French speaking civil law countries.[43] There have been suggestions that CCJA had played a role in narrowing a gap between both systems in the region.[44] CCJA has jurisdiction over disputes between parties in the same country so long as the dispute involves the interpretation of OHADA Acts.

The OHADA system not only attempts to bring about harmonisation of substantive business law, but also seeks to bring about uniform interpretation of cases that end up with its CCJA. It is worth noting that its decisions have precedential value.[45] However, exhaustion of local remedies rule does not apply.[46] Parties may bypass their appellate court and directly appeal to CCJA.[47]

Given that OHADA operates mechanism for lawmaking and its interpretation, it is possible to argue that laws once made will continue to evolve both through legislative amendments and judicial interpretations. CCJA also runs a regional training centre for legal officers.[48]

Obviously, OHADA model is not without its limitations. Charles Manga Fombad outlines the following limitations: legitimacy problem of the process being driven from outside by France and its legal experts although the Acts have to be adopted by national legislatures; focus on big business issues; the inaccessibility of the court.[49] Regardless, the framework with all its limitations stands out as one good example of international commercial dispute resolution with the added benefit of harmonisation of applicable commercial rules.

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[40] *Treaty for Harmonisation of Business Law in Africa*, *supra* note 33, art. 20.

[41] See OHADA, CCJA at a Glance, http://www.ohada.org/index.php/en/court-of-justice-and-arbitration/ccja-at-a-glance

[42] Charles Manga Fombad, *Some Reflections on the Prospect for the Harmonisation of Business Law in Africa*, 59(3) AFRICA TODAY 51, 65 (Spring 2013).

[43] The following seventeen states, mostly former French colonies, that follow continental system are members of OHADA: Benin, Burkina Faso, Cameroon, Central African Republic, Côte d'Ivoire, Congo, Comoros, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, the Democratic Republic of Congo (DRC), Senegal, Chad and Togo.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* at 68.

[48] Fombad, *supra* note 42, at 66.

[49] *Id.*

C. The Caribbean Model (Intergovernmental Approach)

The Caribbean model is established under the auspices of the Caribbean Community and Common Market (CARICOM).[50] CARICOM has its origins in the 1973 agreement between four Caribbean countries to foster regional integration.[51] The establishment of the Caribbean Court of Justice was heralded in 2001 with the signing of agreement establishing it by twelve member states.[52] It became operational on 16 April 2005.[53] It has both original and appellate jurisdictions.[54] Original jurisdiction is in regards to treaty matters while appeal to the court could be made on civil and criminal matters.[55] Countries need to specifically adopt legislation for CCJ to permit this appellate jurisdiction.

The court also replaces the Privy Council for some former British colonies. However, the Privy Council replacement concerning appeal against national law decisions has only been accepted by the four countries of Barbados, Dominica, Guyana and Belize out of twelve countries that agreed to make the Caribbean Court of Justice their final court of Appeal replacing the Privy Council.[56] On 21 June 2016 Grenadian parliament voted to replace Privy Council by Caribbean Court of Justice. This vote put the matter to a referendum. However, Grenadians voted on 24 November 2016 in a referendum to reject CCJ as their final court of appeal.[57]

While the Court has a long way to go before it gains the backing of all its members in regards to its appellate jurisdiction, its very existence provides avenues for harmonisation of the civil laws of these jurisdictions of which commercial laws are one. It can be seen that CCJ did not appear from the vacuum. Instead it responded to the need to hasten regional integration and move away from the colonial institutional legacy.

D. The Gulf Region Models (Hybrid Approach)

The experiences from the financial districts of the Gulf emirates are another approach to commercial dispute resolution. The Emirates of Dubai and Abu Dhabi in the United Arab Emirates and the State of Qatar are the three jurisdictions that demonstrate that international commercial disputes within geographi-

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[50] For Caribbean Community Institutions, see http://caricom.org/community/institutions.

[51] *See* CARICOM, *Who we are*, http://caricom.org/about-caricom/who-we-are.

[52] *See* CARICOM, *Agreement establishing Caribbean Court of Justice*, http://caricom.org/about-caricom/who-we-are/our-governance/about-the-secretariat/offices/office-of-the-general-council/treaties-and-agreements/agreement-establishing-the-caribbean-court-of-justice-ccj (last visited Dec. 30, 2016).

[53] *Id.*

[54] *Id.* See Articles XI-XXV for original and appellate jurisdiction of the Court.

[55] *Id.*; *see also* Salvatore Caserta & Mikael Rask Madsen, *Between Community Law and Common Law: The Rise of the Caribbean Court of Justice At the Intersection of Regional Integration and Post-Colonial Legacies*, 79 LAW & CONTEMP. PROBS. 89, 90 (2016).

[56] *See Grenada Parliament votes for CCJ*, JAMAICA OBSERVER (June 22, 2016) http://www.jamaicaobserver.com/NEWS/Grenada-Parliament-votes-for-CCJ_64626. However, voters rejected the proposal, see *Why the Grenadians Rejected the CCJ*, JAMAICA OBSERVER (Nov. 29, 2016) http://www.jamaicaobserver.com/editorial/Why-Grenadians-rejected-the-CCJ_81970.

[57] *Why the Grenadians rejected the CCJ*, *supra* note 56.

cally defined financial centres could be resolved by specialized hybrid international tribunals without the involvement of regular courts.

i. Dubai International Financial Centre Courts (DIFC)

Dubai is the pioneer in starting such a scheme within its Dubai International Financial Centre (DIFC) in 2006 located in Financial Free Zone. The law establishing the Court to administer justice within the DIFC was enacted in 2004.[58] The DIFC has a Court of First Instance and a Court of Appeal.[59] Court proceedings are to be conducted in public in English while Arabic is the official language for court proceedings in the regular courts.[60]

A person is qualified to be appointed as a judge if the appointee has been the holder of high judicial office in any jurisdiction recognised by the Government of the United Arab Emirates and has significant experience as a qualified lawyer or judge in the common law system.[61] This means that an international judge could be appointed to the bench and that the appointees need to be qualified in a common law system despite Dubai being a predominantly civil law jurisdiction. A judge of the Court could be removed by the decree of the ruler of Dubai for "inability, incapacity or misbehaviour that is found to have taken place by an independent inquiry established by the Ruler, and whose findings have been published."[62] The judges enjoy immunity for things done or omitted to be done in performance or purported performance of their duties unless those actions or omissions were result of bad faith.[63]

The Court of First Instance has original jurisdiction over civil and commercial disputes involving any of the centre's bodies or any of the centre's establishments.[64] Centre's bodies are those established by the centre, while centre establishments are "entities or businesses established, licensed, registered or authorised to carry on business or activities in the Centre."[65] Originally the jurisdiction of the DIFC Courts was geographically limited to parties within the DIFC, but the law was amended to allow parties outside DIFC to institute cases before DIFC Courts by agreement.[66]

The governing laws in the DIFC Courts are the judicial authority law, DIFC Law or any legislation made under it, rules of the court and such law as agreed

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[58] DIFC LAW NO. 10 OF 2004 (U.A.E.), https://www.difc.ae/files/1914/5448/9176/Court_Law_DIFC_Law_No.10_of_2004.pdf.

[59] *Id.* art. 7.

[60] *Id.* art. 13.

[61] *Id.* art. 9(3).

[62] *Id.* art. 10.

[63] *Id.* art. 61.

[64] DIFC Law No. 10 of 2004, *supra* note 58, art. 19.

[65] DIFC LAW NO. (9) OF 2011 AMENDING CERTAIN PROVISIONS OF LAW NO. (7) OF 2004 art. 2 (U.A.E.).

[66] DIFC LAW NO. (16) OF 2011 AMENDING CERTAIN PROVISIONS OF LAW NO. (12) OF 2004 art. 5(A)(3) (U.A.E.).

by the parties.[67] Here it is worth noting the fact that the courts will recognise any choice of applicable law made by the parties.[68] There is a large body of substantive law enacted to be applied by DIFC Court, which include, among others, contract law, company law, employment law, insolvency law, law of damage and remedies, law of obligations, real property law, personal property law.[69] The massive scale of codification of substantive rules done in this area is equivalent to transplanting the whole body of common law in commercial and civil matters in a systematic manner in to another jurisdiction whose legal system is based on the continental civil law.

The rules of evidence used by the Court are those prescribed in DIFC Law, that the DIFC Court finds appropriate, and rules of evidence of England and Wales.[70] For the purpose of any matter before the DIFC Court, a judge may appoint an independent assessor or expert in their field, to assist the DIFC Court in the determination of any of the issues arising in a proceeding before the DIFC Court.[71] Another feature of the system is that, the DIFC Court, on application by the parties to a proceeding before the DIFC Court, may refer any matter relating to the proceedings to an arbitrator.[72]

ii. Qatar Financial Centre Courts

The Civil and Commercial Court in the Qatar International Dispute Resolution Centre was established in 2009, following the footsteps of its neighbour, Dubai. It became operational on 14 December 2010. It was established pursuant to Article 8(3) of the Qatar Financial Centre Law (Law No. 7 of 2005), as amended by Law No. 2 of 2009.[73] Unlike Dubai, where English is the official language, proceedings before the Qatar Court are held both in English and Arabic. The Civil and Commercial Court contains first instance and appellate levels.

The Court has the jurisdiction over civil and commercial disputes involving parties both within and outside the financial centre.[74] Jurisdiction could also be established with the agreement of the parties. There is similarity with the DIFC Court in these regards. The Courts apply QFC Law and regulations issued under it as well as laws agreed between the parties so long as such laws are not inconsistent with the public order of the State of Qatar.[75]

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[67] DIFC Law No. 10 of 2004, *supra* note 58, art. 30(1).

[68] *Id.* art. 50.

[69] See DIFC, *Legal Database*, https://www.difc.ae/laws-regulations/legal-database, for remaining applicable laws.

[70] DIFC Law No 10 of 2004, *supra* note 58, art. 50.

[71] *Id.* art. 18(1).

[72] *Id.* art. 54.

[73] Qatar Financial Centre Version No. 4 [QFC] Law No. (7) of 2005 art. 8, http://www.qfc.qa/en/Documents/ResourcesDocuments/QfcLaw/Rebranded%20QFC%20Law%20Brochure.pdf.

[74] QFC Law No. 7 of 2005, *supra* note 73, art. 8.

[75] *Id.* sched. 6, art. 8.

Just like its Dubai counterpart, the Qatar International Court is staffed by very high profile judges from the Common Law world, notably England.[76] In addition to judicial settlement of disputes, the Centre also provides arbitration and mediation services.[77]

iii. Abu Dhabi International Court

Abu Dhabi, one of the emirates of the United Arab Emirates of which Dubai is also a member, has also established a similar international commercial court within its Abu Dhabi Global Market known as the Global Market Court.[78] The Court is expected to be fully operational after mid-2016 and its proceedings are to be conducted in English.[79]

Parties in the Global Market can agree to exclude the jurisdiction of the Global Market Court or refer the matter to arbitration.[80] Unlike the DIFC Court, Global Market Courts do not have jurisdiction over matters from outside its boundaries. The Court is modelled on the English judicial system in that it applies common law rules, and the judges are high profile judges from the Common Law world, notably England. Perhaps, what sets the Global Market Court apart from its neighbouring DIFC Court is that the former did not codify common law rules but just made some English law applicable by virtue of the Application English Law Regulation 2015.[81] The regulation makes the English Common Law and Equity directly applicable thereby making Abu Dhabi the only post-colonial middle eastern country to voluntarily receive English laws for a specific purpose of promoting commercial dispute resolution.

E. The Singapore Model

Singapore is the latest country to establish a hybrid international commercial court. The idea for the establishment of Singapore's International Commercial Court was conceived in 2013 when Chief Justice Sundaresh Menon proposed this court at the opening of the 2013 Legal Year.[82] The objective was "to grow the legal services sector and to expand the scope for the internationalisation and ex-

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[76] *See List of Qatar International Court Judges*, Qatar Int'l Ct. and Dispute Res. Centre, http://qicdrc.com.qa/the-courts/overview.

[77] *See generally ADR Centre*, Qatar Int'l Ct. and Dispute Res. Centre, http://qicdrc.com/qa/adr-centre.

[78] Khalifa Bin Zayed Al Nahyan, Ruler of Abu Dhabi Law No. (4) of 2013 art. 13, http://adgm.complinet.com/net_file_store/new_rulebooks/a/b/Abu_Dhabi_Law_No_4_of_2013.pdf.

[79] Abu Dhabi Global Market Courts, *Frequently asked questions about ADGM*, http://www.adgm.com/doing-business/adgm-courts/frequently-asked-questions.

[80] Khalifa Bin Zayed Al Nahyan, *supra* note 78, art. 13(7).

[81] Board of Directors of the Abu Dhabi Global Market, *Application of English Law Regulations 2015*, (Mar. 3, 2015) http://www.adgm.com/media/37261/applicationofenglishlawregulations2015_adgm.pdf.

[82] Ms Indranee Rajah et al., Singapore International Commercial Court Committee, *Report of the Singapore International Court Committee*, (Nov. 2013), https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Annex%20A%20-%20SICC%20Committee%20Report.pdf.

port of Singapore law.[83] A Committee was soon established to study, among others, (a) the establishment of a SICC specialising in international commercial cases; (b) the constitution, jurisdiction, powers, procedure and other features of the SICC; and (c) the appointment of specialist commercial Judges to the SICC.[84] The Committee recommended the establishment of the Court in its report, 29 November 2013. The report was followed by a public consultation and legislative processes which culminated in the launch of the Court on 5 January 2015. There are a number of features of this Court that stand out and deserve further discussion.

Needless to say that Singapore is a global, commercial, and financial hub that is uniquely positioned to serve as dispute resolution venue for international commercial disputes. It is slated to become the second largest offshore financial centre in the world by 2020 overtaking London.[85] It already hosts one of the most preferred arbitration centres in Asia and an initiative such as the establishment of the SICC is going to complement the work already being done in that regard. In fact, it is being asserted that the establishment of the Court will assist parties in avoiding the following problems associated with arbitration:[86]

a. over-formalisation of, delay in, and rising costs of arbitration;
b. concerns about the legitimacy of and ethical issues in arbitration;
c. the lack of consistency of decisions and absence of developed jurisprudence;
d. the absence of appeals; and
e. the inability to join third parties to the arbitration

The above list, found on the Court's website, are good indicators of perceived shortcomings of international arbitration which SICC is set out to remedy.[87] Another way of looking at this is how SICC intends to overcome the shortcomings of arbitration and present itself as a form of dispute resolution for transnational litigants.

In his opening Lecture for the DIFC Lecture Series 2015, Singapore's Chief Justice, His Honour Sundaresh Menon highlighted some of the ethical dilemma facing international arbitration. He states:

> There are some well-rehearsed (if not universally accepted) issues relating to the lack of regulation in the arbitration industry. Among other things, there is said to be a lack of ethical consensus to guide the increasingly amorphous and diverse body of practitioners, resulting in various ethical issues; a lack of visibility and public accountability in decision making; increasing judicialisation and laboriousness in process resulting

[83] Rajah, *supra* note 82.

[84] These were the Committee's three terms of reference.

[85] Hugo Greenhalgh, *Singapore to overtake UK as offshore financial centre*, FINANCIAL TIMES (June 7, 2016) https://www.ft.com/content/cf0c64e4-2cb2-11e6-bf8d-26294ad519fc.

[86] *See* SINGAPORE INTERNATIONAL COMMERCIAL COURT [SICC], *Establishment of the SICC*, (Jan. 5, 2015) http://www.sicc.gov.sg/About.aspx?id=21.

[87] *Establishment of the SICC*, *supra* note 86.

> in delay accompanied by rising costs; some unpredictability in the enforcement of arbitral awards due to the *ad hoc* nature of courts' oversight of the enforcement process; and some lack of consistency in arbitral decisions due to the lack of corrective appellate mechanisms or an open body of jurisprudence.[88]

While his honour cites these as some of the push factors away from arbitration, there are also pull factors that prompt parties to choose litigation over arbitration. These pull factors are that, "certain cases are better suited for a process that is relatively open and transparent, equipped with appellate mechanisms, the options of consolidation and joinder, and the assurance of a court judgment."[89] In the paragraphs that follow, we will look at how these push and pull factors are accommodated at the SICC and its additional features that need highlighting.

i. Jurisdiction

SICC is a division of the Singapore High Court and part of the Singapore Supreme Court.[90] In that sense it is similar to commercial court divisions that have been in existence in many places such as London, Delaware, Victoria in Australia and many others. These are essentially domestic courts attuned to the needs of commercial litigants. What qualifies the SICC as a hybrid international court is the mere fact that some of its judges are from overseas jurisdictions. However, using foreign judges is hardly a unique development. Jurisdictions from the larger common law world have been appointing judges from other common law jurisdictions. SICC judges are handpicked and appointed at the discretion of Singapore, and countries of which they are nationals have no say or input in to their appointment.

The international designation of the court has more to do with the subject matter of the dispute and the national origin of a dispute that can come before SICC. Under the rules of the Court, a claim is considered international if: i) the parties to the claim have their places of business in different States; (ii) none of the parties to the claim have their places of business in Singapore; (iii) at least one of the parties to the claim has its place of business in a different State from (A) the State in which a substantial part of the obligations of the commercial relationship between the parties is to be performed; or (B) the State with which the subject matter of the dispute is most closely connected; or finally, (iv) the parties to the claim have expressly agreed that the subject-matter of the claim relates to more than one State.[91]

Commercial court divisions have long been favoured for their specialist knowledge and expertise that they provide. SICC will provide such service.

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[88] Chief Justice Sundaresh Menon, International Commercial Courts: Towards a Transnational System of Dispute Resolution, Opening Lecture for the DIFC Courts Lecture Series 2015, at 9-10, http://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/opening-lecture—-difc-lecture-series-2015.pdf.

[89] Chief Justice Sundaresh Menon DIFC 2015 Opening Lecture, *supra* note 88, at 9.

[90] SICC, *Overview of the SICC*, http://www.sicc.gov.sg/About.aspx?id=22 (June 1, 2016).

[91] Singapore International Commercial Court [SICC], Order 110, r. 1(3) (2014).

SICC's rule states that a claim is considered commercial if the subject matter of the claim arises from a relationship of a commercial nature, whether contractual or not and provides an illustrative list of claims that can be considered commercial.[92] Claims relating to an *in personam* intellectual property dispute as well as claims to which the parties to the claim have expressly agreed that the subject matter of the claim is commercial in nature will be considered as such.[93] For parties that are not sure if the Court has jurisdiction, there is a procedure for obtaining pre-action certificate.[94] A pre-action certificate certifies that the intended claim is international and commercial in nature and the intended action is an offshore case.[95] However, the Court is not necessarily bound by its pre-action certificate as it can set the certificate aside if it determines that it lacks jurisdiction.[96] Pre-action certificates may also be used for the following reasons: to seek an order that the intended action be heard in camera, an order that no person must reveal or publish any information or document relating to the case, and an order that the Court file for the intended action be sealed.[97] This procedure serves a very useful purpose of saving time by allowing parties to get a swift decision on whether or not the court has jurisdiction. It also allows parties to secure the confidential commercial information from getting into the public domain.

One of the advantages of arbitration has been that the hearings take place in camera and the fact that SICC procedure allows for pre-trial decision to protect confidentiality during trial and thereafter addresses the concerns of some parties in regards to confidentiality. At the same time, it is important to note that despite the order not to publish judgments, the Court can direct that a judgment made by the Court be "published in law reports and professional publications if the Court considers the judgment to be of major legal interest."[98] If a court determines that the judgment could not be published without compromising confidentiality, it can order the judgment not to be published for ten years or such shorter period it deems necessary.[99]

Courts in the Gulf Models we saw above started their life as courts intended to serve businesses within specified economic zones, some have now relaxed their rules to allow businesses outside the economic zones to opt to have their disputes resolved by the hybrid commercial courts based in the economic zones. The

[92] SICC Order 110, *supra* note 91, at r.1(1)(2)(b). The illustrative list includes: any trade transaction for the supply or exchange of goods or services; a distribution agreement; commercial representation or agency; factoring or leasing; construction works; consulting, engineering or licensing; investment, financing, banking or insurance; an exploitation agreement or a concession; a joint venture or any other form of industrial or business cooperation; a merger of companies or an acquisition of one or more companies; the carriage of goods or passengers by air, sea, rail or road.

[93] Singapore International Commercial Court [SICC], Order 110, r. 1(3) 2014.

[94] *Id.* at r. 40.

[95] *Id.* at r. 39.

[96] Singapore International Commercial Court [SICC], Order 110 at r. 10(2).

[97] *Id.*

[98] SICC Order 110, *supra* note 91, at r. 31(1).

[99] *Id.* at 3(b).

SICC from the outset was established without such geographical restriction provided parties have consented to its jurisdiction.

ii. Judges

The commercial court divisions in places like London are exclusively staffed by domestic judges and they follow the same rules of procedure and evidence as the other divisions of the court. At the SICC, on the other hand, the judges constitute of both domestic and international judges appointed from diverse overseas legal traditions.[100] Currently, the international judges appointed to the bench are from the US, England and Wales, Australia, France, Austria, Hong Kong, and Japan.[101] There is a glaring absence of judges from China, India and other regional players such as Indonesia or Malaysia.

iii. Applicable Laws

There is also a significant difference between the basic law applied by the Gulf Courts, on the one hand, and the SICC, on the other. As noted above, Gulf courts opted for either codifying common law rules or receiving English statutes in bulk, while the prevailing legal tradition in their regular courts is that of continental civil law. In establishing SICC, Singapore did not need to do this as it is a common law jurisdiction, except to acknowledge parties' right to choose their applicable law. In connection to applicable law, it can be observed that most of the national and regional efforts outside the EU and the OHADA model tend to coalesce around common law rules.

One of the most significant relaxations of Singapore's existing rules around applicable rules involving foreign laws is provision allowing foreign laws determination on the basis of submission instead of proof.[102] Proof would have necessitated the use of expert witnesses. Submission, on the other hand, is to be made by a lawyer representing the party. In making an order on this matter, the Court must be satisfied that "all parties are or will be represented by counsel who are competent to submit on the relevant questions of foreign law."[103] If the person making the submission does not have a right of audience before the Court, the person needs to have a practicing certificate as a solicitor or advocate, admitted to practice or is registered under s. 36P of the Legal Profession Act (Cap. 161).

iv. Rules of Procedure and Evidence

However, at the SICC, rules of evidence are relaxed to exclude the application of Singapore's rules of evidence. Accordingly, the Court may, on the application of the parties, rule that any rule of evidence found in Singapore law shall not

[100] SICC, *Judges*, (Aug. 16, 2016), http://www.sicc.gov.sg/Judges.aspx?id=30 (showing a current list of SICC local and international judges).

[101] *Judges*, *supra* note 100.

[102] SICC Order 110, *supra* note 91, at r. 25.

[103] *Id.*

apply and instead, such other rules of evidence, whether foreign or not, apply.[104] Under these rules, a rule of evidence includes any rule of law relating to privilege or taking of evidence.[105]

v. Legal Representation

At the SICC, representation by a foreign lawyer is allowed where a case is treated as an offshore case pursuant to Order 110, Rule 34 of the Rules of Court or when the court allows.[106] An offshore case is an action that has no substantial connection with Singapore, but does not include an action in rem (against a ship or any other property).[107] A case is considered not to have substantial connection with Singapore if Singapore law is not the law applicable to the dispute and the subject-matter of the dispute is not regulated by or otherwise subject to Singapore law; or the only connections between the dispute and Singapore are the parties' choice of Singapore law as the law applicable to the dispute and the parties' submission to the jurisdiction of the Court.[108] A foreign lawyer representing a party to proceedings commenced in the Court, and in appeals from such proceedings, shall be registered under Section 36P of the Legal Profession Act (Cap. 161).[109]

vi. Appeal

Unlike arbitral awards which are final, the decision of the SICC can be appealed to the Court of Appeal. However, it is interesting to note that parties may agree in writing to waive, limit, or restrict the right to appeal and the Court must enforce this agreement.[110]

vii. Joining Third Parties

Once the Court has assumed jurisdiction, a person may be joined as a party, including as an additional plaintiff, defendant or as a third or subsequent party, to the action.[111] This ability of courts to join third parties makes courts more favourable than arbitral bodies that lack such powers.[112]

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[104] SICC Order 110, *supra* note 91, at r. 23.

[105] *Id.*

[106] SICC, *Singapore International Commercial Court Practice Directions*, § 26(b)-(c), (Jan. 1, 2016), http://www.supremecourt.gov.sg/docs/default-source/default-document-library/sicc-practice-directions-(with-effect-from-1-jan-2016)f7782f33f22f6eceb9b0ff0000fcc945.pdf.

[107] *Id.* § 29.

[108] SICC Order 110, *supra* note 91, at r. 2(f).

[109] SICC Order 110, *supra* note 91, at r. 26. *See also Court Practice Directions, supra* note 106 (stating that the qualifications, requirements, conditions and procedure for registration are prescribed in the Legal Profession Act (Cap. 161) and the Legal Profession Act (Foreign Representation for the Singapore International Commercial Court) Rules 2014).

[110] *Court Practice Directions*, *supra* note 106, § 139.

[111] SICC Order 110, *supra* note 91, at r. 9; *see also*, *Court Practice Directions, supra* note 106, at § 29.

[112] Chief Justice Sundaresh Menon, *supra* note 88, at 26.

viii. Enforcement of Judgments

Where the judgment or order of the Court is to be enforced in Singapore, such enforcement proceeding is to be commenced in a High Court.[113] Enforcement of Singapore Court judgments overseas is dependent upon reciprocal international foreign judgement recognition and enforcement agreements. Currently, Singapore does not have many of such agreements. It relies heavily on framework for recognition and enforcement of foreign judgements within the Commonwealth. In this regard, there is an optimism that the 2005 Convention on the Choice of Law Agreements may assist.

IV. Discussion

The above overview of some of the existing mechanisms for the resolution of commercial disputes provides important insight into various approaches and design of such bodies and the prospect of similar organs being set up in Asia's other sub-regions. The European mechanism which is more developed owing to its advanced economic and political integration is not addressed in this brief study. Asia's developments, particularly, that in Singapore is already inspiring a similar proposal in countries like Australia.[114]

However, a Pan-Asian commercial dispute resolution mechanism is a remote prospect. Given the immense diversity of the region and the under-developed political and economic cooperation mechanisms, it is not even feasible to suggest one. Experience in Asia and elsewhere shows that such initiatives originate in sub-regions and grow in popularity to embrace the greater region or be emulated elsewhere. Replication of such efforts requires understanding of the challenges and opportunities available. It is hoped that experiences from the Gulf region and Singapore will have a cascading effect.

Our overview of the above initiatives reveals that regions that established commercial dispute mechanisms predominately built on foundations that were already in place. Some relied on colonial era relationships and infrastructures and built upon them. Others leveraged their status as legal and financial hub in their sub-region. The Caribbean and OHADA models exemplify the first, while the initiatives from the Gulf and Singapore that of the second.

It is also clear that there is no one single model for advancing the causes of international commercial dispute resolution. There are a number of tools that can be utilised. These tools could, for convenience sake, be grouped as normative, institutional, and procedural.

In normative terms, it has long been the focus of attention of those working in the sphere of harmonisation to propose treaties, model rules, model contracts and practices to ensure substantive harmonisation of applicable rules without establishing supranational dispute settlement bodies. The assumption is that the more harmonised the substantive rules are, the lesser the cost of operating cross border

[113] *Court Practice Directions*, *supra* note 106, § 138.

[114] See Hon. Chief Justice Marilyn Warren AC & The Hon. Justice Clyde Croft, *supra* note 16, for a discussion of this feasibility.

businesses, given the predictability and certainty of applicable legal rules. A lot of energy has been expended on this endeavour with mixed results. Most of the harmonisation efforts are spearheaded by global public entities such as UNICTRAL and UNIDROIT as well as private entities like the ICC, ILA. While there have been regional and sub-regional efforts in the harmonisation sphere, there is little to be shown in the realm of harmonisation of private law. OHADA's experience in this regard could be cited as unique. Under OHADA, several commercial law legislations have been enacted. Whether it is legitimate to replicate similar approaches in Asia's sub regions is an important question to ask. A key factor that unified participants of the OHADA system was that almost all its members were former French colonies or those whose laws had strong affinity with the French legal system. Therefore, it is fair to surmise that having a similar legal tradition is an important consideration for the harmonisation of substantive rules. The same cannot be said of Asia's various sub-regions.

Nevertheless, some key players in the region such as China have gone on to heavily rely on UNIDROIT's Principles of International Commercial Contracts in their reform of their contract laws. Such principles could serve as a basis for reform of substantive commercial rules in the region.

On the other hand, as highlighted earlier, experience from the Gulf seems to suggest that common law's substantive rules are preferred over civil law rules as a basis for the legal engineering attempted. This seems to be inspired by the success of the London Commercial Court and the global significance of the common law in international commerce. A recent study by the Singapore Academy of Law on governing law and jurisdictional choices in cross-border commercial transaction found that 48 percent of the 500 commercial practitioners and in-house counsel who deal with cross-border transactions in Singapore and the region favoured English Law as a preferred governing law.[115] Several reasons for English laws popularity are given. Perhaps the following specialist brief from Allen and Overy would sum up the reasons. These reasons include: 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 struck between commercial parties.[116]

Harmonisation of substantive law alone is not enough in terms of increasing certainty, stability, predictability and reliability of outcomes for commercial litigants. Substantive harmonisation needs to be complemented by harmonisation in the procedural law realm. It is important that courts and arbitral bodies have commercial friendly dispute settlement procedures. Recognising party autonomy in cross border commercial dispute resolution is important. That is generally reflected in recognising parties' choice of law and choice of forum. Some juris-

[115] SINGAPORE ACADEMY OF LAW, *Study on Governing Law and Jurisdictional Choices in Cross-Border Transactions*, (Jan. 11, 2016) http://www.sal.org.sg/Documents/SAL_Singapore_Law_Survey.pdf.

[116] ALLEN & OVERY, *Brexit – Legal Consequences for Commercial P arties: English Governing Law Clauses – Should Commercial Parties Change Their Approach?*, (Feb. 2016), http://www.allenovery.com/SiteCollectionDocuments/Brexit%20Governing%20Law%20Article%20specialist%20paper%20no%201.pdf.

dictions may do so as part of their domestic private international law, while others may ratify relevant treaties. Accordingly, recognition to parties' choice of applicable law and forum is an indicator of their commitment to openness, that in turn makes reciprocity possible.

Once choice of applicable law is recognised, the next logical step would be the mechanism of proving such laws. This is especially critical where the chosen applicable law is not the forum law. The widespread practice has been to rely on expert witnesses.[117] In some jurisdictions, courts can take judicial notice of foreign law. The process of proving foreign law has been described as expensive and these requirements prolong trials.[118] There is the possibility of referring cases to foreign courts for declaration. However, this by itself is time-consuming and in some cases requires the agreement of all parties.[119] In light of this, Singapore's SICC rule, that allows proof of foreign law through submission by the legal counsel instead of expert evidence, can be said to be more permissive.

Issues of judicial cooperation are matters that require attention. Once judgements are handed down, the question of recognition and enforcement of such judgements is bound to arise. The recognition and enforcement of international arbitral awards has so far been favoured by the widespread ratification of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The New York Convention has the finest distinction of being ratified by almost all Asian countries except North Korea, Iraq, Yemen and Turkmenistan. Similar treaties in the realm of foreign judgement have not been widely ratified. In the absence of such global agreements, recognition and enforcement of foreign judgements will have to rely on bilateral agreements. Network of bilateral treaties is less likely to achieve the desired outcome. Regional/sub-regional multilateral treaties are probably the better hope.

In regards to institutional matters, our survey reveals a number of choices available. These choices range from supranational institutions such as the Caribbean Court of Justice or OHADA Common Court of Justice and Arbitration; hybrid courts in defined economic zones; hybrid courts integrated into the regular courts. There is also a room for courts within economic integration unions. This shows there is no single institutional model universally preferred for international commercial dispute resolution and each sub region will have to pick its preferred institutional design based on what can work in their sub region. In summary, the above normative, procedural and institutional considerations require attention in this exercise.

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[117] Hon. Justice P.L.G. Brereton, AM, RFD, *Proof of Foreign Law - Problems and Initiatives: The Future of Private International Law in Australia*, SYDNEY L. SCH. – U. OF SYDNEY (May 16, 2011) http://sydney.edu.au/law/events/2011/May/Justice_Brereton.pdf.

[118] *Id.*

[119] Brereton, *supra* note 117; *see also* New South Wales [NSW], Uniform Civil Procedure Rules 2005, Part 6, Division 9, r. 6.44(1).

The Ex-Im Bank Calls for a Change to Get Back in the Game

Alyse Fischer*

I. Introduction

Franklin D. Roosevelt created the Export-Import Bank of the United States ("Ex-Im Bank" or "the Bank") eighty-two years ago as one of his initiatives to economically reengage America with the rest of the world during the Great Depression.[1] Today, after months of uncertainty in regards to the future of the Ex-Im Bank, the Bank again offers American businesses an opportunity to grow sales internationally.[2] The Ex-Im Bank is the official export credit agency of the

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[1] U.S. Dep't of State Office of the Historian, *New Deal Trade Policy: The Export-Import Bank & the Reciprocal Trade Agreements Act, 1934*, Office of the Historian, https://history.state.gov/milestones/1921-1936/export-import-bank.

[2] *See* Erica Werner, *Congress Revives the Export-Import Bank as Business Establishment Wins Out Over Tea Party*, U.S. News & World Rep. (Dec. 4, 2015), http://www.usnews.com/news/business/articles/2015/12/04/congress-revives-the-export-import-bank-establishment-win ("President Barack Obama signed legislation Friday reviving the federal Export-Import Bank five months after Congress allowed it to expire. The bank is a small federal agency that makes and guarantees loans to help foreign customers buy U.S. goods.").

United States focusing on facilitating international trade.[3] The Bank is required to follow regulations set forth through the United States' participation in the Organization for Economic Co-operation and Development Arrangement ("OECD Arrangement").[4] The OECD Arrangement is an agreement between numerous countries across the world that provides an officially supported framework for exporting.[5]

The Ex-Im Bank creates a financial market for both potential and active exporters who are unable to obtain necessary financial support from private lenders.[6] The inability of exporters to obtain lending from private banks is typically due to the exposure of extra risk.[7] The Ex-Im Bank provides a reliable financing outlet for exporters, even in the most challenging market conditions.[8] Congress has specified that the Ex-Im Bank shall not compete with private lenders, but rather supplement lending where the private sector is unable or unwilling to meet demand.[9] Additionally, the Ex-Im Bank's main mission is to provide more jobs in the United States through facilitating U.S. exports.[10] Congress should charge the Ex-Im Bank with increasing its dollar outlay for small businesses while sustaining its level of support for large U.S.-based multinational corporations and enhance U.S. Ex-Im Bank competitiveness by deregulation of the OECD Arrangement.

This article will first give an overview of the history of the Ex-Im Bank including the creation of the charter as well as the growth the Bank has experienced

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[3] 12 U.S.C. § 635(a)(1) (2015) ("The objects and purposes of the Bank shall be to aid in financing and to facilitate exports of goods and services, imports, and the exchange of commodities and services between the United States or any of its territories or insular possessions and any foreign country or the agencies or nationals of any such country.").

[4] *See* Exp.-Imp. Bank of the U.S., *Organization of Economic Cooperation & Development*, EXIM.GOV, http://www.exim.gov/who-we-serve/congressional-and-government-stakeholders/facts-about-exim/oecd.

[5] *See The Arrangement on Export Credits*, ORG. FOR ECON. COOPERATION & DEV., http://www.oecd.org/tad/xcred/arrangement.htm; *see also* EXP.-IMP. BANK OF THE U.S., *Annual Report 2014* at 13 (2014).

[6] *See* Loren B. Thompson, *Ex-Im Bank: How a Small Agency Delivers Big Benefits For America's Economy*, LEXINGTON INST. 1, 5 (Jan. 28, 2014), http://lexingtoninstitute.org/wp-content/uploads/2014/02/Ex-Im-Bank-Benefits-American-Economy.pdf ("Because Ex-Im is prohibited by its charter from competing with private-sector lenders, it focuses on transactions where no market sources of credit are available.").

[7] *See* Robert Allen, *The Export-Import Bank's Relevancy Today*, NYU BRADEMAS CTR. 1, 2 (2015) *pending at* https://www.nyu.edu/brademas/pdf/RobertAllen.pdf. ("The World Trade Organization outlined the four varieties of risk that must be accounted for when examining a proposed international transaction as economic or commercial risk, exchange rate risk, transportation risk, and political risk.").

[8] Robert E. Rubin & Vin Weber, *The Ex-Im Bank Keeps Americans in Business; A Government Agency That Increases US Jobs and Earns Money for the Treasury Deserves Bipartisan Support*, WALL ST. J., Mar. 27, 2012, at A11 (pointing to the 2008 financial crisis stating, "As global financial markets contracted, Ex-Im financing expanded, thereby ensuring that U.S. exporters could still reach foreign markets.").

[9] *See* SHAYERAH ILIAS AKHTAR, CONG. RESEARCH SERV., R43581, EXPORT-IMPORT BANK: OVERVIEW AND REAUTHORIZATION ISSUES 1 (2015) ("Ex-Im Bank's financing [. . .] must supplement, not compete with, private sources of financing."); *see also* 12 U.S.C. § 635(b)(1)(B).

[10] *See* 12 U.S.C. § 635(a)(1) ("credits shall be to contribute to maintaining or increasing employment of United States workers."); *see also Annual Report 2014*, *supra* note 5, at 1.

since its inception. The article will then discuss who the Bank benefits and how the Bank functions. This will be followed by an analysis of the importance of the Bank on the U.S. economy shown through an international competitive advantage, increased employment, and a reduction in risks of exporting as well as the importance of the Ex-Im Bank to small businesses specifically. The article will also analyze how the OECD Arrangement has affected the Bank. Finally, the article will offer a proposal to increase focus and funding to small businesses in addition to working towards increasing participation in the OECD Arrangement through deregulation of the OECD Arrangement.

II. Background

A. Creation of the Export-Import Bank

Franklin D. Roosevelt became president in 1933, when the United States was in the midst of The Great Depression.[11] Between 1929 and 1932, international export and import volume fell by 30 percent.[12] At this time, Roosevelt was receiving pressure to extend U.S. diplomatic recognition to the Soviet Union.[13] In response, Roosevelt created the first Export-Import Bank in February 1934, which, at that time, only supported trade between the United States and the newly formed Soviet Union.[14] Roosevelt created a second Export-Import Bank supporting trade between the United States and Cuba the following month.[15] A few months later in July 1934, Roosevelt expanded the operations of the second Export-Import Bank to include all countries other than the Soviet Union.[16] The following year Congress consolidated the two banks into one and granted it more capital and powers.[17] Ten years later, Congress enacted the Export-Import Bank Act of 1945, leaving the country with virtually the same Export-Import Bank that exists today.[18]

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[11] U.S. Dep't of State Office of the Historian, *supra* note 1. *See The Great Depression*, HISTORY, http://www.history.com/topics/great-depression.

[12] Allen, *supra* note 7, at 11.

[13] *Id.* at 11-12.

[14] U.S. Dep't of State Office of the Historian, *supra* note 1.

[15] *Id.*

[16] U.S. Dep't of State Office of the Historian, *supra* note 1.

[17] *Id.*

[18] *See* David Brack Bryant, Comment, *The Export-Import Bank: It's History, Function, and the Reauthorization Act's Impact on the United States and Latin America*, 9 LAW & BUS. REV. AM. 743, 743 (2003) ("Since its inception, the focus of the [B]ank has broadened in scope, but the Ex-Im Bank's purposes remain relatively the same.") ("The Export-Import Bank Act of 1945 reincorporated the Ex-Im Bank as a U.S. government corporation, and the purposes and objectives of the Bank remain relatively unchanged today.").

B. Growth Since the Bank's Inception

Since the Bank's inception, it has been reauthorized seventeen times.[19] Until recently, the Bank was viewed as a necessary-and-beneficial component of the United States business strategy and economy.[20] Previously, both major political parties viewed the Bank as a tool for advancing the conditions of private business operations—similar to government funding of private research initiatives.[21] However, a recent lack of bipartisan support for the Ex-Im Bank resulted in a lapse of the charter in July 2015.[22] This lapse was due to a small group of Tea Party Republicans who opposed the Ex-Im Bank on ideological grounds.[23] These opposing Republicans claimed the U.S. government had no right to interfere with global financial affairs, calling the Ex-Im Bank an "embodiment of corporate welfare."[24] After a five-month lapse, President Obama signed the reinstatement of the Ex-Im Bank at the beginning of December 2015, marking the seventeenth reauthorization of the Bank.[25]

While the objectives and purposes of the Bank have remained steady since its inception, the Ex-Im Bank has grown tremendously in response to the growing and evolving global markets.[26] In the beginning, the Bank only provided direct loans to domestic exporters.[27] Furthermore, between 1934 and 1935 loan disbursements totaled around $14 million with a majority of the money disbursed for buying and minting silver.[28] The Bank has since evolved and now provides various trade-financing solutions including: direct loans; working capital guaran-

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19 Fred P. Hochberg, *Protecting America's Competitive Advantage: Why the Export-Import Bank Matters*, 94 FOREIGN AFFAIRS 59, 59 (May/June 2015) (stating that the Bank has been reauthorized 16 times since its inception and pointing out that the Bank's charter was due to lapse in July 2015); *see also* Nick Timiraos, *Export-Import Bank is Revived*, WALL ST. J. (Dec. 9, 2015), http://www.wsj.com/articles/export-import-bank-set-for-renewal-1449265587 (stating that the Bank was officially reauthorized after its recent lapse of charter, making the most recent authorization the 17th authorization).

20 James Fallows, *ExIm Redux: A Sign of Congress Stepping Back From the Brink?*, THE ATLANTIC (Oct. 27, 2015), http://www.theatlantic.com/notes/all/2015/09/the-defunding-of-the-export-import-bank/406873/#note-412657.

21 *Id.*

22 *See* Press Release, The White House Office of the Press Sec'y, FACT SHEET: The Export-Import Bank: Supporting American Exports and American Workers in Every State Across the Country, (June 30, 2015) https://www.whitehouse.gov/the-press-office/2015/06/30/fact-sheet-export-import-bank-supporting-american-exports-and-american ("Ex-Im has earned the support of the last 13 U.S. presidents, Republicans and Democrats alike); *see also* Nick Timiraos & Kristina Peterson, *Small Businesses Bear Burden of Ex-Im Bank Shutdown*, WALL ST. J., July 28, 2015 ("The Ex-Im Bank [. . .] stopped accepting new loans at the beginning of July after Congress allowed its charter to expire.").

23 Hochberg, *supra* note 19, at 59; *see also Beggar-Thy-Neighbour Banking*, THE ECONOMIST (July 5, 2014), http://www.economist.com/node/21606324/print.

24 *Beggar-Thy-Neighbour Banking*, *supra* note 23.

25 Timiraos, *supra* note 19.

26 Bryant, *supra* note 18, at 744.

27 Allen, *supra* note 7, at 17.

28 *See* Gardner Patterson, *The Export-Import Bank*, 58 Q. J. OF ECON. 65, 68 (1943) ("During 1934 and 1935 the Bank was more or less experimenting and very few loan authorizations were made. The total was slightly over $57 million. Even this is an exaggerated statement of its activity, since actual disbursements amounted to only $14 million; and of this total, over $13 million of the disbursements were in connection with the buying and minting of silver in the United States for the Republic of Cuba.").

tees; loan guarantees; finance lease guarantees; and export-credit insurance to both domestic and foreign firms.[29] In the Ex-Im Bank's latest annual report, the Bank reported over $20 billion in authorizations for fiscal year 2014.[30] Furthermore, in fiscal year 2014, the types of exporters included, but were not limited to: manufacturing, services, satellites, agribusiness, aircraft and avionics, oil and gas, power generation, and mining industries.[31]

Additionally, when the Bank was created in 1935 there was little regulation of international trade between the United States and other prominent exporting nations.[32] Prior to 1976, no internationally defined and approved trade market regulation existed.[33] Around this time however, export credit policies amongst countries emerged and in 1978 the Organisation for Economic Co-operation and Development ("the OECD") created the OECD Arrangement.[34] The OECD Arrangement provides regulation in the export trade business with the goal of preventing competition on a basis of advantageous financing terms, thereby encouraging competition primarily on service, quality, and price.[35] Twenty-three countries are parties to the OECD Arrangement, but key international export nations such as Brazil, China, India, and Russia are not member-parties.[36] The OECD Arrangement sets limitations on the export credit agencies of the participating countries.[37] Such limitations include, but are not limited to categories such as: minimum repayment terms; minimum cash down payment; minimum risk premium rates; and minimum interest rates.[38] With a lack of participation in

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[29] Allen, *supra* note 7, at 17; *see* Exp.-Imp. Bank of the U.S., *What We Do*, EXIM.GOV, http://www.exim.gov/what-we-do#by-name.

[30] EXP.-IMP. BANK *Annual Report 2014*, *supra* note 5, at 7.

[31] EXP.-IMP. BANK *Annual Report 2014*, *supra* note 5, at 26 (listing the main industrial sectors the Ex-Im Bank supported).

[32] *See Arrangement on Officially Supported Export Credits*, ORG. FOR ECON. COOPERATION & DEV. 1, 7 (Feb. 1, 2016), http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=tad/pg(2016)1 ("The main purpose of the Arrangement [. . .] is to provide the institutional framework for an orderly market for officially supported export credits,") (implying no regulation previously existed).

[33] *See Summary Overview of the Arrangement*, ORG. FOR ECON. COOPERATION & DEV., http://www.oecd.org/tad/xcred/summaryoverviewofthearrangement.htm (stating that talks about developing regulation for exporting started in 1976, implying no standard regulations were in place before 1976).

[34] *Id.*

[35] *Id.*

[36] *See The Arrangement on Export Credits*, *supra* note 5 ("The Participants to the Arrangement are: Australia, Canada, the European Community (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom), Japan, Korea (Republic of), New Zealand, Norway, Switzerland and the United States."); *see also* EXP.-IMP. BANK *Annual Report 2014*, *supra* note 5, at 13 (comparing financing export volumes of OECD Arrangement participants to those of select Non-OECD Arrangement participants, suggesting these non-members are key international export countries, Table A-1).

[37] *See Summary Overview of the Arrangement*, *supra* note 32 ("The Arrangement places limitations on the terms and conditions of export credits that benefit from official support.").

[38] *See Summary Overview of the Arrangement*, *supra* note 32 (listing specific limitations the OECD Arrangement places on participating countries).

the OECD Arrangement from non-member countries the United States still faces significant, unregulated competition in the exporting industry.[39]

III. Discussion

A. Who the Ex-Im Bank Benefits

The Ex-Im Bank benefits both the United States economy and its domestic exporting industries.[40] Congress has made it clear that the Bank is not authorized to *compete* with local private lenders, but to supplement private banks in instances where exporters are unable to obtain financial aid necessary to participate in international trade.[41] Private banks shy away from financing projects in developing markets because of the high risks associated with these projects.[42] In fiscal year 2014, 68 percent of the Ex-Im Bank's authorizations, or nearly $14 billion, financed emerging, consequently more risky, markets.[43]

To better accomplish the Bank's purpose, the Bank's charter requires that it focus on geographical, sectoral, and business-size-based differences among exporters.[44] Geographically, Congress has identified 190 countries the Bank is allowed to support.[45] However, Congress has prioritized some countries over others.[46] For instance, Congress has identified sub-Saharan Africa as a priority region.[47] Additionally, in regards to sectoral focus, Congress has identified domestic industries with high export growth potential and required the Bank to focus on them.[48] These industries include: aircraft, renewable energy, oil and gas, agribusiness, medical equipment and services, mining, construction equip-

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[39] *See Beggar-Thy-Neighbour Banking*, *supra* note 23 (estimating China's (a non-OECD Arrangement member) official export credit totaled around $111 billion, which is more than a third of the global total, suggesting China to be a significant competition to all other ECAs); *see also* EXP.-IMP. BANK OF THE U.S., *Report to the U.S. Congress on Global Export Credit Competition*, EXIM.GOV, at 2 (June 2015), http://www.exim.gov/sites/default/files/reports/EXIM%202014CompetReport_0611.pdf (reporting shows non-OECD-compliant ECAs in countries such as China, Japan, and Korea are financing much more than the U.S., at lower rates, with more lenient terms, and "minimal risk-related fees" than that of the Ex-Im Bank).

[40] *See* Thompson, *supra* note 6, at 9 ("The Export-Import Bank has a long history of promoting economic growth and progress.").

[41] *See* Allen, *supra* note 7, at 14 ("[T]he 'Bank expects to supplement rather than compete with existing sources of export and import credit, [and] short-term credit [less than 180 days] will be granted only when unusual circumstances indicate that commercial banks can not handle the business.'").

[42] *See* Hochberg, *supra* note 19, at 62 ("As private lenders have shied away from projects in developing markets, export credit agencies have stepped in."); *see* AKHTAR, *supra* note 9, at 17 ("Private lenders and insurers conduct the majority of the short-term export financing, though ECAs may play an active role in supporting certain sectors, such as taking on risks of financing small business exports.").

[43] EXP.-IMP. BANK *Annual Report 2014*, *supra* note 5, at 7.

[44] AKHTAR, *supra* note 9, at 9.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] AKHTAR, *supra* note 9, at 9.

ment and services, and power generation.[49] Finally, the Ex-Im Bank's charter prioritizes aid to small and medium-sized enterprises ("SMEs") over large enterprises.[50]

The focus points required by the Ex-Im Bank's charter match the needs the Bank presently serve.[51] For instance, the Bank plays an exceptionally vital role for small-business exporters.[52] In fiscal year 2014, 3,300 small businesses received authorizations from the Ex-Im Bank with 545 of these small businesses using the Ex-Im Bank for the first time.[53] These 3,300 small business authorizations totaled over $5 billion in direct financial support, 25 percent of the total authorizations.[54] In addition to the direct impact on small businesses, a significant portion of export revenue from larger Ex-Im Bank recipients indirectly supports small suppliers and subcontractors.[55] While small businesses only accounted for about a quarter of the Bank's authorizations in fiscal year 2014,[56] this level of financial aid—together with the indirect benefits from Ex-Im Bank financial aid to larger businesses—shows the significant impact the Ex-Im Bank has on small businesses engaged in international trading.

The Ex-Im Bank also benefits the United States economy.[57] The charter requires Ex-Im Bank officials to consider potential adverse effects any authorization may have on industries and/or employment in the United States.[58] With these considerations in mind, the Ex-Im Bank successfully supported 164,000 jobs for the Unites States economy and contributed $674.7 million of surplus money profits to American taxpayers in fiscal year 2014, from fees and interest imposed on users.[59] Over the past twenty years, the Ex-Im Bank has contributed over $6.9 billion to the United States Treasury.[60] While many government agencies create jobs for the United States economy, the Ex-Im Bank is unique in that it creates the jobs at no cost to the government in addition to generating money for the United States Treasury.[61]

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[49] AKHTAR, *supra* note 9, at 9.

[50] *Id.*

[51] *See* Thompson, *supra* note 6, at 9 (giving an example about the potential of Boeing losing market share to Airbus in Sub-Saharan Africa if it didn't have financing access from the Ex-Im Bank. Also talking about the impact the Ex-Im Bank has on small businesses—two focus sectors Congress requires the Ex-Im Bank to focus on).

[52] *See id.* ("Ex-Im plays an especially potent role [. . .] at small businesses.").

[53] EXP.-IMP. BANK *Annual Report 2014*, supra note 5, at 20.

[54] *Id.* at 9.

[55] *See* Thompson, *supra* note 6, at 9 ("Boeing, for instance, sources about 80% of its business activity domestically, and has 17,000 suppliers – most of them small or medium size companies.").

[56] EXP.-IMP. BANK *Annual Report 2014*, *supra* note 5, at 7, 9.

[57] *See id.* at 7 ("In October, [the Bank] wired $674.7 million to the U.S. Treasury to support deficit reduction.").

[58] AKHTAR, *supra* note 9, at 29; *see also* 12 U.S.C. § 635(a)(2) (2015).

[59] EXP.-IMP. BANK *Annual Report 2014*, *supra* note 5, at 7; Thompson, *supra* note 6, at 9.

[60] EXP.-IMP. BANK *Annual Report 2014*, *supra* note 5, at 7.

[61] *See* Thompson, *supra* note 6, at 6 ("What makes Ex-Im different is that it uses no taxpayer money while achieving impressive results."); *see also* EXP.-IMP. BANK *Annual Report 2014*, *supra* note 5, at 7 (see parenthetical from footnote 57).

B. How the Ex-Im Bank Works

The Ex-Im Bank is an independent government agency operating on a self-sustaining basis through fees and interest collected from users.[62] The Bank is responsible for making authorizations to businesses unable to obtain loans, insurance programs, and guarantees from private lenders.[63] The Ex-Im Bank is only allowed to extend loans when commercial credit is unavailable to a business, in order to avoid a financing competition between the Bank and private lenders.[64] As such, the Ex-Im Bank is strictly demand driven, but regulated by Congress through an exposure limit.[65] This limits the amount of guarantees, loans, and insurance the Ex-Im Bank is allowed to have outstanding at one time.[66]

Any business unable to obtain commercial credit can apply for an authorization from the Ex-Im Bank if it meets the following five requirements: (1) the business has been up and running for at least three years; (2) the business has at least one person working full-time; (3) the business has a Dun & Bradstreet Number; (4) the business has a positive net worth; and (5) the business exports products made in the United States or services provided by workers in the United States.[67] If a business meets these requirements, the Ex-Im Bank offers, *inter alia*: (1) direct loans; (2) working capital finance; (3) loan guarantees; and (4) export credit insurance.[68] Direct loans are typically extended to foreign buyers of United States goods and services.[69] Working capital financing assists busi-

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62 EXP.-IMP. BANK *Annual Report 2014*, *supra* note 5, at 1; *see also* The White House Office of the Press Sec'y, *supra* note 22 ("Ex-Im doesn't cost taxpayers a penny. In fact, due to fees and interest, the Bank generated $675 million in returns for taxpayers last year.").

63 *See* EXP.-IMP. BANK OF THE U.S., *The Facts about EXIM Bank*, EXIM.GOV, http://www.exim.gov/about/facts-about-ex-im-bank ("EXIM Bank fills export financing gaps through its loan, guarantee, and insurance programs when the private sector is unable or unwilling to do so.").

64 *See* U.S. CHAMBER OF COM., *The Export-Import Bank of the United States: Its Impact on U.S. Competitiveness, Exports, and Jobs*, USCHAMBER.COM, https://www.uschamber.com/international/support-ex-im-bank/about/export-import-bank-united-states-its-impact-us ("Ex-Im extends loans and guarantees to all applicants that meet its strict lending requirements but does so only when commercial credit is unavailable or when it is necessary to counteract below-market credit from foreign ECAs."); *see also* Thompson, *supra* note 6, at 3 ("Because Ex-Im is prohibited by its charter from competing with private-sector lenders, it focuses on transactions where no market sources of credit are available.").

65 EXP.-IMP. BANK OF THE U.S., *Annual Report 2015*, at 46 (2015) ("[T]he Bank's current exposure cap, also known as its statutory authority, is $140.0 billion.").

66 *See Sen. Richard C. Shelby Holds a Hearing on Oversight of the Export-Import Bank of the United States: Hearing on S. 819 Before the Comm. on Banking, Hous. & Urban Affairs*, 104th Cong. 2 (2015) [hereinafter *Sen. Richard C. Shelby*] ("Ex-Im does not pick winners and losers. Rather, it serves any eligible American business seeking competitive financing. We are, by definition, demand-driven."); *see also* AKHTAR, *supra* note 9, at 12 ("Ex-Im Bank's charter places a statutory limit on the aggregate amounts of loan, guarantees, and insurance that the Bank can have outstanding at any one time (oftentimes referred to as the Bank's exposure. . .limit).").

67 EXP.-IMP. BANK OF THE U.S., *Get Started*, EXIM.GOV, http://exim.gov/get-started#what.

68 AKHTAR, *supra* note 9, at 5.

69 *See id.* ("Direct loans have no minimum or maximum size, but generally involve amounts of more than $10 million. The Bank extends to the U.S. company's foreign customer a loan covering up to 85% of the U.S. contract value. Direct loans are available for medium- and long-term transactions, but most commonly are offered on a long-term basis. The direct loans carry fixed interest rates and generally are made at terms that are the most attractive allowed under the provisions of the OECD Arrangement. The specific rates charged on Ex-Im Bank are based on the Commercial Interest Reference Rates.").

nesses that have exporting potential but lack sufficient capital funds to market and/or produce goods or services for international trade.[70] This is primarily a benefit to small businesses.[71] Furthermore, the Ex-Im Bank can work with private lenders by providing loan guarantees to foreign buyers of domestic goods, wherein the United States promises to pay the debt of the buyers with interest if the buyers default.[72] Finally, the Ex-Im Bank offers export credit insurance to protect both exporters and lenders from losses of non-repayment due to political or commercial reasons.[73]

Of course, in providing financial support to private businesses, the Ex-Im Bank must accept some measure of risk; however, the charter maintains stiff regulations to insure against these potential risks.[74] Through methods such as credit underwriting, monitoring the risks of the Bank's current transactions, exercising due diligence of potential transactions, and increasing staffing levels of the Bank's Asset Monitoring Division, the Ex-Im Bank boasts a minimal default rate of 0.235 percent as of September 2015.[75]

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[70] *See* AKHTAR, *supra* note 9, at 7 ("Working capital guarantees provide repayment guarantees to lenders on secured, short- and medium-term working capital loans made to qualified exporters. They can be for a single loan or a revolving line of credit, and typically are for one year, but can be extended to up to three years. Working capital guarantees cover up to 90% of the principal and interest on a loan made to an exporter by a private lender for export-related accounts receivables, and up to 75% for export-related inventory. Generally, each product must have more than 50% U.S. content based on all direct and indirect costs for eligibility. The interest rates for working capital loans guaranteed by Ex-Im Bank are set by the commercial lenders.").

[71] *Id.*

[72] *See id.* at 7 ("Loan guarantees are intended to cover repayment risk. Medium- and long-term loan guarantees are typically used to finance purchases of U.S. capital equipment and services. Unlike insurance [. . .], loan guarantees are *unconditional*—representing Ex-Im Bank's commitment to a commercial bank for full repayment in the event of a default. There is no limit on the transaction size for a loan guarantee. Ex-Im Bank provides a guarantee of up to 85% or 100% of the U.S. content, whichever is lower, with a minimum 15% down payment required from the buyer. It provides coverage for 100% of the commercial and political risks of borrower repayment.").

[73] *See id.* at 7 ("Short-term exporter insurance is available for products shipped from the United States and with at least 50% content [. . .]. Ex-Im Bank offers a renewable one-year policy that generally covers up to 180-day terms, but can be extended up to 360 days for qualifying transactions. It also maintains short-term insurance policies for lenders. Depending on the policy, the Bank will cover 90-95% of nonpayment losses due to commercial and political risks. Ex-Im Bank can extend medium-term insurance, generally up to five years and with a maximum cover of $10 million, to both exporters and lenders, covering one or a series of shipments. The Bank will insure up to 85% of the contract price prior to delivery. If the foreign content is more than 15%, it will only support the U.S. portion. It requires the buyer to make cash payment to the exporter equal to 15% of the net U.S. contract value. It covers 100% of nonpayment due to commercial and political risk.").

[74] *See id.* at 15 ("[The Bank's] charter requires a reasonable assurance of repayment for all transactions supported by the Bank and for the Bank to have reasonable provisions for losses.").

[75] *See* AKHTAR, *supra* note 9, at 5. ("The Bank has a system in place to mitigate risks through credit underwriting and due diligence of potential transactions, as well as monitoring risks of current transactions."); *see also Sen. Richard C. Shelby*, *supra* note 66, at 4-5 ("Ex-Im continues to proactively implement risk management improvements to further ensure we remain faithful stewards to the taxpayer. [. . .] [The Bank] increased staffing in [their] Asset Monitoring Division by 33 percent and [they] went beyond all federal requirements to implement mandatory ethics training for all employees."); *see also The Facts about EXIM Bank*, *supra* note 63 ("As reported to Congress, EXIM Bank's active default rate was 0.235%—less than one fifth of one percent—as of September 30, 2015.").

IV. Analysis

A. Why the Ex-Im Bank is Crucial for the United States Economy

The Ex-Im Bank is crucial for the United States economy for numerous reasons. For instance, the Ex-Im Bank keeps our country internationally competitive, is responsible for significant job creation, reduces the risk associated with exporting, and generates a significant amount of money for American taxpayers on an annual basis.[76] With the Ex-Im Bank created in an attempt to restore the U.S. economy during the Great Depression, along with the substantial role the Bank played in buffering the 2008 recession, the Bank is an important tool in sustaining our economy.[77]

B. International Competitive Advantage

All nations with a major trading industry have an agency equivalent to the Ex-Im Bank of the United States.[78] There are at least 60 other countries with export-import banks across the world supporting their respective countries in similar financial transactions.[79] Several of these banks who are not participants of the OECD Arrangement have been given more authority and flexibility by their respective governments to keep up with loosely regulated countries like China, who far surpassed the United States in money spent on export transactions.[80] Having an export-import bank for the United States allows our country to remain internationally competitive.[81] Without the Ex-Im Bank, international customers would take their business to competing companies in other countries or U.S.

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[76] *See* Carolyn B. Maloney, TOP TEN REASONS FOR RENEWING THE U.S. EXPORT-IMPORT BANK (Joint Economic Committee) (2015) (discussing reasons why the Bank should be reinstated at the point when reauthorization was questionable. The document notes the Bank's role in keeping the United States internationally competitive, job creation, and money generated for American taxpayers); *see also* AKHTAR, *supra* note 9, at 15 ("Ex-Im Bank seeks to manage the risks it faces in its transactions. Its charter requires a reasonable assurance of repayment for all transactions supported by the Bank and for the Bank to have reasonable provisions for losses.").

[77] Thompson, *supra* note 6, at 1 ("[I]n the midst of the greatest economic depression the nation had ever known, the federal government established a new agency that could create jobs by helping U.S. companies to export their goods and services. That agency came to be known as the Export-Import Bank, and it has played a vital role in strengthening U.S. trade competitiveness despite remaining small by Washington standards."); *see also* Maloney, *supra* note 76 ("Exports have played an important role in helping the economy recover from the Great Recession and they are critical for our long-term prosperity. Over the course of the recovery, export growth has accounted for nearly 30 percent of GDP growth.").

[78] Loren Thompson, *Ten Valuable Things America Will Lose if the Export-Import Bank Dies*, FORBES (Oct. 23, 2015, 10:14 AM), http://www.forbes.com/sites/lorenthompson/2015/10/23/ten-valuable-things-america-will-lose-if-the-export-import-bank-dies/.

[79] U.S. Chamber of Com., *supra* note 64; AKHTAR, *supra* note 9, at 16.

[80] *See* Hochberg, *supra* note 19, at 60 ("In the past two decades, the nature of export competition has fundamentally changed: as an increasing number of countries operate with little regard for established international guidelines, export competition has come to resemble the Wild West. To keep up with countries, such as China, that are willing to shell out billions of dollars to help their exporters close a deal, other governments have given their own versions of the Export-Import Bank more flexibility and authority."); *see also Sen. Richard C. Shelby*, *supra* note 66, at 16 ("China [. . .], in two years has done about $670 billion worth of loans and guarantees. It took [the United States] 80 years to get to $590 billion.").

[81] *See* Maloney, *supra* note 81 ("The Ex-Im Bank is needed to level the playing field so U.S. business are not at a competitive disadvantage against foreign competitors.").

companies would shift manufacturing offshore.[82] The Ex-Im Bank exists because private lenders simply cannot provide equivalent lending.[83] The Bank provides the United States with the competitive edge necessary to stay relevant in today's international trade marketplace.[84]

C. Positive Influence on Employment in the United States

The Ex-Im Bank's biggest mission is to create and sustain U.S. jobs.[85] In fiscal year 2014, the Ex-Im Bank supported the creation of 164,000 jobs in the United States.[86] Furthermore, the Bank has supported the creation of over 1.3 million jobs over the past six years.[87]

The Bank plays an imperative role for jobs at small businesses.[88] The Ex-Im Bank directly supported over 3,300 small businesses in fiscal year 2014,[89] thereby supporting jobs at these small businesses. The Bank also indirectly influences jobs at small businesses that do not directly work with the Ex-Im Bank.[90] Several of the corporate giants that obtain financing from the Ex-Im Bank in turn use small U.S. businesses, such as subcontractors and suppliers, for various aspects of their export dealings.[91] Without the support of the Ex-Im Bank, these

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[82] *See* Maloney, *supra* note 76 ("The private sector simply would not be able to take over for Ex-Im. According to leaders of the Financial Services Roundtable and BAFT, "Without Ex-Im Bank programs, commercial banks often could not provide the required financing, resulting in lost sales for their corporate clients and lost jobs for employees at those companies.").

[83] *Id.* ("Many overseas customers insist on the option of using official export credit as a condition of doing a deal. Without Ex-Im, deals that may have gone to American companies like Boeing, GE and Caterpillar may go to foreign companies like Airbus, Siemens and Komatsu instead."); *see also* Jackie Calmes, *A Single Senator Stymies the Export-Import Bank*, N.Y. TIMES, June 27, 2016, http://www.nytimes.com/2016/06/28/business/international/a-single-senator-stymies-the-export-import-bank.html?_r=0 (quoting multiple companies announcing that they have plans to expand and/or relocated manufacturing to international locations).

[84] Thompson, *supra* note 78 ("We will lose global market share in key industries such as aerospace and telecommunications. . . foreign customers would find it easier to obtain financing on favorable terms from countries with export credit agencies, so it is there that they would turn for their jetliners, earth movers and locomotives.").

[85] *Annual Report 2014*, *supra* note 5, at 1 ("Ex-Im Bank [. . .] exists to support American jobs by facilitating the export of U.S. goods and services.").

[86] *Id.* at 6.

[87] *Id.*

[88] *See* Thompson, *supra* note 6, at 9 ("Ex-Im plays an especially potent role in creating jobs at small businesses.").

[89] *Annual Report 2014*, *supra* note 5, at 7.

[90] *See* Thompson, *supra* note 6, at 1 ("Even when Ex-Im financing supports the exports of big companies like Boeing and Caterpillar, much of the money passes through to small suppliers and subcontractors."); *see also id.* at 9 ("[I]n December of 2013, the bank's board approved a $695 million loan for the export of U.S.-made mining and rail equipment to Australia; a $641 million loan guarantee for the export of U.S. made oil refining equipment to Turkey; and a $45 million loan guarantee for the export of U.S.-made turbines to Israel. Over 6,000 jobs were directly tied to these transactions, but there were undoubtedly additional indirect jobs made possible by the resulting economics of scale and other efficiencies.").

[91] *See id.* ("[M]uch of the export revenue generated by larger recipients of Ex-Im financing passes through to small subcontractors and suppliers."); *see also id.* at 9 (Boeing, for instance, sources about 80% of its business activity domestically, and has 17,000 suppliers — most of them small and medium-size companies).

corporate giants would have no business to give the smaller, indirectly influenced, businesses.[92] As such, the Ex-Im Bank supports more jobs than its statistics report.[93]

Additionally, research has shown that jobs supporting U.S. exports are not minimum wage jobs.[94] Export jobs have been found to have a higher than average rate of pay as well as better benefits.[95] While the Ex-Im Bank's mission is to create jobs in America, the true impact it has is above and beyond its original, self-proclaimed responsibility.[96]

D. Reduction in Risks Involved with Exporting

The United States is fortunate to be one of the remarkably stable countries in this world and as such, has well-established business practices, institutions, and legal standards with a transparent financial system and sound currency.[97] While domestic lending has associated risk, this risk does not compare to trading internationally.[98] Exporting goods to countries that lack the level of stability in the United States creates additional risk to the lenders, making lending for exporting less prevalent among private lenders.[99] Some countries are only able to guarantee predictability and fairness.[100] The Ex-Im Bank mitigates risk through many avenues such as credit underwriting, monitoring the risks of the Bank's current

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[92] *See* Thompson, *supra* note 6, at 9 ("[M]uch of the export revenue generated by larger recipients of Ex-Im financing passes through to small subcontractors and suppliers."); *see also* Andy Winkler, *Connecting America's Small Businesses to Foreign Buyers: The Role of the Export-Import Bank*, AMERICAN ACTION FORUM (June 23, 2014), https://www.americanactionforum.org/research/connecting-americas-small-businesses-to-foreign-buyers-the-role-of-the-expo ("Small business suppliers also feed products into larger companies and benefit when the exports of the final product are expanded. For example, Boeing claims over 21,000 various suppliers and partners in the production of its products.").

[93] *See* Thompson, *supra* note 6, at 9 ("Ex-Im has a "multiplier effect" for job creation at businesses engaged in the global economy, because in the process of financing a company's exports, it makes the whole enterprise more competitive. The full impact of this effect is hard to measure because so many jobs are sustained indirectly.").

[94] *See* Maloney, *supra* note 76 ("[R]esearch shows that jobs in export industries tend to pay more than average.").

[95] *See id.* ("[R]esearch shows that jobs in export industries tend to pay more than average."); *see also* Thompson, *supra* note 6, at 9 ("[These jobs] typically pay better wages and benefits than jobs focused on domestic markets. For instance, Boeing—a big user of Ex-Im financing that sells 70-80% of its U.S.-built planes abroad—leads the aerospace sector in worker compensation.").

[96] *See* Thompson, *supra* note 6, at 9 ("Boeing, for instance, sources about 80% of its business activity domestically, and has 17,000 suppliers—most of them small or medium-size companies.").

[97] *See* Maloney, *supra* note 76, at 6.

[98] *See* James McDevitt, Op-Ed, *Ex-Im Bank Helps Small Exporters*, WALL ST. J., July 11, 2014, at A12 ("When a bank finances sales to a domestic customer, credit risk is the only concern. Financing an American customer's exports involves the additional factor of political risk. A major international money-center bank with branches and offices world-wide and a staff of sophisticated international economists is well-equipped to assess and possibly assume the political risk. A local or regional bank is not.").

[99] *See Beggar-Thy-Neighbour Banking*, *supra* note 24 ("Banks are reluctant to provide long-term export financing, to lend to countries with shaky political or legal regimes, or to small businesses, even more so since new capital standards have made such loans costlier. Export-credit agencies simply fill an unmet need—and their profits prove it.").

[100] *See* Thompson, *supra* note 6, at 6 ("[M]ost countries can only aspire to the fairness and predictability of the U.S. system.").

transactions, and exercising due diligence of potential transactions.[101] The Bank's strong risk management has led to a default rate of 0.235 percent as of September 2015.[102] Additionally, over the past eight decades, the Ex-Im Bank's default rate has been lower than commercial banks.[103]

Exposure to risk for United States taxpayers is also minimal through the security of the exported goods.[104] The Bank reserves over $4 billion for losses from loans.[105] Through the extensive and proactive risk management initiatives at the Ex-Im Bank and ability to maintain a low default rate, the Bank's services remain attractive to potential users.

E. How the Ex-Im Bank Influences Small Businesses

Small businesses are an integral part to economic development in the United States and other countries alike.[106] Economies benefit from small businesses through new innovations, new industries, and job creation.[107] Furthermore, small businesses have been viewed as vital players in the preservation of free and healthy competition.[108] With corporate giants "downsizing," the number of small businesses has grown, making small businesses the leading source for jobs in the United States.[109]

The Ex-Im Bank plays a crucial role in enabling small businesses to generate export sales.[110] As Todd McCracken, the president and CEO of the National Small Business Association bluntly put it, "Ex-Im Bank isn't crony capitalism, it isn't a drain on taxpayers and it has no private-market alternative. It's a lifeline to

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[101] *See* AKHTAR, *supra* note 9, at 15 ("The Bank has a system in place to mitigate risks through credit underwriting and due diligence of potential transactions, as well as monitoring risks of current transactions."); *see also Sen. Richard C. Shelby*, *supra* note 66, at 2 ("Ex-Im continues to proactively implement risk management improvements to further ensure we remain faithful stewards to the taxpayer. [. . .] [The Bank] increased staffing in [their] Asset Monitoring Division by 33 percent and [they] went beyond all federal requirements to implement mandatory ethics training for all employees.").

[102] *The Facts about EXIM Bank*, *supra* note 63.

[103] U.S. Chamber of Com., *supra* note 64.

[104] *See id.* ("Ex-Im loans expose the U.S. taxpayer to little risk as they are backed by the collateral of the goods being exported.").

[105] AKHTAR, *supra* note 9, at 15.

[106] Kitsuron Sangsuvan, *Small Businesses in International Trade*, 41 S. U. L. REV. 145, 146 (2014).

[107] *See id.* ("In almost all cases of successful economic development, small-scale entrepreneurs or small businesses have played a prominent role. [. . .] Small businesses are viewed as a source of entrepreneurship by creating new products that incorporate new ideas.").

[108] *See id.* at 147 ("The existence of substitute products in the market, created by smaller competitors, has been regarded as a key to preserving free competition. The existence of small businesses is also considered an essential element of a healthy competitive market.").

[109] *See id.* ("In the United States, small businesses are the backbone of the economy and the primary source of jobs. While corporate America has been "downsizing," the rate of small business "start-ups" has grown.").

[110] *See* Bryant, *supra* note 18, at 753 ("Private lenders often arrange financing for major buyers, but are unwilling to extend trade credit in small amounts, because they only generate small banking fees.").

small firms looking to export that otherwise wouldn't be able to do so."[111] Exporting is not an easy business move for small businesses to make.[112] Small businesses are unable to acquire the necessary funding from private banks because the cost to process this type of transaction is not worth the overhead cost to the bank, so the private banks steer clear of lending to small businesses.[113] Additionally, private banks typically do not accept collateral in the form of foreign receivables, a practice accepted by the Ex-Im Bank.[114] The Ex-Im Bank provides the otherwise nonexistent opportunity for small businesses to receive financing to export their goods and services until the business grows enough to become attractive to private banks.[115]

F. How the OECD Arrangement Has Affected the Ex-Im Bank

One hundred percent of the active export credit agencies were held to the rules and regulations of the OECD Arrangement at the OECD Arrangement's inception.[116] This one hundred percent figure has since dropped to thirty-five percent in a mere 16 years.[117] This drop is due to export deals made by non-OECD Arrangement members, who are able to provide unregulated and opaque exporting deals.[118] These non-member countries, primarily Brazil, China, India, and Russia, create the biggest challenge in keeping the United States competitive in exporting.[119] China has financed around $670 billion of exports over the past two years, although given China's opaque tendencies it is possible this number may be closer to $1 trillion.[120] In contrast, the Ex-Im Bank has authorized

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111 Todd McCracken & Diane Katz, *Should Congress Reauthorize the Export-Import Bank? Two Experts Square Off on Whether the Bank Really Helps Small Business*, WALL ST. J., Jan. 26, 2015, http://www.wsj.com/articles/should-congress-reauthorize-the-export-import-bank-1422244839.

112 *Sen. Richard C. Shelby, supra* note 66, at 2 (Senator Sherrod Brown speaking on behalf of the Ex-Im Bank stating, "It's not easy for small businesses to export.").

113 *See* McDevitt, *supra* note 98 ("It costs just as much to underwrite and process a $100,000 transaction as it does a $100 million transaction. The big banks only do the big deals.").

114 *See* McCraken & Katz, *supra* note 111 ("[M]ost banks won't consider foreign receivables as collateral. [. . .] the Export-Import Bank is a critical tool. Because the bank shoulders some of the risk of international deals, more small businesses are able to export today.").

115 *See* Hochberg, *supra* note 19, at 62 ("The Export-Import Bank [. . .] supports small businesses whose razor-thin margins often deter private financers. The bank provides the backing necessary for smaller firms to tackle global markets until they grow large enough to become attractive to private lenders.").

116 *Sen. Richard C. Shelby, supra* note 66, at 4-5 (statement by Fred P. Hochberg, President and Chairman of the Export-Import Bank of the United States).

117 *Id.*

118 *See Sen. Richard C. Shelby, supra* note 66, at 4-5 ("[C]ountries such as China and Russia, which operate outside of the OECD Arrangement, have begun to aggressively back their domestic exporters with unregulated, opaque financing.").

119 *Id.* at 15 (statement by Fred P. Hochberg, President and Chairman of the Export-Import Bank of the United States, "China, Russia, Brazil, and India are not a member [of the OECD Arrangement]. So they are very opaque. They could offer any terms they want, as long as they want, as low interest as they want, subsidize rates. And we really are not able – that's a real threat to U.S. competitiveness.").

120 Hochberg, *supra* note 19, at 60.

around $590 billion of exports over the past eighty years of operation.[121] Under the current rules and regulations that the OECD Arrangement requires members to abide by, the United States is slowly losing its competitive edge, unable to match offers from non-member countries vying for the same deals.[122]

V. Proposal

A. Increased Focus on Funding to Small Businesses

Upon signing the reauthorization of the charter in 2012, President Obama stated, "We're helping thousands of businesses sell more of their products and services overseas, and in the process we're helping them create jobs here at home.[123] And we're doing it at no extra cost to the taxpayer."[124] President Obama strategically made this statement to an audience full of small business owners.[125] It is no secret that the role small businesses play in the United States economy is growing each year.[126] Additionally, a key component to growth for small businesses is international trade.[127] Due to these undeniable facts, it is important that opportunities for small businesses to participate in exporting their goods and services continue to grow.

With private lenders reluctant to extend financing to small businesses for exporting purposes due to the increased risk of dealing with risky markets and the lack of profit to the private banks, the Ex-Im Bank is imperative to small businesses ability to grow.[128] While 90 percent of the number of authorizations made were for small businesses, only about a quarter of the money spent by the Ex-Im Bank went to small businesses.[129] Corporate giants are understandably going to

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121 Hochberg, *supra* note 19, at 60.

122 *Sen. Richard C. Shelby*, *supra* note 66, at 5 (statement made by Hochberg, "I was in South Africa [. . .] and I met with Transnet, which is the rail authority in South Africa. They had a large tender for locomotives. In the end, they divided it half to the Chinese, half to the U.S. I asked the head of Transnet: "Well, what kind of financing terms are the Chinese offering you?" So I would know as a businessman what the competition is. And he said, "Well, they said to me, 'What would I like? 10 years? 15 years? 20 years? A grace period? What do I need – what do I want to make the deal?" We don't do that. We offered – the most we can offer is 14 years.").

123 Thompson, *supra* note 6, at 12.

124 *Id.*

125 Thompson, *supra* note 6, at 12.

126 *See* Sangsuvan, *supra* note 106, at 147 ("While corporate America has been 'downsizing,' the rate of small business 'startups' has grown.").

127 *See id.* at 148 ("While small businesses are growing rapidly, international trade and global markets are the critical component of small businesses.").

128 *See* Hochberg, *supra* note 19, at 62 ("The Export-Import Bank [. . .] supports small businesses whose razor-thin margins often deter private financers. The bank provides the backing necessary for smaller firms to tackle global markets."); *see also* Bryant, *supra* note 18, at 753 ("Private lenders often arrange financing for major buyers, but are unwilling to extend trade credit in smaller amounts, because they only generate small banking fees."); *see also* Kati Suominen, *Exporters as a New Asset Class,* TRADEUP.COM at 2 (Jan. 2014), http://www.tradeupfund.com/uploads/2/6/0/4/26048023/u.s._sme_exporters_as_new_asset_class_-_tradeup_2014.pdf ("SMEs' typical sources of financing, banks have been pulling back from the small business market. Private equity and angel investments are reserved only for select companies—and typically not destined to helping SMEs grow internationally.").

129 *Annual Report 2014*, *supra* note 5, at 7, 21.

have the larger financial requests due to their ability and need to conduct business on a much larger scale, but that does not mean the Ex-Im Bank has reached capacity in financing small businesses.[130]

Small businesses have become such an integral part of our economy that Congress created the Small Business Administration ("SBA").[131] The SBA is responsible, along with other federal and state agencies, such as the Ex-Im Bank, to assist small businesses in their efforts to participate in international trade.[132] The Ex-Im Bank already targets small businesses through sponsoring programs for small business owners, which informs these owners of pertinent information about exporting opportunities.[133] Increasing efforts like this would help the Ex-Im Bank reach more small businesses.[134]

B. Decrease Regulation of the OECD Arrangement

The United States' financial deficit as of August 2016 was calculated at $530 billion.[135] In the latest annual report from the Ex-Im Bank, the Bank contributed just under $675 million to the U.S. Treasury to contribute to the deficit for fiscal year 2014.[136] Throughout the past twenty years, the Ex-Im Bank has contributed $7 billion for the U.S. Treasury.[137] The Ex-Im Bank is one of the few government agencies that is not only self-sustaining, but also contributing financially to the U.S. economy.[138]

The annual exposure limit Congress imposes on the Ex-Im Bank has not been met since at least 1997.[139] Between the Ex-Im Bank profiting the U.S. economy

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130 *See* Thompson, *supra* note 6, at 9 ("Ex-Im also has steadily expanded the range of its products and activities targeting small businesses, opening regional offices, sponsoring conferences that highlight overseas selling opportunities, and disseminating information useful to prospective exporters."); *see also* Suominen, *supra* note 128, at 2 ("[R]ecent surveys indicate that three-quarters of current SME exporters look to expand their overseas sales, while almost a quarter of the 6 million non-exporters want to start exporting.").

131 *See* Sangsuvan, *supra* note 106, at 155 ("Congress believed that small businesses were a critical component of the economy." As such, Congress created special programs to support small businesses).

132 *See id.* at 163 ("According to the SBA, small businesses should be aided and assisted by the SBA, the Department of Commerce, and other federal and state agencies to increase their ability to compete in international markets. This aid and assistance includes: (1) enhancing their ability to export [. . .].").

133 *See* Thompson, *supra* note 6, at 9 ("Ex-Im [. . .] has steadily expanded the range of its products and activities targeting small businesses, opening regional offices, sponsoring conferences that highlight overseas selling opportunities, and disseminating information useful to prospective exporters.").

134 *Id.* (stating the efforts discussed in footnote 133 "have the potential to create U.S. jobs." An increase in jobs infers an increase in the number of businesses reached by the Ex-Im Bank).

135 *Budget*, CONG. BUDGET OFFICE, https://www.cbo.gov/topics/budget (last viewed Nov. 5, 2016).

136 *Annual Report 2014*, *supra* note 5, at 7.

137 *See* Jackie Calmes, *House Votes Overwhelmingly to Reopen the Ex-Im Bank*, N.Y.TIMES, Oct. 27, 2015, at B1 ("The Democrats' leader [. . .] cited estimates that the bank [. . .] had earned $7 billion over two decades for the Treasury through proceeds from loan repayments.").

138 *See The Role of the Export-Import Bank in U.S. Competitiveness and Job Creation: Hearing Before the Subcomm. On Int'l Monetary Policy & Trade of the Comm. On Fin. Services*, 112th Cong. 7 (2011) [hereinafter *The Role of the Export-Import Bank*] ("[B]ecause the bank charges exposure fees to its borrowers, it is not only self-sustaining, but consistently earns a profit for U.S. taxpayers. It is a government program that helps lower the deficit – something I'm sure you don't hear all that often.").

139 *See* AKHTAR, *supra* note 9, at 12 (referencing the information found in Figure 5).

and available funds for use, focus should be on increasing authorizations made by the Ex-Im Bank to increase the total profit for the U.S. economy and meet the exposure limit, if not force an increase on the limit.[140]

In order to increase authorizations, an imperative move is to adjust exporting regulations.[141] The United States' hands are tied in numerous potential deals because of the country's participation in the OECD Arrangement.[142] Countries that are not participants in the OECD Arrangement are able to offer much more appealing deals to purchasers.[143] Lowering the regulation standards with the OECD Arrangement would give the United States a better competitive edge to land more deals against some of the leading exporting countries like Brazil, China, India, and Russia.[144] More authorizations would equate to more profit made by the Ex-Im Bank and ultimately more money to contribute to the United States deficit.[145]

VI. Conclusions

With the Ex-Im Bank being one of the few federal agencies putting money into the U.S. economy, it is imperative that the Bank not only continue to be successfully operated, but to focus on increasing authorizations to maximize financial returns to our economy. Non-member countries of the OECD Arrangement, such as China, are quickly overshadowing the United States in exporting.

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[140] *See The Role of the Export-Import Bank*, *supra* note 138, at 5 ("To improve the effectiveness of the U.S. export finance system, we urge the Congress to [. . .] reauthoriz[e] [. . .] Ex-Im with greater lending authority [. . .] [and] eliminat[e] regulatory restrictions that weaken Ex-Im's competitiveness vis-à-vis other ECAs." The suggestion to eliminate regulatory restrictions would help increase authorizations).

[141] *Id.* at 6 ("[W]e would urge that Ex-Im be directed to match financing offered by foreign governments competing abroad or in the U.S. home market, where such financing is inconsistent with the OECD arrangement or where investment financing is being offered to win market share from U.S. competitors."); *see also* K. William Watson, *Free Trade, Free Markets: Rating the 112th Congress*, 53 FREE TRADE BULL. 1, 1 (2013) ("Barriers to international trade reduce consumer options, increase prices, and impede economic growth. Such barriers exist as an instrument for politically powerful interests to secure private gain at public expense.").

[142] *See* AKHTAR, *supra* note 9, at 20 ("The government-backed export credit activities of these non-OECD countries may not comply with international export credit standards. China, Brazil, and India may offer below-market and concessionary financing alternatives with which it is difficult for ECAs of OECD members [such as the United States] to compete.").

[143] *See id.* ("The OECD Rail Sector Understand, concluded in September 2013, sets guidelines for railway infrastructure exports. It provides repayment terms up to 12 years for transactions in high-income OECD countries, subject to conditions aimed at complementing the private sector, and up to 14 years for transactions in all other countries. [. . .] In contrast to OECD repayment terms, various studies suggest that China's repayment terms for its rail exports, such as for infrastructure projects in sub-Saharan Africa, can exceed 20 years.").

[144] *The Role of the Export-Import Bank*, *supra* note 138, at 6 ("[F]or U.S. exporters to be globally competitive, we need Ex-Im to be as flexible and nimble as its global competitors. To that end, we would urge reform of [. . .] Ex-Im policies that diminish Ex-Im's' flexibility and weaken its competitiveness."); *see also* AKHTAR, *supra* note 9, at 38 (referencing Table A-1 that compares the OECD Arrangement participant financing volumes with the financing volumes of Brazil, China, India, and Russia, therefore indicating these four countries as the biggest non-OECD ECA competitors).

[145] *The Role of the Export-Import Bank*, *supra* note 138, at 5 ("[G]reater lending authority will in fact only result in an increase in their surplus, their return to the U.S. Treasury.").

The OECD Arrangement is too restricting on exporting for members and if a shift does not happen, member-countries such as the United States will inevitably become irrelevant in the global exporting market.

Furthermore, the Ex-Im Bank should focus more on funding small businesses rather than corporate giants. Small businesses are becoming more prominent players in the marketplace and international trading is an ideal way to increase sales. Because private lenders are much more reluctant to extend funding to these small businesses due to the increased risk the lenders face, the Ex-Im Bank should focus on reaching more small businesses to help fund their exporting needs.

KEEPING DISPUTE RESOLUTION COSTS SMALLER THAN YOUR SMALL BUSINESS: THE CASE FOR INTERNATIONAL COMMERCIAL ARBITRATION UNDER THE NEW YORK CONVENTION

Robert Schur*

> "Business is grateful to the United Nations for having provided it with this instrument in a world where arbitration is resorted to for the resolution of international commercial disputes."[1]
>
> - Pieter Sanders, Principal Drafter of The Convention on the Recognition of Foreign Arbitral Awards of 1958 (The New York Convention)

I. Introduction

The popular press did not treat arbitration well in 2015.[2] In particular, *The New York Times* published a three-part series about arbitration with titles including "Arbitration Everywhere: Stacking the Deck of Justice," and "In Arbitration,

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[1] Pieter Sanders, Honorary President, Int'l Council for Commercial Arbitration, Keynote Address at International Council for Commercial Arbitration Congress Series No. 9: The History of the New York Convention (May 3, 1998), *in* IMPROVING THE EFFICIENCY OF ARBITRATION AND AWARDS: 40 YEARS OF APPLICATION OF THE N.Y. CONVENTION, 1998 ICCA Congress Series No. 9 11 (Albert Jan van den Berg, ed., 1999).

[2] *See* Dr. Markus Altenkirch & Nicolas Gremminger, *Parties' Preference in International Arbitration: The Latest Statistics of Leading Arbitral Institutions*, GLOBAL ARBITRATION NEWS, (Aug. 5, 2015), http://globalarbitrationnews.com/parties-preferences-in-international-arbitration-the-latest-statistics-of-the-leading-arbitral-institutions-20150805/ ("In 2015, ICSID might well be on the way to a new record year."); *See also* INTERNATIONAL CENTRE FOR SETTLEMENT INVESTMENT DISPUTES, *Background Information on International Centre for Settlement Investment Disputes* 1 (last visited Oct. 23, 2016), https://icsid.worldbank.org/apps/ICSIDWEB/about/Documents/ICSID%20Fact%20Sheet%20-%20ENGLISH.pdf [hereinafter *ICSID*] (defining ICSID).

a 'Privatization of the Justice System.' "[3] The series even included a piece called "In Religious Arbitration, Scripture is the Rule of Law."[4] These headlines imply unfairness. The prose, discussed intermittently in this article, depicts arbitration as the evil twin of the American justice system, depriving consumers of their due process rights.[5]

Reading articles like these would leave the reader with the impression that arbitration inherently favors one side and limits the other party's access to justice. While the articles sweepingly discuss arbitration, their real focus appears to lie in business to consumer arbitration, overlooking settings in which arbitration is useful, helpful, expedient and fair.[6] This comment focuses on one of those settings: international commercial arbitration and the benefits it holds for small businesses engaging in international transactions and signing cross-border contracts. International commercial arbitration is particularly effective when conducted to take advantage of The Convention on the Recognition of Foreign Arbitral Awards of 1958 (The New York Convention).[7]

International commercial arbitration offers several generally applicable benefits that are particularly helpful to small businesses. As one scholar writes:

> There are different principles by which to gauge the legal tradition of international commercial arbitration. The first principle is consensual, namely, that the parties *choose* arbitration. The parties are free to select the nature, form and operation of arbitration, whether its nature is *ad hoc* or institutional, whether its form is modelled on European, English, American or "other" legal traditions, whether it is conducted primarily

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[3] Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere: Stacking the Deck of Justice*, N.Y. TIMES, (Oct. 31, 2015), http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html; *see also* Michael Corkery & Jessica Silver-Greenberg, *In Arbitration, a 'Privatization of the Justice System*', N.Y. TIMES (Nov. 1, 2015), http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html?action=click&contentCollection=dealBook&module=relatedCoverage&region=marginalia&pgtype=article [hereinafter *Privatization of the Justice System*].

[4] Michael Corkery & Jessica Silver-Greenberg, *In Religious Arbitration, Scripture is the Rule of Law*, N.Y. TIMES (Nov. 2, 2015), http://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html?action=click&contentCollection=dealBook&module=relatedCoverage&region=marginalia&pgtype=article [hereinafter *Scripture is the Rule of Law*].

[5] *See generally Arbitration Everywhere*, *supra* note 3. (The first article in the series explores arbitration clauses in consumer contracts that prohibit class action suits. Nonetheless, the authors enhance the apparent severity of their narrow focus by pointing out such facts how Chief Justice John Roberts worked on a case seeking to uphold these clauses. The Times attempts to depict a conspiracy where none exists.); *see also* David B. Lipsky, *The New York Times' Attack on Arbitration*, *Series Highlighted Abuses – But Also Ignored Arbitration's Many Advantages*, 22 DISP. RESOL. MAG., no. 4, 2016 at 6 ("There is more than a hint of a conspiracy in the Times account of this development . . . .").

[6] Silver-Greenberg & Gebeloff, *supra* note 3; *Privatization of the Justice System*, *supra* note 3; *Scripture is the Rule of Law*, *supra* note 4.

[7] Convention of the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter *New York Convention*]; *see also* Albert Jan Van Den Berg, *The New York Convention 1958 and the Panama Convention 1975: Redundancy or Compatibility,* 5 ARB. INT'L 214, 214-29 (1989) (distinguishing between the Panama Convention and the New York Convention, in existence now for over 30 years).

> through oral testimony or written submissions, and whether it is impacted by a multi-or bilateral treaty or by discrete customary law influences.[8]

While *The New York Times* finds "circumventing the courts" objectionable, the ability to avoid courts actually favors small businesses that use arbitration in international disputes.[9] Parties are free to set the rules of their proceedings, the laws to be applied, and how the arbitration will be conducted.[10]

Like the popular press, scholars have increasingly spoken out against international commercial arbitration. Academics tend to endorse large scale-judgment reciprocity treaties.[11] This article will show that such schemes are impractical and provide minimal benefits to small businesses and their lawyers.[12]

Fortunately, the New York Convention ensures that arbitration awards won in any signatory country are enforceable in any other signatory country.[13] Since arbitration proceedings and their location are inherently consensual anyway, parties can proceed confidently that as long as they receive an award, it will be upheld and entered as a judgment in any of the convention's 156 ratifying countries.[14]

This fundamental aspect of the New York Convention forms the foundation of this comment. The following pages provide a guide to international commercial arbitration within the New York Convention's framework. The comment begins with an examination of the relevant provisions of the New York Convention, as well as its companion treaty, the Inter-American Convention on International Commercial Arbitration, more commonly known as the Panama Convention.[15]

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[8] Leon E. Trakman, *Legal Traditions and International Commercial Arbitration*, 17 AM. REV. INT'L ARB. 1, 18-19 (2006) (discussing the opportunity to choose arbitration as a general benefit).

[9] *Privatization of the Justice System*, *supra* note 3 (discussing arbitration as amounting to a wholescale privatization of our justice system); *see also* Lipsky, *supra* note 5, at 6-7 (contrasting the N.Y. Times article's sentiment that arbitration for small businesses is always bad).

[10] Trakman, *supra* note 8, at 23-26 (discussing the nature of arbitration through the rules and procedures and illustrating how the "wide range of services provided by different arbitration associations is the plethora or arbitration clauses, procedures and evidentiary rules adopted by each [region].").

[11] *See generally* John F. Coyle, *Rethinking Judgments Reciprocity*, 92 N.C.L. REV. 1109, 1113 (2014); *see also* Katherine R. Miller, *Playground Politics: Assessing the Wisdom of a Reciprocity Requirement into U.S. International Recognition and Enforcement Law*, 35 GEO. J. INT'L L. 239, 241-42, 280-81 (2004) (citing that the Hague Conference is an ideal forum for the adoption of a major international treaty where "more than forty-five countries are involved in the Hague Convention project, including every significant U.S. trading partner." The need for simplification of "international recognition and enforcement practice is enormous." Thus introducing the "reciprocity requirement" will provide an incentive for other countries to join the Hague Convention and increase the "bargaining power of the United States *vis a vis* those other countries.").

[12] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 1081-91 (Kluwer Law International, et al. eds., vol. 1, 2009) ("It is fundamental that the scope of an agreement to arbitrate is a matter of contract, subject to the parties' will").

[13] *New York Convention*, *supra* note 7, art. I.

[14] See *Contracting States*, N.Y. ARB. CONVENTION, http://www.newyorkconvention.org/countries (last visited Dec. 24, 2015), for a full list of signatory countries to the New York Convention.

[15] *See The Inter-American Convention on International Commercial Arbitration*, ORG. OF AMERICAN STATES (Jan. 5, 2016), http://www.oas.org/juridico/english/treaties/b-35.html. (The Panama Convention is codified in the United States as 9 U.S.C. 301. The full text of the Panama Convention is readily available online).

Subsequently, it explores the enforcement mechanisms for arbitration awards both generally and under the New York Convention, both in the United States and abroad. The enforcement climate is particularly favorable in the United States because federal preemption allows the Federal Arbitration Act, with its incorporation of the New York Convention, to supersede any state arbitration laws.[16] American courts have even upheld arbitration awards to the government of Iran.[17] European and other foreign courts, while bound by the New York Convention to enforce arbitration awards, are less inclined to allow arbitrations to proceed in the first place.[18]

The analysis also illuminates the potential pitfalls of international commercial arbitration that arise from relying on the New York Convention. The choice of law clause causes significant consternation as countries have varying standards for what constitutes a fair arbitration clause.[19] If an arbitration is subject to a certain country's law, the New York Convention does not stop that law from applying to the validity of the arbitration clause.[20]

In sum, effective and efficient arbitrations arise from careful planning. Small business owners and their counsel should take considerations discussed in this comment into account when planning for dispute resolutions in international transactions to ensure a successful result and an expedient and cost efficient process. Accordingly, this article concludes with a proposal to promote arbitration and to more widely disseminate materials that educate lawyers serving small businesses on the mechanics of international commercial arbitration and small business owners on the process' benefits.[21]

II. Background

International commercial arbitration emerged after World War II as trade increased between the victorious and economically expanding Western nations.[22] This post-war international economic expansion created the need for the New

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[16] Craig M. Gertz, *The Selection of Choice of Law Provisions in International Commercial Arbitration: A Case for Contractual Depecage*, 12 Nw. J. Int'l. L. & Bus. 163, 182 (1991); *see also* Jan Van Den Berg, *supra* note 7, at 214.

[17] Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc., 665 F.3d 1091, 1105 (9th Cir. 2011); Ministry of Def. of the Islamic Republic of Iran v. Gould, Inc., 969 F.2d 764, 770 (9th Cir. 1992).

[18] Donna M. Bates, *A Consumer's Dream or Pandora's Box: Is Arbitration a Viable Option for Cross-Border Consumer Disputes?*, 27 Fordham Int'l L.J. 823, 839-40 (2004) (finding that in the European Union, unlike in the United States, no pre-dispute arbitration agreements with consumers is binding. Thus, the burden does not rest on the consumer in the European Union to demonstrate a "recognized ground for non-enforcement of the agreement" because the Union generally refuses to enforce such clauses).

[19] Kitsuron Sangsuvan, *Small Businesses in International Trade*, 41 S.U. L. Rev. 145, 183 (2014).

[20] *Id.* at 183-84.

[21] Press Release, U.S. Chamber of Commerce, Lawsuits Cost Small Businesses $105 Million, Study Shows (Jul. 7, 2010), https://www.uschamber.com/press-release/lawsuits-cost-small-businesses-105-billion-study-shows.

[22] Thomas E. Carbonneau, *The Ballad of Transborder Arbitration*, 56 U. Miami L. Rev. 773, 778 (2002).

York Convention.[23] The International Commerce Commission ("ICC") first proposed an international arbitral award enforcement treaty in 1953.[24] After extensive discussion and proposals, the United Nations ratified the "Dutch Proposal," in 1958, a version of the convention far narrower than others. This version's limited scope ensured foreign awards would be recognized in the courts of other ratifying states.[25]

The Panama Convention, ratified in 1984, is effectively a regional, Latin-American version of the New York Convention.[26] Today, the Panama Convention covers eighteen Latin American countries and is written to be fully compatible with the New York Convention.[27] While there are some small differences between these two agreements, the Panama Convention supplements the New York Convention by resolving long-standing problems in enforcement of arbitral awards in Latin America.[28] Many of the countries that ratified the Panama Convention were not original signatories to the New York Convention, but subsequently ratified the New York Convention.[29] In instances where both treaties apply, American law resolves the existing conflict by applying the Panama Convention, though the differences between the two are nominal.[30]

The New York Convention sought to "encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in signatory nations."[31] Justice Potter Stewart of the United States Supreme Court wrote those words in *Scherk v. Alberto-Culver Co.*, a landmark case that solidified the United States' adherence to the provisions of the New York Convention.[32] While only the notes in Stewart's opinion reference the New York Convention specifically, Stewart nonetheless captured the essence of the convention and its aims in his opinion when he wrote:

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[23] Carbonneau, *supra* note 22, at 778.

[24] Sanders, *supra* note 1.

[25] *See* Sanders, *supra* note 1. Sanders drafted the proposal that became the New York Convention in a distinctly non-legal setting: perched in a relative's suburban New York garden with a typewriter.

[26] John P. Bowman, *The Panama Convention and Its Implementation Under the Federal Arbitration Act*, 11 AM. REV. INT'L ARB. 1, 6 (2000).

[27] *Id.* at 19-20.

[28] *Id.* at 8-9 (explaining that barriers to enforcement of arbitral awards in Latin America include, "(1) court refusal to enforce agreements to arbitrate future disputes; (2) the existence of extremely broad grounds for attacking arbitral awards, making enforcement difficult at best; (3) restrictions or prohibitions against non-nationals acting as arbitrators; and (4) the requirement that an arbitration agreement be made in a public writing—an *escritura publica*, a writing executed before a notary, a judicial officer in civil law countries.").

[29] N.Y. ARB. CONVENTION, *supra* note 14.

[30] Relationship Between the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, 9 U.S.C. § 305 (1990); *Interamerican Arbitration Convention*, INST. FOR TRANSNAT'L ARB., http://faculty.smu.edu/pwinship/arb-22.htm (last visited Sept. 13, 2016).

[31] Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974).

[32] *Id.* at 507.

> A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.[33]

Stewart and the Supreme Court protected the New York Convention in the United States to ensure that ignorance of a foreign forum on a particular topic or national bias would not hinder aggrieved parties in receiving the relief to which they are entitled.[34]

The convention's drafters sought uniformity and strived "to establish a single, stable set of international legal rules for the enforcement of arbitral agreements and awards."[35] Assurance that arbitration awards in one country will be enforced in another makes certain that arbitration can achieve its principal advantages of "privacy of the proceedings, likely maintenance of the business relationships if the parties so desire and savings in cost and time."[36]

Considering that business' litigation costs are spiraling out of control, such certainty makes sense. Procedural and discovery costs of the American litigation system make any lawsuit a potentially damaging proposition to a small business.[37] In 2008, small businesses in the United States spent $105 billion dollars on tort judgment awards.[38] The escalating costs of litigating in the United States judicial system only further adds to the expense of defending lawsuits.[39] The effect of losing a suit, or even just having to defend one, can be catastrophic for a small business that may already be on precarious financial footing, particularly during its foundational stages.[40] For companies doing business overseas, enforcing a foreign judgment domestically or vice versa would discourage investment in any jurisdiction where enforcement of an award is less than certain.[41]

Finally, this article adheres to the guidelines of the United States' Small Business Administration ("SBA") defining small businesses.[42] These definitions vary by industry and are measured by either employees or gross annual receipts.[43] For

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[33] Scherk v. Alberto-Culver Co., 417 U.S. at 507.

[34] *Id.*

[35] BORN, *supra* note 12, at 23.

[36] William K. Slate II, *International Arbitrations: Do Institutions Make a Difference?*, 30 WAKE FOREST L. REV. 41, 43 (1996).

[37] U.S. Chamber of Commerce, *supra* note 21.

[38] *Id.*

[39] U.S. Chamber of Commerce, *supra* note 21.

[40] *Id.*

[41] Guillermo Aguilar-Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365, 369 (2003).

[42] *Summary of Size Standards by Industry Sector*, U.S. SMALL BUS. ADMIN. (Feb. 26, 2016), https://www.sba.gov/content/summary-size-standards-industry-sector.

[43] *Id.*

instance, the SBA defines a "truck transportation company" as a small business when it has $27.5 million in annual receipts, but deems a water transportation company a small business when it has 500 employees.[44] For general purposes of this article, small businesses have fewer financial and human resources than larger corporations, such that protracted and expensive litigation would pose a threat to their viability.

III. Discussion

In the United States, the Federal Arbitration Act ("FAA") gives the New York Convention its authority.[45] The FAA subjects any arbitration award for which a party seeks enforcement in the United States to federal oversight and a single standard of review.[46] Regardless of the size of the dispute and whether it is between domestic or international parties, the FAA applies.[47] Further, the recent Supreme Court cases of *AT&T Mobility v. Concepcion* and *American Express Co. v. Italian Colors*, both reaffirmed that the FAA will preempt any state court decision to circumvent the act.[48] While these cases focused on the application of the FAA to class action lawsuits, the court nonetheless made the emphatic point that courts must "'rigorously enforce' arbitration agreements" and that the only a "congressional command" can override the FAA.[49] Thus, since the FAA backs the New York Convention, United States courts have set a precedent that the United States will continue enforcing the convention's provisions.

In contrast, other countries are still institutionally hostile towards arbitration.[50] For instance, the European Union Consumer Directive of 1993 throws out any contract's arbitration clause if a court deems the provision "unfair" or if the court detects a "significant imbalance in the parties' rights and obligations."[51] This directive stands in stark contrast to the situation in the United States discussed above. United States courts have even gone so far as to force a complex antitrust claim under U.S. law to be arbitrated in Japan because the arbitration agreement prescribed doing so.[52] Nonetheless, the Japanese courts are far less willing to do

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[44] *Summary of Size Standards by Industry Sector*, *supra* note 42.

[45] Federal Arbitration Act, 9 U.S.C. § 1-307 (1947).

[46] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); William M. Park, *International Commercial Arbitration: The Specificity of International Arbitration: The Case for FAA Reform*, 36 VAND. J. TRANSNAT'L L. 1241, 1245 (2003).

[47] *Moses*, 460 U.S. at 24; Park, *supra* note 46.

[48] AT&T Mobility v. Concepcion, 131 S. Ct. 1740, 1753 (2011); Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2312 (2013).

[49] *Am. Express Co.*, 133 S. Ct. at 2308-09.

[50] *Am. Express Co.*, 133 S. Ct. at 2308-09.

[51] Bates, *supra* note 18, at 839.

[52] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 640 (1985).

the same.[53] Japanese courts by law invalidate any arbitration clause "contrary to public policy and good morals."[54]

This hostility notwithstanding, arbitration is nonetheless fundamentally fair because the parties may decide the terms of the proceedings far in advance of their disputes. It is "competitive and consensual, allowing parties to both singularly and mutually consider and agree upon the dispute resolution terms most suitable to their particular situations."[55] In drafting an arbitration agreement, parties may negotiate the terms of their arbitration proceedings, starting with the procedural rules that will govern a potential arbitration.[56] They may choose the governing law of the situs of the arbitration, set their own rules, or use a set of pre-prescribed rules from one of the myriad of international arbitration organizations across the world.[57] The parties also select their own arbitrator or set of arbitrators and can prescribe how they are chosen.[58] Many arbitration organizations are readily discoverable over the internet and their rules are generally posted on their websites.[59]

IV. Analysis

In this anti-arbitration academic and journalistic climate, what is a small business owner reading about arbitration to believe and how should he proceed? The following considerations about the New York Convention will equip lawyers to direct a conversation with a small business client about the benefits of international commercial arbitration. This section explores the safeguards built into the New York Convention to ensure only fair and lawful arbitration awards are enforced, the potential pitfalls of international arbitration under the New York Convention and, finally, why alternatives to international commercial arbitration are still inferior for both small businesses and the population at large.

A. Safeguards Built into the New York Convention

Even in the face of popular criticism of arbitration, the New York Convention provides numerous safeguards for parties arbitrating under its framework.[60] For example, a losing party under the convention can invalidate an award in the court

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[53] Sangsuvan, *supra* note 19, at 183 (citing CHRIS NOONAN, THE EMERGING PRINCIPLES OF INTERNATIONAL COMPETITION LAW 294 (2008)).

[54] *Id.*

[55] Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT'L L. 79, 82-83 (2000).

[56] Pippa Read, *Delocalization of International Commercial Arbitration: Its Relevance in the New Millennium,* 10 AM. REV. INT'L ARB. 177, 179 (1999).

[57] *Id.*

[58] *Id.* at 178.

[59] See *International Arbitration Network and Resources*, International Arbitration Law, http://www.internationalarbitrationlaw.com/arbitral-institutions/ for a useful list of international arbitration organizations.

[60] Winston Stromberg, Comment, *Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes*, 40 LOY. L.A. L. REV. 1337, 1372-73 (2007).

where enforcement is sought by showing either an invalid arbitration agreement, that a party was denied procedural fairness or due process, that the arbitrators exceeded their authority, or that the arbitration procedures differed materially from the parties' arbitration agreement or the applicable procedural law.[61] The party may also show that the award is not yet fully binding or was set aside by a "competent authority."[62]

The New York Convention also sanctifies the freedom to choose the rules of the arbitration by stating in Article V (1)(d) that awards under the convention are unenforceable when they are not in accordance with the parties' agreement and, therefore, should the procedural rules not be provided for in the agreement, then the law of the arbitration situs shall govern the proceedings.[63] The convention is thus drafted to ensure that procedural omissions from an initial arbitration agreement do not undermine award enforcement.[64] Theoretically, this clause should alleviate the need for the protectionist laws in the European Union and Japan, but in practice, these countries' legal systems simply invalidate arbitration agreements so that they are not enforced.[65]

Beyond the provisions of arbitration agreements themselves, the New York Convention also protects any bilateral agreements already in place between nations.[66] Article VII states explicitly that the convention "shall not affect the validity of the multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States."[67] In addition, Article VII allows for parties to still avail themselves of local laws in place for enforcement of arbitration awards.[68]

B. Pitfalls to Consider in Preparing for Arbitration Under the New York Convention

Even with all of these benefits and safeguards, the New York Convention's choice of law clause in Article V (1) (a) undermines the Convention's mission of universal arbitral award enforceability.[69] This clause states that parties may either choose the law that applies or, if they fail to do so, then the arbitration agreement is subject to the law of the country where the award was made, which is logically the situs of the arbitration.[70] However, under the second option, some countries will not enforce awards if they find the arbitration agreement

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[61] Stromberg, *supra* note 60, at 1372-73.

[62] *Id.* at 1373.

[63] *Id.* at 1374.

[64] Stromberg, *supra* note 60, at 1372-73.

[65] Sangsuvan, *supra* note 19.

[66] *New York Convention*, *supra* note 7, art. VII.

[67] *Id.*

[68] *Id.*

[69] *New York Convention*, *supra* note 7, art. V.

[70] Albert Jan van den Berg, *The New York Convention of 1958: An Overview*, INT'L COUNCIL FOR COM. ARB. 11 (2009), http://www.arbitration-icca.org/media/o/12125884227980/new_york_convention_of_1958_overview.pdf.

"offensive to the generally accepted values of the forum."[71] Some countries have codified the meaning of "values" in an similarly vague way. For example and as previously mentioned, in Japan, the standard is simply what is "contrary to public policy and good morals."[72] Kitsuron Sangsuvan, an adjunct professor at Indiana University Robert H. McKinney School of Law, points out the perils of this aspect of the New York Convention for small business owners and urges them to heed this problem in drafting their arbitration agreements.[73] Parties must therefore choose wisely where they will arbitrate in case they need to seek local judicial enforcement of the award later.[74]

Awards enforceable under the New York Convention are far from assured because foreign courts with jurisdiction over one party to the original contract can still interfere with pre-arbitration disputes that may affect the proceedings' outcome.[75] Federal courts in the United States have simply ignored the arbitration agreement's choice of law clause and instead employed Federal law.[76] *Becker-Autoradio U.S.A, Inc. v. Becker Autoradiowerk GmbH* provides a notable example of this phenomenon dating back to 1978.[77] In that case, the choice of law clause specified that German law would govern the arbitration, including which issues the arbitrator could resolve.[78] Nonetheless, the Third Circuit Court of Appeals refused to apply German law and instead applied United States law in determining the scope of the German arbitrator's authority, citing a long string of authority stating that once an agreement is covered by the Federal Arbitration Act, then all questions of interpretation are determined by United States law rather than foreign law.[79]

Pre-arbitration issues notwithstanding, a review of the cases surrounding U.S. enforcement of foreign arbitration awards reveals that once an award is made, U.S. courts do not overturn it. Among many interesting examples, the Ninth Circuit Court of Appeals would not overturn an arbitration award rendered against a United States military defense manufacturer and the Ministry of Defense of Iran.[80] In *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, the defendant argued that upholding an arbitration award in favor of the government of Iran amounted to payment to Iran that was repugnant to the United States' policy against "trade,

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[71] Sangsuvan, *supra* note 19.

[72] *Id.*

[73] *Id.* at 181.

[74] *Id.*

[75] Gertz, *supra* note 16.

[76] *Id.*

[77] *Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH*, 585 F.2d 39 (3d Cir. 1978).

[78] Gertz, *supra* note 16.

[79] *Becker Autoradio U.S.A., Inc*., 585 F.2d at 43; *see also Coenen v. R. W. Pressprich & Co., 453 F.2d 1209, 1211 (2d Cir. 1972)* ("once a dispute is covered by the [Federal Arbitration] Act, federal law applies to all questions of [the arbitration agreement's] interpretation, construction, validity, revocability, and enforceability.").

[80] *Ministry of Def. & Support of Iran*, 665 F.3d 1091.

investment, and economic support" of an enemy state.[81] Both this case and another 1992 breach of contract case, in which Iran sued an American company, stress the sanctity of the New York Convention and the strong public policy interest in ensuring the enforcement of foreign arbitration awards.[82] While certainly federal preemption issues surround pre-arbitration disputes, awards remain safe under the New York Convention.

Gary Born, a preeminent authority on international commercial arbitration, notes that the same pre-arbitration and procedural issues outlined here in U.S. courts can occur in any jurisdiction. The arbitration situs' own domestic laws can govern certain aspects of the arbitration, regardless of what the parties' arbitration agreement or arbitration clause says.[83] Indeed, "in virtually all countries local law contains mandatory public policy or statutory restrictions that apply to any arbitration conducted within national territory, even if a foreign procedural law applies generally to the arbitration."[84] In other words, the scenario that played out in *Becker* could happen in any jurisdiction.

C. Alternatives to International Commercial Arbitration

The New York Convention does not supplant the laws of its signatory countries, but rather supplements them, making the convention preferable to other award assurance schemes such as global judgment reciprocity enforcement.[85] This concept sharply contrasts with John Coyle and his 2015 article on judgment reciprocity enforcement.[86] Coyle advocates a system of what he calls "reciprocal legislation" for enforcing judgments in which each signatory country enforces judgments made in another signatory's country.[87] While Coyle's article at first glance appears to focus only on litigation, he dismisses arbitration and the New York Convention, stating that arbitration is seldom used in tort suits and foreign parties would be hindered by language barriers and unfamiliarity with the United States' legal system.[88] Coyle, however, misses the converse argument, that the problems of language and unfamiliarity with a foreign legal system would plague a United States party abroad. He instead proposes a complicated and unwieldy system of judgment reciprocity agreements predicated on the elements of a few successful bilateral reciprocity agreements.[89] One of his examples, a treaty between the State of New York and the Australian State of New South Wales is so limited in scope as to be completely unadaptable to a larger scale.[90] In that

[81] Ministry of Def. & Support of Iran, 665 F.3d at 1097.

[82] *Id.* at 1098; *Ministry of Def. of the Islamic Republic of Iran*, 969 F.2d at 770.

[83] Born, *supra* note 12, at 415, 429.

[84] *Id.* at 415.

[85] Coyle, *supra* note 11; *see also* Miller, *supra* note 11.

[86] Coyle, *supra* note 11.

[87] *Id.* at 1111-13.

[88] Coyle, *supra* note 11, at 1146.

[89] *Id.* at 1169.

[90] *Id.* at 1123.

agreement, New York judges are able to certify questions of Australian law to judges in New South Wales and vice versa.[91] Such an agreement, while laudable, solves very little. To have universal judgment enforcement under this scheme, every jurisdiction in the world would each need agreements with all other jurisdictions. Rather than focus on large-scale and impractical global initiatives to ensure judgment reciprocity, the international legal community should heed and use the New York Convention as a well-conceived and helpful aid to international dispute resolution.

However, Coyle's proposal makes sense as a complement to international commercial arbitration. Given that the New York Convention still reinforces the sanctity of local laws and bilateral treaties, Coyle's proposal can work on a limited basis when the parties have failed to agree on terms of arbitration and instead litigate (or simply proceed to litigation without considering arbitration).[92] Nonetheless, litigation across international borders poses the significant challenges previously discussed as well as uncertainty about whether a judgment is enforceable. Judgment enforcement is not merely an international problem. For example, in the United States, thirty-two of the fifty states adopted the Uniform Foreign Money-Judgment Act, which provides specific procedures for enforcement of foreign judgments in the United States.[93] Nonetheless, some states have their own laws on this issue.[94] Of course, if foreign judgment enforcement is not even uniform within the United States, the situation is even worse abroad.[95] As one author describes his own thought process when meeting with a client seeking enforcement of a foreign judgment, "You mutter to yourself no wonder the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly called the New York Convention) is so popular in international transactions!"[96]

While nearly every ratifying country to the New York Convention needed to enact domestic legislation to implement the convention, such a hurdle is minor compared to a patchwork of bilateral agreements.[97] On a regional level though, there certainly is quite a bit of room for bilateral agreements when they suit the close trade ties between two localities. In particular, several U.S. states bordering Canada have reciprocal arrangement with Canada for money judgments in

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[91] Coyle, *supra* note 11, at 1123.

[92] Coyle, *supra* note 11, at 1113.

[93] *Foreign-Country Money Judgments Recognition Act Summary*, UNIFORM L. COMMISSION (last visited Dec. 28), 2015), http://www.uniformlaws.org/ActSummary.aspx?title=foreign-Country%20Money%20Judgments%20Recognition%20Act.

[94] Houston Putnam Lowry, *Enforcing International Judgments*, GP SOLO, April/May 2011, at 34, http://www.americanbar.org/content/dam/aba/publications/gp_solo_magazine/full_issue_2011_april_may_28_3.authcheckdam.pdf.

[95] Coyle, *supra* note 11, at 1155.

[96] Lowry, *supra* note 94, at 35.

[97] BORN, *supra* note 12, at 20.

Canada and vice versa.[98] However, parties in these places still may do business with entities outside of these agreements. Since the New York Convention accommodates existing laws and bilateral treaties, treaties of these sorts only strengthen and supplement the New York Convention's general applicability.

Some scholars have realized that the enforcement of foreign arbitration awards is far more assured under the New York Convention than under any potential judgment enforcement regime. Unlike Coyle, Yelena Zenalova advocates for such a scheme, but then concedes that the prospects for achieving such a framework are remote.[99] Zenalova instead proposes internal United States reforms to make the U.S. more amenable to accepting other countries' judgments.[100] While her limited scheme certainly seems more practical than other proposals discussed in this article, neither Zenalova nor Coyle have discussed what benefits, if any, their plans would confer upon small business owners.

One student article from 2005 discussed how international commercial arbitration could help small business owners, but does so in a cursory way that leaves unanswered many questions that this article addresses.[101] Its author, William S. Fiske, advocates that arbitration is only logical in countries without specialized knowledge of a particular industry.[102] Fiske argues that arbitration succeeds because parties can select an arbitrator with knowledge of the industry in question or countries that lack a common law tradition, like China.[103] While Fiske finds arbitration to be a "wonderful alternative for all American transnational businesses, large, medium and small," he still misses the general applicability that makes international commercial arbitration under the New York Convention so appealing.[104] The New York Convention makes such jurisdictional gymnastics unnecessary. Arbitration is simply available to any party that wishes to use it and the New York Convention provides the necessary framework for successful enforcement of a trans-border arbitration award.[105]

Indeed, Fiske admits that his hypothetical is "simplistic."[106] This analysis, however, picks up where he left off and demonstrates how businesses can benefit from dictating the terms of their dispute resolutions and then subsequently ensuring the enforcement of hard-won arbitration awards. While there are certainly important considerations and even pitfalls in drafting an arbitration agreement, the New York Convention provides sturdy assurance that companies conducting

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98 Committee on Foreign and Comparative Law, Association of the Bar of the City of N.Y., *Survey on Foreign Recognition of U.S. Money Judgments* (2001), http://brownwelsh.com/Archive/ABCNY_Study_Enforcing_Judgments.pdf.

99 Yuliya Zeynalova, *The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?*, 31 BERKELEY J. INT'L. L. 150, 169 (2013).

100 *Id.*

101 William S. Fiske, *Should Small and Medium-Size American Businesses "Going Global" Use International Commercial Arbitration?*, 18 TRANSNAT'L L. 455, 455 (2005).

102 *Id.* at 484.

103 Fiske, *supra* note 101, at 484.

104 *Id.* at 483-84.

105 Trakman, *supra* note 8.

106 Fiske, *supra* note 101.

business across international borders will realize the relief to which they are entitled.

Proposal

While international commercial arbitration is rarely, if ever, a flawless process, the New York Convention is an excellent starting point for parties to begin drafting useful and effective arbitration clauses in their contracts. Organizations with an interest in promoting international commercial arbitration must find ways to effectively communicate the process' benefits and utility, particularly because governments have been of little help to international commercial arbitration.[107] For example, the North American Free Trade Agreement simply relies on the New York Convention, Panama Convention, and other treaties like it in its sole provision for international dispute resolution.[108] In other words, international trade treaties tend to ignore arbitration altogether, leaving lawyers and the clients to fend for themselves in effectively utilizing international commercial arbitration.[109]

Reaching non-lawyer business owners requires thinking of international commercial arbitration not as a legal proceeding, but rather as a marketable service.[110] Parties consenting to arbitration hire an arbitrator to meet them in a specific place at a specific time to resolve a dispute in accordance with previously stipulated rules, a convenient alternative to litigating in government-run courts.[111] The lawyer's task is thus to explain arbitration as such, thereby steering dollars that businesses earmark for legal services to international commercial arbitration since parties left to their own devices will often simply ignore resolution of potential disputes when drafting agreements.[112] While introducing this issue into discussions with a potential business partner may cast a pall over the negotiations, preparation for dispute contingencies is essential.[113] Companies engaged in trans-border business should develop standard policies for dispute resolution to be heeded in any contract negotiation.[114] The considerations related to the New York Convention outlined here provide guidelines for framing such a policy.

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[107] Jonathan I. Miller, *Prospects for the Satisfactory Dispute Resolution of Private Commercial Disputes Under the North American Free Trade Agreement*, 21 PEPP. L. REV. 1313, 1318 (1993-1994).

[108] *Id.* (citing North American Free Trade Agreement, art. 2022, Can.-Mex.-U.S., Jan. 1, 1994, 107 Stat. 2123).

[109] Miller, *supra* note 107.

[110] Benjamin Ersing, A Global Market Analysis of Private Law Competition: From the United Kingdom and Germany, to New York City and Africa 5 (2013) (unpublished paper) (on file with the New York University Center for Technology & Economic Development).

[111] Read, *supra* note 56.

[112] Thomas J. Stipanowich & Peter H. Kaskell, COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS 6 (2001).

[113] *Id.*

[114] Stipanowich & Kaskall, *supra* note 112.

While arbitration is often the default choice for large business, preferred over litigation, the same is not true for small and medium sized businesses.[115] Even so, an increasing number of U.S. law firms are offering international arbitration to small and medium size businesses that have not previously considered it.[116] However, offering services only represents half of the puzzle. Organizations with an interest in arbitration, whether profit or as the purpose of the organization should publicize the advantages of international commercial arbitration and of their group. For its part, in 1996, the American Arbitration Association ("AAA") established the International Centre for Dispute Resolution ("ICDR") as an extension of the AAA for international arbitrations.[117] Certainly, ICDR serves an important purpose, but does little to advance the case for international commercial arbitration over its competitors, especially for business owners unfamiliar with the intricacies of the local system and options for alternative dispute resolution.

Like ICDR, The International Commerce Commission provides the support necessary to facilitating effective arbitrations when disputes arise.[118] While this organization has handled approximately 7,500 international arbitrations since its inception in 1923, almost half of those were in the ten year period from 1983-93.[119] That growth has only continued in recent years, though international commercial arbitration remains under siege from the popular press and academic community, as discussed previously.[120] Nonetheless, the advantages of what one author calls "mercantile justice" are clear, but need to be properly communicated to the business community at large.[121]

Many arbitration organizations already conduct their own forms of marketing to attract potential parties to their services, but these efforts are not specifically targeted to small businesses.[122] Some countries and municipalities even compete with each other to be the situs of arbitrations.[123] For example, New York City, in 2010 launched a Task Force on New York Law in International Matters to bring arbitration business to the city.[124] Similar efforts in the last five years have developed in the United Kingdom and Germany as well as on the island of Mauritius, off Africa.[125] Governments sponsor these efforts to bring arbitration

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115 Fiske, *supra* note 101, at 480.

116 Elena V. Helmer, *International Commercial Arbitration: Americanized, "Civilized," or Harmonized?*, 19 OHIO ST. J. ON DISP. RESOL. 35, 40 (2003).

117 Stromberg, *supra* note 60, at 1353.

118 Robert Donald Fischer & Roger S. Haydock, *International Commercial Disputes Drafting an Enforceable Arbitration Agreement,* 21 WM. MITCHELL L. REV. 941, 944-45 (1996).

119 *Id.*

120 Stephanie Garber, *Global Trend Drives Arbitration Growth*, LAWYERS WEEKLY (Mar. 31 2015).

121 Trakman, *supra* note 8, at 6.

122 Fiske, *supra* note 101, at 479.

123 Michael P. Malloy, *Transnational Business Law in the Twenty-First Century: Current Issues in International Arbitration*, 15 TRANSNAT'L L. 43, 46 (2002).

124 Ersing, *supra* note 110, at 7.

125 Ersing, *supra* note 110, at 6-8.

business within their borders for the economic benefit that arbitrations bring.[126] Thus, the question then turns to not only bringing in existing arbitrations, but also to creating new consumers of arbitration proceedings.

To do so, the international arbitration community must both raise awareness about the advantages of international commercial arbitration and provide guidance to companies and their counsel about how best to ensure a smooth and cost-effective arbitration process. When Sangsuvan wrote his own proposal for how small businesses should draft their international contracts, he cited a website that actually provides very little useful guidance and only cursory information about arbitration.[127] While arbitration may only be necessary in what businessmen perceive to be a remote contingency, arbitration clauses are nonetheless essential to any international business contract.[128] The alternative of litigating in a foreign forum without the prospect of enforcement of an award elsewhere is a risk too great to bear for many small businesses.[129]

Although an increasing number of American law firms are offering international commercial arbitration services, their fees may be out of the price range of small business owners.[130] Many materials on how to draft an arbitration clause already exist to help lawyers less familiar with international commercial arbitration, but who may already be serving small businesses.[131] However, attorneys must heed special considerations for drafting the arbitration clause for a potential international proceeding.[132] In particular, choosing an appropriate arbitration site can be challenging.[133] While the New York Convention ensures enforcement of judgments in any signatory jurisdiction, it makes no provision for the selection of arbitrators and contains no safeguards towards nationalistic inclinations.[134] An agreement between a Chinese company and American company could easily disintegrate if one company insisted on the arbitration occurring within its native borders for fear of local bias in the other party's jurisdiction.[135]

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[126] Ersing, *supra* note 110, at 6-8; Charles River Associates, *Arbitration in Toronto: An Economic Study* (2012), http://www.crai.com/sites/default/files/publications/Arbitration-in-Toronto-An-Economic-Study.pdf (in 2012, 425 arbitrations in Toronto contributed $256.3 Canadian dollars to the city's economy, worth roughly an equivalent amount in American dollars at that time since the currencies were at parity in 2012).

[127] Sangsuvan, *supra* note 19, at 174 (citing at note 261 "[i]nclude an arbitration clause to facilitate amicable and quick settlement of disputes or differences that may arise between the parties.").

[128] Fischer & Haydock, *supra* note 118, at 942.

[129] Jeffrey T. Cook, Comment, *The Evolution of Investment-State Dispute Resolution in NAFTA and CAFTA: Wild West to World Order*, 34 Pepp. L. Rev. 1085, 1095 (2007).

[130] Helmer, *supra* note 116.

[131] See Rodolphe J.A. DeSeife, Solving Disputes Through Commercial Arbitration 30 (1987) for useful, but concise, considerations about how to draft a general arbitration clause. See Handbook on Commercial Arbitration 93-140 (American Arbitration Association, 2nd ed. 2010) for a much more comprehensive set of articles on this topic.

[132] *See* David E. Wagoner, *Tailoring the ADR Clause in International Contracts*, 48 Arb. J. 77, 77 (1993) (discussing considerations for drafting an international arbitration clause).

[133] *Id.* at 78.

[134] *New York Convention*, *supra* note 7, art. I.

[135] Wagoner, *supra* note 132, at 78.

More countries are entering the arbitration hosting market to serve the need for compromise and neutrality, including Bulgaria, China, and Mexico.[136] However, lawyers from both sides should remember that some forums impose their own laws on the arbitral proceedings, a phenomenon discussed at some length earlier in this article.[137]

Businesses and their counsel should also consider the emergence of the internet and e-commerce an important angle to contemplate in arbitrating potential disputes. In recent years, the internet has given rise to a rash of thorny personal jurisdiction questions avoidable through arbitration.[138] Given the ambiguity surrounding jurisdiction over disputes stemming from business occurring over the internet, arbitration agreements in both the business to consumer and business-to-business settings help to avoid costly litigation just to resolve jurisdictional issues.[139] Upon proper implementation of an arbitration clause, the Federal Arbitration Act, Panama Convention and most importantly, the New York Convention, will all operate over the agreement, such a contract's genesis from internet-based business notwithstanding.[140]

Additional issues abound but exceed the scope of this article. Nonetheless, a lawyer attempting to help any client draft an agreement should keep these mechanical considerations in mind. Only with sufficient concern for the technical aspect of an arbitration agreement can a lawyer confidently explain to his client a plan for pursuing and winning an arbitration. Under the New York Convention, the ensuing award will then be uniformly enforceable in any and all signatory countries.

VI. Conclusion

In an ever-expanding global business climate, effective dispute resolution ensures that litigation does not derail a small business. The New York Convention provides assurance that any award won in an international arbitration conducted in a ratifying country will be upheld in any other ratifying country.[141]

The international commercial arbitration process allows parties to control the terms of their dispute resolution, with the added benefit of likely reducing costs to do so.[142] This article has demonstrated the safeguards that the New York Convention has in place to protect the integrity of arbitration awards. Lawyers and business owners alike will benefit from considering pitfalls of the New York Convention system, especially the choice of law clause and the reluctance of

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[136] Wagoner, *supra* note 132, at 78.

[137] Gertz, *supra* note 16; *Becker Autoradio U.S.A, Inc.*, 585 F.2d at 39.

[138] Steven C. Bennett, *Arbitration Clauses May Cure Internet Jurisdiction Woes, Handbook on Commercial Arbitration*, *in* HANDBOOK ON COMMERCIAL ARBITRATION 133 (2nd ed. 2010). *See*, *e.g.*, Zippo Mfg. Co. v. Zippo Dot Com Inc., 952 F. Supp. 1119 (W.D. Pa. 1997) (showing an example of the current American "sliding scale" approach to the internet personal jurisdiction issue).

[139] Bennett, *supra* note 138, at 134-35.

[140] *Id.* at 135.

[141] *New York Convention*, *supra* note 7.

[142] DESEIFE, *supra* note 131, at 4.

some countries to recognize otherwise legitimate arbitration clauses and agreements.[143]

Even with the New York Convention in place, breaking the inclination to litigate remains difficult, but possible. In 1987, Rodolphe J.A. DeSeife, a law professor at Northern Illinois University and leading scholar on international commercial arbitration, wrote:

> The American System of justice, in claiming its total devotion to the ideals of the common law, is closer in spirit to the English law of 1776 than is any member of the British Commonwealth, including the United Kingdom itself. Thus, the American constitutional guarantee of jury trials really may not be compatible with the resolution of commercial cases which require prompt and knowledgeable attention.[144]

In the twenty years since DeSeife penned these words, the United States Supreme Court has repeatedly upheld the New York Convention and its supporting domestic legislation, the Federal Arbitration Act.[145] While the foreign countries discussed here are unlikely to change their stances on enforcing arbitration clauses, parties can still avail themselves of the New York Convention as long as they do three things. First, they should thoughtfully select the situs of the arbitration to be a jurisdiction friendly to enforcing New York Convention awards. Second to mitigate enforcement issues, parties should also make the agreement prominent in the contract. Finally, to mitigate the chance of a foreign country's courts not enforcing the award, the arbitration agreement itself must be fundamentally fair on its face.[146] Attorneys' careful planning to utilize the New York Convention in their clients' favor and dodge certain countries' hostility towards arbitration ensures that small businesses that win arbitration awards can quickly and expediently recover their damages wherever their rapidly expanding businesses lead them.

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[143] Bates, *supra* note 18.

[144] DeSeife, *supra* note 131, at 3-4.

[145] *See, e.g., Am. Express Co.*, 133 S. Ct. at 2304 (holding "no contrary congressional command overrode principle that arbitration was a matter of contract, as would require a court to reject merchants' contractual waiver of class arbitration."); *see also AT&T Mobility*, 131 S. Ct. at 1740 (holding "the FAA preempts California's judicial rule regarding unconscionability of class arbitration waivers in consumer contracts."); *see also Scherk*, 417 U.S. at 520 n.15 (holding "in the context of the international agreement which the purchase and sale of business represented the arbitration clause would be enforced.").

[146] *Compare generally* Bennett, *supra* note 138, at 137 (supports making the clause prominent and wording it fairly is essential to avoiding claims of a fraudulent clause in the American context), *with* Bates, *supra* note 18 (stating that the Japanese have set the bar far lower for invalidating an arbitration agreement as "contrary to public policy and good morals").