THE LAWS OF ASIAN INTERNATIONAL BUSINESS TRANSACTIONS

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Abstract: The purpose of this article is to assess the preferences of parties to Asian international business transactions when they choose the law governing their contracts. To that end, I conducted an empirical analysis of unpublished data of the four main arbitral institutions active in Asia (outside Mainland China) for the years 2011 and 2012. I found that three laws dominate the Asian market for international contracts: English law, U.S. law, and, to a lesser extent, Singapore law. This article makes three contributions. First, it documents the regional variations in parties' preferences: the laws which are successful in Asia are different from those in Europe. Second, it shows that, while English and U.S. laws might govern an equivalent number of transactions, they are chosen in very different circumstances. U.S. laws are typically chosen in transactions between a U.S. and an Asian party where the parties also agree to settle their dispute in the United States under the aegis of the international division of the American Arbitration Association. These are thus transactions where the bargaining power of the U.S. party was strong and enabled that party to impose choice of a U.S. dispute resolution institution and of a U.S. law. By contrast, English law is chosen in transactions between parties of all nationalities, in the context of arbitration under the aegis of almost all institutions, in proceedings with their seat anywhere in Asia. English law appears to be the only law to be considered as attractive to international commercial parties operating in Asia and seeking an option other than the laws of the party's home country. Finally, this article seeks to explain the remarkable attractiveness of English law in Asia. It explores whether certain substantive rules of English law might be especially appealing to international commercial parties, and whether the fact that many Asian jurisdictions are former English colonies might play a role. It concludes that the most convincing reasons are the wide presence of Commonwealth educated lawyers in Asia and concern about the American way of law.

I. INTRODUCTION

Parties to international business transactions are free to choose the law governing their contracts, particularly in the context of international commercial arbitration. Which law do they choose? On which grounds? What does it reveal about their preferences?

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Conventional wisdom posits that, despite the diversity of international commercial parties and international business transactions, the world of international business transactions is dominated by two laws: English and New York law. The general and the trade press regularly publish stories on the exorbitant privilege that these two laws enjoy[1] and the competition that they have engaged with each other: a clash of the titans between the only two great powers in the legal global market.[2]

Yet, there are few empirical studies on the laws governing international business transactions. One reason is that the data is hard to gather. Each year, private parties likely enter into millions of international commercial contracts and typically have no obligation to make such contracts available to the public. In fact, many of these contracts are confidential.

Scholars have nevertheless found three ways to collect data on international contractual practices. The first is to take advantage of the rare legal obligations of certain groups of actors to publish such data. For instance, such an obligation exists in the United States for publicly-held companies and Geoffrey Miller and Theodore Eisenberg published a number of articles in the late 2000s analyzing 2,800 contracts published in this context.[3] Unfortunately, it appeared that these were, for the most part, domestic contracts between two U.S. parties. As such, the data was more relevant to the analysis of U.S. contractual practices than international ones.

The second way is to conduct interviews with practitioners. In 2010, the School of International Arbitration at Queen Mary, University of London conducted a survey of 150 practitioners and concluded that the two governing laws most frequently used by corporations were English law (40% of the cases) and New York law (17–22% of cases).[4] No other state's

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[1] *Exorbitant Privilege*, THE ECONOMIST, May 10, 2014.

[2] Tom Moore, *Clash of the Titans*, LEGAL BUSINESS (July 7, 2014, 9:00), http://www.legalbusiness.co.uk/ index.php/analysis/167-global-100-2014/2572-clash-of-the-titans.

[3] *See, e.g.*, Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475 (2009) [hereinafter Eisenberg & Miller, *Flight to New York*]; Theodore Eisenberg & Geoffrey P. Miller, *The Market for Contracts*, 30 CARDOZO L. REV. 2073 (2009) [hereinafter Eisenberg & Miller, *Market for Contracts*]; Geoffrey P. Miller, *Bargains Bicoastal: New Light on Contract Theory*, 31 CARDOZO L. REV. 1475 (2010) [hereinafter Miller, *Bargains Bicoastal*].

[4] WHITE & CASE, 2010 INTERNATIONAL ARBITRATION SURVEY: CHOICES IN INTERNATIONAL ARBITRATION 14 (2010), http://events.whitecase.com/law/services/2010-International-Arbitration-Survey-Choices.pdf (17% of interviewees mentioned New York law, but 5% also mentioned "U.S. law" without further specification).

law was mentioned in more than 10% of cases.[5] The geographic locations of interviewees were primarily Asia (35%), Western Europe (31%), and, to a lesser extent, North America (12%).[6]

Finally, scholars can analyze data gathered by international arbitration institutions. In 2014, I published an analysis of the data gathered from 2007 through 2012 by the world's leading arbitration institution, the International Court of Arbitration of the International Chamber of Commerce (ICC).[7] The data concerned more than 4,400 international contracts involving close to 12,000 parties from more than 120 countries. My analysis revealed that contrary to conventional wisdom, the picture was much more complicated than a world dominated by English and U.S. laws, as Swiss law was chosen as often as U.S. laws.[8]

These differences may well reveal the existence of significant regional variations in parties' preferences. For example, European parties are overrepresented in ICC arbitration. They consistently account for more than half of the parties, with Asian (including Pacific) and American parties each accounting for another 20%.[9] Is the success of Swiss law a regional phenomenon? In 2008, two research institutes at Oxford University conducted a survey of 100 European businesses and concluded that the preferred laws of European parties were English (21%), German (16%), Swiss (14%), and French (14%) laws.[10] U.S. laws were only mentioned by 4% of interviewees as their preferred choice.[11]

This article addresses regional variations by using the same methodology used in my previous work to focus on Asia.[12] Unpublished

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[5] *Id*. at 14 (Swiss law: 8%, French law: 6%).

[6] *Id*. at 35.

[7] *See generally* Gilles Cuniberti, *The International Market for Contracts: The Most Attractive Contract Laws*, 34 NW. J. INT'L L. & BUS. 455 (2014).

[8] *Id*. at 458−59, 468, 472−73, 475.

[9] *Id*. at 464.

[10] Stefan Vogenauer, *Perceptions of Civil Justice Systems in Europe and their Implications for Choice of Forum and Choice of Contract Law: an Empirical Analysis*, *in* CIVIL JUSTICE SYSTEMS IN EUROPE: IMPLICATIONS FOR CHOICE OF FORUM AND CHOICE OF CONTRACT LAW 1 (Stefan Vogenauer & Christopher Hodges eds., forthcoming 2016) [hereinafter Vogenauer, *Perceptions of Civil Justice Systems*]. *See also* Stefan Vogenauer & Stephen Weatherill, *The European Community's Competence to Pursue the Harmonisation of Contract Law—An Empirical Contribution to the Debate*, *in* HARMONISATION OF EUROPEAN CONTRACT LAW: IMPLICATIONS FOR EUROPEAN PRIVATE LAWS, BUSINESS AND LEGAL PRACTICE 105 (Stefan Vogenauer & Stephen Weatherill eds., 2006).

[11] Vogenauer, *Perceptions of Civil Justice Systems*, *supra* note 10.

[12] For a recent study based on the survey of 127 practitioners focuses exclusively on China-related transactions see ASIAN LEGAL BUS., GOVERNING LAW SURVEY: RESULTS AND TRENDS (Sophie Cameron, ed., 2014), http://www.legalbusinessonline.com/reports/practical-law-china's-2014-governing-law-survey.

data of the main arbitral institutions active in Asia (outside Mainland China) from 2011 and 2012 was used to assess whether parties to Asian international business transactions have different preferences as far as choice of law is concerned. The analysis found that three laws dominate the Asian market for international contracts: English law, U.S. law, and, to a lesser extent, Singapore law. In contrast to the governing law preferences of private European international contracts, parties to Asian arbitrations virtually never choose Swiss, German, or French laws.

Second, this article reveals that the circumstances under which English and U.S. laws are chosen in Asia are very different. U.S. laws—generally New York or California laws—are typically chosen in transactions between a U.S. and an Asian party where the parties also agree to settle their dispute in the United States under the aegis of the international division of the American Arbitration Association: the International Center for Dispute Resolution (ICDR). Thus, these are transactions where, presumably, the U.S. party's bargaining power was strong, enabling that party to impose its choice of a U.S. dispute resolution institution and of a U.S. law. In other words, choice of U.S. laws seems to be a direct function of the economic power of U.S. corporations.

By contrast, English law is chosen in transactions between parties of all nationalities, under the auspices of all institutions (except ICDR), in proceedings seated anywhere in Asia. Where Asian international transactions are not governed by the law of one of the parties, which often means that neither party possessed sufficiently strong bargaining power to impose it, they are typically governed by English law. English law dominates the Asian market for neutral laws, leaving only some room for Singapore law.

While English and U.S. law might govern an equivalent number of Asian international contracts, English law appears to be the predominant choice when parties operating in Asia choose an option other than the law of one of their home countries. Swiss law, English law's biggest competitor in Europe, is nonexistent in Asia, nor are French and German laws, which are also regularly chosen as neutral laws in Europe.[13] This begs the question of why parties find English law so attractive and, in particular, why parties find English law so much more attractive than Swiss and U.S. laws. By seeking

[13] *See* Cuniberti, *supra* note 7, at 472.

answers, this article also makes an important contribution to the scholarly debate on regulatory competition in the field of contract law.[14]

This article is structured into four parts. Part I provides background on the various arbitral institutions active in Asia and their respective caseloads. Part II presents my empirical study of choice of law in Asian arbitration. Part III assesses the international attractiveness of contract laws in Asia by determining which laws are chosen as neutral laws. Part IV explains why English law is the most popular neutral law chosen in Asian business transactions.

II. BACKGROUND: ARBITRATION IN ASIA

A. Arbitral Institutions

1. The Big Four

Four arbitral institutions dominate Asian international commercial arbitration outside Mainland China. Each receives between 150 and 200 cases per year. Two are based in Asia and focus on Asia: the Singapore International Arbitration Center (SIAC) and the Hong Kong International Arbitration Centre (HKIAC). The two others are global institutions: the ICC and the ICDR. Though they do not specifically focus on Asia, they receive a high number of cases involving Asian parties.

Other important arbitral institutions are much less active in Asia. For example, the London Court of International Arbitration handles far fewer cases involving Asian parties than the ICC or ICDR,[15] while the Swiss Chambers' Arbitration Institution[16] and the Stockholm Institute of the Stockholm Chamber of Commerce handle even fewer.[17]

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[14] *See, e.g.*, Eisenberg & Miller, *Market for Contracts*, *supra* note 3; Stefan Vogenauer, *Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence*, 21 EUR. REV. PRIV. L. 13 (2013) [hereinafter Vogenauer, *Regulatory Competition*]; Giesela Rühl, *Regulatory Competition in Contract Law: Empirical Evidence and Normative Implications,* 9 EUR. REV. CONT. L. 61 (2013); REGULATORY COMPETITION IN CONTRACT LAW AND DISPUTE RESOLUTION (Horst Eidenmüller ed., 2013).

[15] The London Court of International Arbitration, which handles less than 300 cases per year, reports that Asian parties accounted for only 14.75% in 2012 (India: 4.25%; Singapore: 1.75%; China: 2.25%; Other Asia Pacific: 6.5%) and 12.4% in 2013 (India: 2.7%; Singapore: 2.7%; Mongolia: 1.4%; Other Asia Pacific: 5.6%) of the parties to LCIA arbitrations. *See* SARAH LANCASTER, REGISTRAR'S REPORT 2 (2013), http://www.lcia.org//LCIA/reports.aspx (last visited Nov. 21, 2015).

[16] Between 2004 and 2013, the Swiss Chambers' Arbitration Institution handled 732 cases. There were so few Asian parties that the institution's statistics refer to a category including parties from both Asia and the Middle East, which accounted during this period for 9% of all parties to the 732 arbitrations. *See*

2. Mainland China

A number of arbitral institutions based in Mainland China handle a high number of arbitration cases. The biggest is the China International Economic and Trade Arbitration Commission (CIETAC).[18] However, for purposes of this article, CIETAC data would not be as illuminating as the data from the four other institutions because generally any choice of law other than the law of the People's Republic of China is rare in Mainland Chinese arbitrations,[19] and in CIETAC arbitration in particular. In any case, CIETAC has not answered requests to provide data on choice of law.

3. Other Asian Institutions

The Korean Commercial Arbitration Board (KCAB) reports a caseload of around 80 international arbitration cases per year.[20] Unfortunately, KCAB does not publish data on choice of law in the arbitration cases it handles. Nor has it responded to requests asking whether such data are available.

The Japan Commercial Arbitration Association (JCAA) does not report regularly on its caseload. In its Newsletter for January 2012,[21] it published an article reporting its caseload from 2006 through 2010. The number of international arbitration cases handled by JCAA averaged approximately 15 per year, reaching 21 cases in 2010.[22] Another arbitral institution reported that JCAA handled nineteen international arbitrations in

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SWISS CHAMBERS' ARB. INST., ARBITRATION STATISTICS 2013 1 (2013), https://www.swissarbitration.org/sa/download/statistics_2013.pdf.

[17] Until 2010 and 2011, there were virtually no Asian parties involved in arbitration under the aegis of the Stockholm Institute. In 2012 and 2013, a few Chinese (around ten) parties were involved. *See* ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE, STATISTICS 2008-2013 (2008-2013), http://www.sccinstitute.com/statistics/statistics-2008-2013.

[18] CIETAC has reported that it received 375 international cases in 2013. *See CIETAC Has Great Potential in Foreign-Related Commercial Arbitrations*, CIETAC NEWSL. (China Int'l Econ. & Trade Arb. Comm'n, Beijing, P.R. China), Feb. 25, 2014.

[19] *See* JINGZHOU TAO, ARBITRATION LAW AND PRACTICE IN CHINA 111−12 (3d ed. 2012); Yijin Wang, *Ascertaining Foreign Law in PRC Arbitration*, 10 ASIAN INT'L ARB. J. 93, 103 (2014) (stating that despite lack of data, "it is reasonable to estimate that a few" cases would be governed by foreign law).

[20] *See* KOREAN COMM. ARB. BOARD, ANNUAL REPORT 10 (2013), http://www.kcab.or.kr/upload/marketing/2013%20연례보고서(영어).pdf (KCAB reported 52 cases filed in 2010, 77 in 2011, 85 in 2012, and 77 in 2013).

[21] *See* Mark Goodrich, *Japanese Arbitration—Much Work Done; Much Still to Do*, JCAA NEWSL. (Japan Comm. Arb. Ass'n, Tokyo, Japan), Jan. 2012, http://www.jcaa.or.jp/e/arbitration/docs/newsletter 27.pdf.

[22] *Id.* at 1 (11 cases in 2006, 12 in 2007, 12 in 2008, 17 in 2009 and 21 in 2010).

2012.[23] Like the CIETAC and KCAB, the JCAA does not publish data on choice of law in the arbitration cases it handles. However, data from the same study found that the vast majority of the law firms representing the parties in JCAA arbitrations were Japanese.[24] Although these firms were also involved in a few domestic JCAA arbitrations, this "suggests that Japanese law is frequently the governing law in such disputes, supporting the suggestion that it is those cases in which a Japanese party is in a strong bargaining position which tend to see JCAA arbitration clauses."[25]

The Kuala Lumpur Regional Centre for Arbitration (KLRCA) does not report regularly on its caseload. In its Newsletter for October to December 2012, it reported a caseload of 85 cases for the year 2012, 20% of which were international.[26] KLRCA does not publish data on choice of law in the arbitration cases it handles either. It also has not responded to requests asking whether such data are available.

Table 1: Number of Asian International Commercial Arbitration Cases by Forum from 2011–2012

Arbitral institution	**2011**	**2012**
SIAC (Singapore)	127	163
HKIAC (Hong Kong)	178	196
ICC (international)	163	169
ICDR (United States)	203	174
KCAB (South Korea)	77	85
JCAA (Japan)	20	19
KLRCA (Malaysia)	17	17

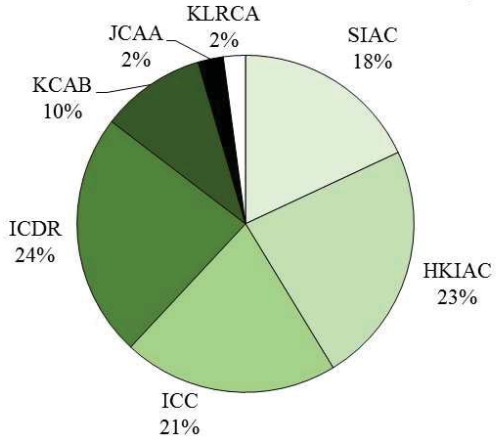
[23] Datuk Sundra Rajoo, *Arbitration in Asia*, NEWSL. OF KUALA LUMPUR REGIONAL CTR. FOR ARB. (Kuala Lumpur Regional Ctr. For Arbitration, Kuala Lumpur, Malaysia), July−Dec. 2012. On KLRCA, *see supra* note 7 and accompanying text.

[24] Goodrich, *supra* note 21, at 1 (14 out 19 firms in 2006, 19 out of 25 in 2007, 17 out of 23 in 2008, 22 out of 30 in 2009 and 38 out of 48 in 2010).

[25] *Id*. at 2.

[26] *See* Rajoo, *supra* note 23.

Chart 1: Asian International Commercial Arbitration, 2011–2012



This study will focus on the data provided by the four major arbitral institutions in Asia, which together handle more than 85% of international arbitration proceedings outside Mainland China.

B. Nationalities of Parties to Asian Arbitrations

1. The Singapore International Arbitration Center

Between 2010 and 2013, the number of arbitrations filed with SIAC each year varied from 164 to 259. The vast majority of them (70 – 86%) were international in character and thus governed by the Singapore International Arbitration Act. The number of parties involved in those arbitrations varied from 328 to 504 parties per year.

Table 2: Number of Cases and Parties

	2010	**2011**	**2012**	**2013**
International cases	166	127	163	223
Domestic cases	26	37	36	36
Cases (total)	192	164	199	259
Parties (total)	370	328	428	504

SIAC publishes detailed accounts of the nationalities of the parties involved in its arbitration proceedings in its annual reports since 2010.[27]

[27] *See* SING. INT'L ARB. CTR., 2010 CEO'S ANNUAL REPORT (2010) [hereinafter SIAC, 2010 REPORT]; SING. INT'L ARB. CTR., 2011 CEO'S ANNUAL REPORT (2011) [hereinafter SIAC, 2011 REPORT]; SING. INT'L ARB. CTR., 2012 CEO'S ANNUAL REPORT (2012) [hereinafter SIAC, 2012 REPORT]; SING. INT'L ARB. CTR., ANNUAL REPORT 2013 (2013) [hereinafter SIAC, 2013 REPORT]; SING. INT'L ARB. CTR.,

Parties to SIAC proceedings annually originate from around forty countries,[28] with a peak to fifty in 2013. However, although parties come from the United States, Europe, the Middle East, and Africa, Asian parties clearly dominate. Even if one excludes Singaporean parties, Asian parties account for more than 40% of all parties and for more than 50% of foreign parties. European parties, which come next, typically account for less than 10% of the parties, and North American parties account for 3 to 6%.

Table 3: Nationalities of Parties to SIAC Arbitrations

	2010	**2011**	**2012**	**2013**
Singapore	107 (29%)	79 (24%)	146 (34%)	132 (26%)
Other Asian	173 (46%)	132 (40%)	192 (45%)	216 (43%)
Europe	29 (7.8%)	69 (21%)	32 (7.4%)	56 (11%)
USA[29]	13 (3.5%)	13 (3.9%)	25 (5.8%)	23 (4.5%)
Caribbean Islands	24 (6.4%)	19 (5.7%)	13 (3%)	41 (8%)
Middle East	13 (3.5%)	6 (1.8%)	5 (1.1%)	10 (2%)
Australia[30]	6 (1.6%)	7 (2.1%)	9 (2.1%)	9 (1.8%)
Africa	5 (1.3%)	3 (0.9%)	6 (1.4%)	12 (2.4%)
Latin America	0	0	0	5 (1%)

Among Asian parties, besides Singaporeans, the most represented jurisdictions are India, Hong Kong, Indonesia, and the PRC. SIAC appears to be the preferred Asian institution for parties from Indonesia and perhaps Malaysia.

Table 4: Nationality of Asian Parties to SIAC Arbitrations

	2010	**2011**	**2012**	**2013**
India	36 (20.8%)	24 (18%)	42 (21.9%)	66 (30%)
Hong Kong	26 (15%)	23 (17.4%)	18 (9.3%)	17 (7.8%)
Indonesia	22 (12.7%)	20 (15%)	27 (14%)	34 (15.7%)
China (PRC)	14 (8%)	20 (15%)	44 (22.9%)	33 (15.3%)
Malaysia	12 (6.9%)	12 (9%)	14 (7.3%)	20 (9.2%)
Japan	11 (6.4%)	7 (5.3%)	4 (2.1%)	4 (1.8%)
South Korea	12 (6.9%)	7 (5.3%)	12 (6.3%)	19 (8.8%)
Vietnam	15 (8.7%)	3 (2.3%)	5 (2.6%)	4 (1.8%)
Thailand	7 (4%)	4 (3%)	6 (3.1%)	11 (5%)
Philippines	5 (2.8%)	3 (2.3%)	6 (3.1%)	4 (1.8%)
Taiwan	3 (1.7%)	2 (1.5%)	5 (2.6%)	3 (1.4%)
Sri Lanka	0	1 (0.75%)	3 (1.5%)	1 (0.4%)

ANNUAL REPORT 2014 (2014) [hereinafter SIAC, 2014 REPORT]. All available at http://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/annual-report.

[28] *See id.* (Parties originated from 45 jurisdictions in 2010, 40 in 2011, and 39 in 2012).

[29] Also Canada in 2011 and 2013.

[30] Also Samoa in 2011 and New Zealand in 2013.

2. The Hong Kong International Arbitration Centre

In 2011 and 2012, there were respectively 275 and 295 arbitrations filed with HKIAC, respectively. Around two-thirds of them were international in character.

Table 5: Number of Cases and Parties

	2010	**2011**	**2012**
International cases	175	178	196
Domestic cases	116	97	99
Cases (total)	291	275	295
Parties (total)	582	313	472

The HKIAC's data on the nationalities of the parties involved in its arbitration proceedings reveal several commonalities with the SIAC's data. For example, parties to HKIAC arbitrations annually originate from around forty countries, but Asian parties also clearly dominate. Even if one sets aside Hong Kong parties, Asian parties account for more than 40% of all parties, and for more than 50% of foreign parties. European parties, which come next, typically account for less than 10% of the parties, and North American parties account for 2–5%.

Table 6: Nationalities of Parties to HKIAC Arbitrations

	2011	**2012**
Hong Kong	100 (31%)	179 (38%)
Other Asian	149 (47%)	205 (43%)
Europe	16 (5.1%)	38 (8%)
Caribbean Islands	25 (7.9%)	14 (2.9%)
USA[31]	15 (4.7%)	12 (2.5%)
Africa	4 (1.2%)	9 (1.9%)
Australia/Samoa	2 (0.6%)	5 (1%)
Latin America	1 (0.3%)	8 (1.7%)
Middle East	1 (0.3%)	0

Among Asian parties, besides Hong Kong parties, the most represented jurisdictions are the PRC, Singapore, South Korea, and India. The HKIAC appears to be the preferred Asian institution for Chinese parties choosing to resolve their disputes outside of the Mainland.

[31] Also Canada in 2012.

Table 7: Nationalities of Asian Parties to HKIAC Arbitrations		
	2011	**2012**
China (PRC)	87 (58%)	114 (55%)
Singapore	14 (9.4%)	38 (18.5%)
South Korea	9 (6%)	14 (6.8%)
India	4 (2.6%)	15 (7.3%)
Japan	9 (6%)	1 (0.5%)
Indonesia	5 (3.3%)	2 (1%)
Malaysia	2 (1.3%)	1 (0.5%)
Vietnam	2 (1.3%)	4 (2%)
Thailand	0	2 (1%)

3. The ICC International Court of Arbitration

Unlike the SIAC and HKIAC, the International Court of Arbitration of the ICC is a global institution not specifically focused on Asia. However, it is an important player in Asian arbitration because it handles both arbitrations with an Asian seat and arbitrations involving Asian parties with a seat outside of Asia.

In 2011 and 2012, Asian parties were involved in 163 and 169 ICC cases, respectively, but only 59 and 71 arbitrations had their seat in Asia. This suggests that the seat of arbitrations involving Asian parties is in Asia in around 40% of the cases. Thus, most ICC arbitrations involving Asian parties are necessarily seated outside of Asia. When ICC arbitrations are in Asia, they are typically in Singapore or Hong Kong, with 54–66% of those proceedings seated in these two jurisdictions.

Table 8: Number of Cases and Parties		
	2011	**2012**
ICC Cases involving an Asian Party	163	169
Number of Asian Parties involved in an ICC Case	303	299

Table 9: Asian Seats in ICC Arbitrations			
	2010	**2011**	**2012**
Singapore	24	24	36
Hong Kong	14	8	11
India	7	6	11
Japan	3	5	3
Thailand	4	2	1
Malaysia	2	4	1
Sri Lanka	3	0	3
Philippines	0	4	1
Vietnam	0	3	0
South Korea	0	1	2
China (PRC)	0	1	1
Taiwan	1	0	1
Indonesia	0	0	0
Australia	2	1	0
Total	**60**	**59**	**71**

The most represented Asian jurisdictions in ICC arbitrations are India, the PRC, and South Korea. The ICC also appears to be the preferred institution for Indian and South Korean parties.

Table 10: Nationalities of Asian Parties to ICC Arbitrations			
	2010	**2011**	**2012**
India	71 (27.8%)	53 (17.5%)	81 (27%)
China (PRC)	27 (10.6%)	37 (12.2%)	28 (9.4%)
South Korea	23 (9%)	26 (8.6%)	41 (13.7%)
Hong Kong	24 (9.4%)	11 (3.6%)	26 (8.7%)
Japan	21 (8.2%)	24 (7.9%)	17 (5.7%)
Singapore	21 (8.2%)	13 (4.3%)	24 (8%)
Indonesia	10 (3.9%)	19 (6.3%)	17 (5.7%)
Malaysia	8 (3.1%)	21 (6.9%)	11 (3.7%)
Vietnam	7 (2.8%)	12 (4%)	5 (1.7%)
Thailand	10 (3.9%)	8 (2.6%)	9 (3%)
Philippines	1 (0.4%)	41 (13.5%)	5 (1.7%)
Other[32]	32 (12.6%)	38 (12.5%)	35 (11.7%)
Total	**255**	**303**	**299**

4. The International Centre for Dispute Resolution

As with the ICC, the ICDR is a global institution that is not specifically focused on Asia. However, like the ICC, it is an important

[32] Including Australia, which accounted for 10 parties in 2010, 12 in 2011 and 10 in 2012.

player in Asian arbitration because it handles a significant number of arbitrations involving Asian parties.

Table 11: Number of Cases and Parties				
	2010	**2011**	**2012**	**2013**
ICDR Cases involving an Asian Party	209	203	174	237
Number of Asian Parties involved in an ICDR Case	226	233	208	265

The most represented Asian jurisdictions in ICDR arbitration are Japan, India, and the PRC. The ICDR appears to be the preferred Asian institution for Japanese and Australian parties.

Table 12: Nationalities of Asian Parties to ICDR Arbitrations				
	2010	**2011**	**2012**	**2013**
Japan	51 (22.5%)	59 (25.3%)	45 (21.6%)	51 (19.2%)
India	36 (16%)	33 (14.1%)	40 (19.2%)	63 (23.7%)
China (PRC)	20 (8.8%)	31 (13.3%)	26 (12.5%)	36 (13.6%)
Hong Kong	9 (4%)	12 (5.1%)	11 (5.3%)	24 (9%)
South Korea	4 (1.7%)	18 (7.7%)	11 (5.3%)	16 (6%)
Taiwan	11 (4.8%)	13 (5.5%)	13 (6.2%)	6 (2.2%)
Singapore	4 (1.7%)	7 (3%)	6 (2.9%)	9 (3.3%)
Malaysia	2 (0.8%)	2 (0.8%)	2 (0.9%)	15 (5.6%)
Philippines	5 (2.2%)	5 (2.1%)	3 (1.4%)	4 (1.5%)
Thailand	3 (1.3%)	1 (0.4%)	1 (0.5%)	1 (0.3%)
Indonesia	0	0	1 (0.5%)	2 (0.7%)
Other[33]	81 (36%)	62 (26%)	49 (23.6%)	38 (14.3%)

III. AN EMPIRICAL STUDY ON CHOICE OF LAW IN ASIA

The purpose of this article is to gather and analyze empirical evidence on commercial parties' choice of contract law in international transactions. At the outset, the study of international contractual practices presents numerous methodological difficulties. The first and most obvious one comes from a lack of access to relevant data, as public information is scarce. Many commercial contracts are subject to confidentiality clauses. Moreover, even in the absence of a confidentiality clause, private commercial parties are typically not obligated to make their contracts public.[34] A second difficulty is the sheer volume of international

[33] Including Australia and New Zealand, which accounted respectively for 75 and 0 parties in 2010, 55 and 4 in 2011, 32 and 5 in 2012, and 25 and 6 in 2013.

[34] In some circumstances, applicable law may compel certain types of commercial actors to publish some of their contracts (in whole or in part), but these contracts could, at best, only aid in understanding the practices of those subject to such requirement. Moreover, the contracts might not be international. For

commercial contracts concluded around the world. The total number is undoubtedly enormous, raising questions about the representativeness of any sample that is considered as part of an empirical study.

Despite these methodological difficulties, the statistics gathered by arbitral institutions are meaningful for an empirical study of the contractual practices of international commercial parties. At the same time, the representativeness of data of arbitral institutions can be challenged in two respects. First, such data only concerns contracts that resulted in arbitration proceedings. Unlike these contracts, most commercial contracts do not give rise to disputes. As such, the data of arbitral institutions are not representative of international commercial contracts in general, but only of those which give rise to disputes that were not able to be resolved without resort to external dispute resolution mechanisms. Such disputes may have arisen out of these particular contracts by virtue of the clauses they contain, which in turn may have incentivized the parties to seek external resolution. These clauses might also have included choice of law clauses. Thus, one might argue that data of arbitral institutions do not reveal a commercial party's choice of laws preferences so much as the choice of law preferences of parties who eventually sue each other. Taking that argument to its logical conclusion, this could mean that some laws may be more susceptible to external dispute resolution than others.

While this hypothesis cannot be excluded, the data available for this study suggests it should be rejected. Some laws might require and be more prone to external dispute resolution because they lack precision. If so, a law that affords detailed and precise rules should be less prone to external dispute resolution and therefore should not be well represented in contracts that end up in arbitration.[35] This is because rational contracting parties theoretically seek to maximize clarity in their agreements by choosing laws with bright-line rules. English law is often described as encompassing one of the most precise and detailed bodies of contract laws in the world. If the choice of the law governing contracts significantly impacts the rate of external dispute resolution, one would expect to see English law the least often in arbitration, given its precision and breadth. To the contrary: in this study, English law appears to be the most attractive and frequently selected

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instance, U.S. law requires publicly traded companies to publish portions of certain types of contracts, a review of which revealed that they were typically domestic. *See* Eisenberg & Miller, *Flight to New York*, *supra* note 3, at 1487.

[35] Precise rules should make the outcome of litigation predictable and, therefore, more likely to give the parties an incentive to negotiate a settlement without incurring litigation costs.

law for commercial actors resorting to external dispute resolution, indicating that there are other forces at work.[36]

The second peculiarity with respect to data provided by arbitral institutions is that the relevant international contracts have given rise to disputes that the parties have chosen to arbitrate rather than litigate. Commercial contracts providing for arbitration are likely to differ from other contracts in one important respect: the average value of these contracts is generally much higher. This is because arbitration is significantly more expensive than litigation in most countries. Arbitrators must be compensated and attorneys often charge higher fees.[37] As a result, the assumption is that sophisticated parties provide for arbitration only when a certain minimum value is at stake.[38] The link between this monetary issue and the parties' choice of law, however, seems tenuous. Nevertheless, it is reasonable to presume that sophisticated commercial actors engaging in high-stake transactions are far less likely than parties in lower-stake transactions to leave the choice of law governing their contracts to the vagaries of private international law. Rather, such parties are far more likely to invest their resources in negotiating an acceptable choice of applicable law provision. Thus, data of arbitral institutions may actually be much more meaningful than a sample of international cases adjudicated in national courts.

Another reason why parties would choose arbitration over litigation may be that they have far greater freedom to choose their preferred contract law in the context of international arbitration than in litigation before national courts. This is because the vast majority of national arbitration

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[36] Of course, it is possible that the study will still understate the attractiveness of English law, which might be underrepresented in arbitral data as contracts governed by English law may be less likely to give rise to disputes (or at least disputes that require external dispute resolution) than others.

[37] This statement might come as a surprise to many U.S. lawyers, as the United States is one of the few, if not the only jurisdiction where arbitration is perceived as a cheaper mode of dispute resolution. However, litigation is much cheaper in civil law jurisdictions, if only because of the absence of pre-trial discovery and of the much shorter duration of trials. As a consequence, lawyers charge much less for litigation and arbitration appears as a much more sophisticated and expensive mode of dispute resolution.

[38] Around half of the cases going to ICC arbitration involve values between USD 1 million and 30 million. *See* Int'l Ct. of Arb., *2011 Statistical Report*, 23 INT'L CT. OF ARB. BULL. 5, 14 (2011) [hereinafter Int'l Ct. of Arb., *2011 Report*] (50.9% in 2011); Int'l Ct. of Arb., *2012 Statistical Report*, 24 INT'L CT. OF ARB. BULL. 5, 13 (2012) [hereinafter Int'l Ct. of Arb., *2012 Report*] (50.3% in 2012). The average value of disputes in SIAC cases in 2011 and 2012 was respectively USD 5 and 6.5 million. *See* SIAC, 2011 REPORT, *supra* note 27; SIAC, 2012 REPORT, *supra* note 27. The average claim made in ICDR Asian cases in 2011 and 2012 was respectively USD 7 and 3.5 million (data provided by ICDR and on file with author). Finally, HKIAC does not report the average value of the cases it handles.

laws recognize parties' unlimited freedom to choose the applicable governing law,[39] whereas courts will sometimes only enforce the parties' choice of law if the relevant clause in the contract calls for the application of a law connected to the dispute.[40] The statutes governing international arbitration in the major Asian arbitration centers all give the parties full freedom to choose whichever law they wish to govern the substance of their dispute. On this point, both Hong Kong and Singapore have enacted Article 28 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, which merely provides that the "arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute."[41]

Moreover, national judges are almost invariably lawyers trained in a single legal system. Sophisticated parties might thus be reluctant to ask a national court to apply any foreign laws since doing so could not only be costly but could easily result in errors and misinterpretations of that foreign law's content. In contrast, members of arbitral tribunals typically do not come from a single legal background. The parties can freely choose the tribunal members after a particular dispute arises. This allows them to take the specific dispute and the applicable law into account when choosing tribunal members and appointing arbitrators familiar with the applicable law. The freedom to choose arbitrators based on their background and expertise allows commercial actors, at the time of formation, to ignore questions about the quality and skill of the future adjudicator. Below, I present and analyze the data on choice of law provided by the four major arbitral institutions in Asia.

A. Presentation of the Data of the Four Arbitral Centers

1. The Singapore International Arbitration Center

SIAC provided data on choice of law in the cases that resulted in arbitration proceedings filed with SIAC from 2010 to 2012. SIAC

[39] *See, e.g.*, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL), MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, at Art. 28(1), U.N. Doc. A/40/17, U.N. Sales No. E.08.V.4 (1985).

[40] This has long been the general rule in the United States. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (AM. LAW INST. 1971). The only exception is that a number of states have derogated to the Restatement for choices of forum law under certain conditions. *See, e.g.*, Choice of Law, N.Y. Gen. Oblig. Law §5–1401 (1984); Eisenberg & Miller, *Market for Contracts*, *supra* note 3, at 2091.

[41] Singapore International Arbitration Act 1994 (Cap 143A, 2002 Rev Ed); Hong Kong Arbitration Ordinance, (2014) Cap. 609, 26 § 64 (H.K.).

published, for the first time, data on choice of law in its 2013 annual report.[42] Unfortunately, the data published for 2013 is less detailed than that provided for previous years insofar as it does not indicate which laws were chosen in less than 7.4% of the cases and does not distinguish between domestic and international cases.[43] The data from 2010 to 2012 appear in Table 13.

Table 13: Substantive Law Chosen in SIAC Arbitrations (Cases)

International Cases	**2010**	**2011**	**2012**
English law	33 (19.8%)	31 (24.4%)	31 (19%)
Singapore law	69 (41.56%)	69 (54.33%)	76 (46.62%)
Chinese law	0	2 (1.57%)	3 (1.84%)
Indian law	11 (6.26%)	2 (1.57%)	14 (8.58%)
Indonesian law	12 (7.22%)	6 (4.72%)	6 (3.68%)
New York law	1 (0.6%)	0	1 (0.61%)
Other	21 (12.6%)	7 (5.5%)	16 (9.81%)
UNIDROIT principles	0	0	1 (0.61%)
CISG	2 (1.2%)	1 (0.78%)	1 (0.61%)
Unspecified	17 (10.8%)	9 (7%)	14 (8.58%)
Domestic Cases			
Singapore law	25 (96.2%)	15 (40.5%)	17 (47%)
English law	0	16 (43.2%)	8 (22.2%)
Chinese law	0	1 (2.7%)	0
Indian law	0	0	4 (11.1%)
UNIDROIT principles	0	0	2 (5.55%)
Other	0	3 (8.1%)	3 (8.3%)
Unspecified	1 (3.8%)	2 (5.4%)	2 (5.55%)

Between 2010 and 2013, most parties choosing to arbitrate under the aegis of SIAC chose one of two laws to govern their contract, and thus the substance of the dispute. Singapore law was preferred, chosen in 41–54% of international cases. English law was also regularly chosen in around 20% of international cases. Next came, depending on the year, either Indian or Indonesian law, but neither was chosen in more than 10% of cases in a given year. U.S. state laws, in particular New York law, were virtually never chosen.

The idea of choosing non-state laws in international arbitration has generated heated debates and an enormous volume of literature in the last

[42] SIAC, 2013 REPORT, *supra* note 27, at 12.

[43] *Id.* (The data for both domestic and international SIAC cases (259) are: Singapore law: 44.5%; English law: 31.6%; Indian law: 7.4%; unspecified: 8.6%; other: 7.8%).

fifty years.[44] Despite these debates, there is no doubt that Article 28 of the Model Law, insofar as it refers to "rules of law," allows parties to provide for the application of rules other than national laws.[45] An empirical study of the cases referred to the ICC has shown that commercial actors very rarely use this power, and virtually always provide for the application of national laws.[46] The SIAC's data is the first indication that parties to Asian arbitrations are equally reluctant to choose non-state laws.

2. The Hong Kong International Arbitration Centre

HKIAC provided data on choice of law in the cases that resulted in arbitration proceedings filed with HKIAC from 2010 to 2012. Unfortunately, this data does not distinguish between international and domestic arbitration.

Table 14: Substantive Law Chosen in all HKIAC Cases

	2010	**2011**	**2012**
English law	53 (18%)	111 (40.36%)	122 (41.62%)
Hong Kong law	105 (37%)	66 (24%)	84 (28.65%)
Chinese law	5 (1%)	8 (2.91%)	27 (9.19%)
U.S. laws	0	9 (3.2%)	4 (1.1%)
Other	0	2 (0.7%)	9 (3%)
Unspecified	128 (44%)	79 (28.73%)	49 (16.76%)

Based on the foregoing data, I assume that parties to domestic arbitrations in Hong Kong would either provide for the application of the law of Hong Kong, or would not specify the applicable law. I therefore allocated and subtracted domestic cases from these two categories of cases in accordance with their share of the total.

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[44] *See, e.g.*, Lord Michael Mustill, *The New Lex Mercatoria: The First Twenty-Five Years*, 4 ARB. INT'L 86 (1988); Berthold Goldman, *Nouvelles Réflexions sur la Lex Mercatoria*, FESTSCHRIFT PIERRE LALIVE 241 (1993); Paul Lagarde, *Approche Critique de la Lex Mercatoria*, ETUDES OFFERTES À BERTHOLD GOLDMAN 125 (1987); Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 IND. J. GLOBAL LEGAL STUD. 447 (2007); Symeon Symeonides, *Party Autonomy and Private-Law Making in Private International Law: The Lex Mercatoria that Isn't*, *in* ESSAYS IN HONOUR OF K. KERAMEUS 1379 (2009); Emmanuel Gaillard, *Transnational Law: A Legal System or a Method of Decision Making?* 17 ARB. INT'L. 59 (2001); KLAUS PETER BERGER, THE CREEPING CODIFICATION OF THE LEX MERCATORIA (2nd ed. 2010); STEVEN C. BENNET, LEX MERCATORIA AND ARBITRATION (Thomas E. Carbonneau ed., rev. ed. 1998).

[45] *See, e.g.*, EMMANUEL GAILLARD & JOHN SAVAGE, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (1999); JULIAN LEW, LOUKAS MISTELIS & STEFAN KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION (2003).

[46] *See*, Gilles Cuniberti, *Three Theories of Lex Mercatoria*, 52 COLUM. J. TRANSNAT'L L. 369 (2014). *See also*, Christopher R. Drahozal, *Contracting Out of National Law: An Empirical Look at the New Law Merchant*, NOTRE DAME L. REV. 523 (2005).

Table 15: Substantive Law Chosen in HKIAC International Cases			
	2010	**2011**	**2012**
English law	53 (30.28%)	111 (62.35%)	122 (62.24%)
Hong Kong law[47]	105 - (0.45x116) = 53 (30.28%)	66 - (0.45x97) = 22 (12.35%)	84 - (0.63x99) = 22 (11.22%)
Chinese law	5 (2.8%)	8 (4.5%)	27 (13.77%)
U.S. laws	0	9 (5%)	4 (2%)
Other	0	2 (1.1%)	9 (4.6%)
Unspecified[48]	128 - (0.54x116) = 64 (36.57%)	79 - (0.54x97) = 26 (14.6%)	49 – (0.37x99) = 12 (6.12%)

Between 2010 and 2012, the vast majority of parties choosing to arbitrate under the aegis of HKIAC also typically chose one of two laws: English or Hong Kong law. The preference for English law and the law of the seat of the arbitration was stronger in Hong Kong than in Singapore, as other laws were very rarely chosen (less than 5% in each). The only exception was in 2012, where the law of the PRC was chosen in almost 14% of cases.

As in SIAC arbitrations, the number of parties that chose U.S. state laws was remarkably low. In 2010, no parties agreed on the application of a U.S. state law. In 2011, Delaware state law was chosen in seven contracts and New York state law and that of the "USA" were chosen in one contract each. Finally, in 2012, California state law and New York state law were each chosen in two contracts.

Finally, non-state laws were not chosen in any of the cases referred to HKIAC in the relevant period, which confirms the reluctance of parties to Asian arbitrations to choose non-state laws. It is noteworthy that the HKIAC Model Clause does not specifically encourage parties to provide for the applicable law, while the SIAC Model Clause encourages parties to provide for the application of a national law. One would thus expect to see

[47] The first figure in each of the three columns is the total number of cases where Hong Kong (HK) law was chosen (e.g. 105 in 2011). As explained above, I consider that parties in domestic cases would either choose HK law, or not specify the applicable law. Thus, I assume that the number of domestic cases where HK law was chosen is the ratio of choices of HK law over the sum of choices of HK law plus unspecified cases (e.g., 45% in 2011) multiplied by the number of domestic cases in a given year (e.g., 116 in 2011). I then subtract domestic cases from the total number of cases to find the number of international cases where HK law was chosen.

[48] Same as in previous footnote, but for the purpose of calculating the number of international cases where no choice of law was specified. The ratio applied is unspecified cases over the sum of choices of HK law and unspecified cases.

more cases of choice of non-state law in arbitrations administered by HKIAC rather than SIAC.[49]

3. The ICC International Court of Arbitration

The ICC provided detailed data on choice of law in arbitration proceedings involving Asian parties filed with the ICC in 2011 and 2012. The data are summarized in Table 16.

Table 16: Substantive Law Chosen in ICC Asian Arbitrations

	2011	**2012**
English law	19 (11.65%)	30 (17.7%)
U.S. laws	15 (9.2%)	11 (6.5%)
Indian law	9 (5.5%)	14 (8.2%)
Swiss law	8 (4.9%)	10 (5.9%)
Singapore law	5 (3%)	9 (5.3%)
Hong Kong law	2 (1. 2%)	8 (5.2%)
Chinese law (PRC)	5 (3%)	3 (1.7%)
Other	54 (33%)	51 (30%)
Unspecified	46 (28%)	33 (19.5%)

The ICC data differ from the data of SIAC and HKIAC. The ICC data cover all cases involving an Asian party. Contrary to SIAC and HKIAC, the seat of ICC arbitration is typically outside of Asia.[50] It is likely that this difference explains some of the ICC data on choice of law. In certain jurisdictions, the seat of the arbitration seems to have an important impact on the law chosen by the parties to govern their transaction. Switzerland is one such example. The applicable law almost always follows the seat of the arbitral forum.[51]

As far as Asia is concerned, SIAC data suggest that this is also the case for Singapore[52] and HKIAC data suggest the same for Hong Kong, but to a lesser extent.[53] The ICC's data do not confirm the importance of the seat for Singapore. In 2011 and 2012, Singapore was the seat of 24 and 36 ICC arbitrations, respectively, but Singapore law was only chosen in five and nine cases respectively.

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[49] As of August 1, 2014, HKIAC Model Clause was amended and now does encourage parties to provide for the applicable law.

[50] *See supra* text immediately preceding Tables 8 & 9.

[51] *See* Cuniberti, *supra* note 7, at 475−76.

[52] *See supra* Table 13.

[53] *See supra* Table 14.

By contrast, in 2011 and 2012, Hong Kong was chosen as a seat in respectively eight and eleven cases, and Hong Kong law was chosen in two and eight cases respectively. Given the attractiveness of Hong Kong as a seat for parties originating from Mainland China,[54] it is interesting to aggregate the data concerning Hong Kong and the PRC. In 2011, the PRC was chosen as a seat in one ICC arbitration, and in 2012, the law of the PRC was chosen in five and three cases respectively. In total, Hong Kong and the PRC were chosen as a seat in nine and twelve cases, and one of the two laws was chosen in seven and eleven cases.

The ICC data also differ from SIAC and HKIAC data insofar as English law is less dominant in Asian ICC arbitration than it is in SIAC and HKIAC arbitrations. U.S. laws are chosen more often in these proceedings as governing law. It could not be verified whether this difference was correlated with a seat of the arbitration in the United States.[55]

Finally, the ICC data is similar to SIAC and HKIAC data with respect to choice of non-state laws. In 2011 and 2012, there was only one case in which the parties chose a set of rules other than a national law to govern their contract. There, the parties had chosen the United Nations Convention on Contracts for the International Sale of Goods (CISG) as primary governing law and Swiss law as the subsidiary governing law. The ICC data further demonstrate the reluctance of Asian parties to choose non-state law.

4. The International Centre for Dispute Resolution

Unfortunately, data on choice of law in ICDR cases are unavailable. The ICDR has yet to invest the human resources needed to gather this information. However, ICDR officials have identified certain features that are shared by the vast majority of ICDR cases involving Asian parties.[56] First, the other party is usually an American party.[57] Second, the seat of the arbitration is typically located in the United States.[58]

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[54] *See supra* text immediately preceding Table 7.

[55] For the purpose of a study of choice of law in Latin American arbitration that the author is currently conducting, the ICC provided more detailed data which show that the choice of U.S. laws is typically correlated with a seat of the arbitration in the United States.

[56] Interview with Michael D. Lee, Vice President of ICDR/AAA for Asia, Singapore (Jan. 23, 2015).

[57] *Id*. Mr. Lee insisted, however, on the fact that characterizations of the nationality of commercial parties to international transactions raised a number of problems as soon as subsidiaries of international groups were concerned.

[58] *Id*.

These views are shared by a number of experienced practitioners in Asia. James E. Hough is head of the Litigation Department of the Tokyo office of the U.S. law firm Morrison & Foerster, and was previously head of the Litigation Department in the New York office of the same firm. If one focuses on the number of non-Japanese partners, Morrison & Foerster is clearly the largest international firm in Japan with almost three times more U.S.-educated partners than any other firm in Japan. Japan is an important jurisdiction for ICDR Asian arbitration, as it was the most represented Asian nationality in ICDR arbitration from 2010 until 2012 and a close second in 2013. In all Asian ICDR arbitrations in which Mr. Hough was involved, the seat of the arbitration was in the United States (New York or California) and one of the parties was from the United States.[59] The only exception was an ICDR arbitration between a Japanese party and a Korean party, but the Korean party was a wholly-owned subsidiary of a U.S. company.[60] When asked whether he would think that these features concern the vast majority of ICDR arbitrations involving Asian parties, Mr. Hough wrote that he believed so.[61] Kap-You (Kevin) Kim is head of the International Arbitration and Litigation practice group of Bae Kim & Lee LLC, a leading Korean law firm. Chambers Asia reports that Mr. Kim is "one of the most respected figures in the Asian arbitration space" and "the best Korean lawyer in the field of arbitration in Asia."[62] Mr. Kim's experience also has been that the vast majority of Asian ICDR arbitrations are seated in the United States and involve one U.S. party.[63] However, there are exceptions: Mr. Kim was involved in a few ICDR arbitrations with a seat in Singapore or Japan, but those arbitrations always involved a U.S. party.[64] Finally, Dr. Michael J. Moser has advised foreign clients in the Asia-Pacific region since 1980. He has acted as arbitrator, mediator, or counsel in more than 300 international proceedings.[65] Dr. Moser's personal experience also has been that the vast

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[59] E-mail from James E. Hough, Partner, Morrison Foerster, to Gilles Cuniberti, Professor of Private Int'l Law, Univ. of Lux. (Feb. 24, 2015) (on file with author).

[60] *Id*.

[61] *Id*.

[62] *Professionals: Kap-You (Kevin) Kim*, BAE KIM & LEE, http://www.bkl.co.kr/front/law/prf/memberView.do?lang=eng&memberNo=21#.Viu0YeorKRs (last visited Nov. 15, 2015).

[63] E-mail from Kap-You (Kevin) Kim, Partner, Bae Kim & Lee LLC, to Gilles Cuniberti, Professor of Private Int'l Law, Univ. of Lux. (Apr. 14, 2015) (on file with author).

[64] *Id. See also People: Byung-Chol (B.C.) Yoon*, *Representative Work*, KIM & CHANG, http://www.kimchang.com/home/bcyoon#Representative%20Work (last visited Nov. 15, 2015) [hereinafter Yoon] (stating that another leading Korean lawyer, Byung-Chol (B.C.) Yoon, was involved in an ICDR case between a U.S. party and a Korean party with a seat in Seoul, Korea where Korean law was the applicable substantive law).

[65] *See Michael J. Moser, JP: Experience*, MICHAEL MOSER, *http://www.michaelmoser.com/* (last visited Nov. 15, 2015).

majority of Asian ICDR arbitrations are seated in the United States and involve one U.S. party.[66]

The ICDR has also published a few arbitral awards.[67] Those involving Asian parties all had their seat in the United States and most involved a U.S. party.[68]

The fact that the vast majority of ICDR arbitrations involving Asian parties concern disputes between Asian and U.S. parties and have their seat in the United States strongly suggests that, in the vast majority of these cases, the parties will have chosen the law of a U.S. state to govern their contract. The first reason is that parties to international transactions often find it natural to select the same jurisdiction as the seat of the arbitration and the applicable substantive law. The second reason is that the circumstances surrounding the formation of the contract favored resolving disputes with an American arbitration institution and a seat in the Unites States. This could reveal that the U.S. party had a strong bargaining power. It could also reveal that the nexus of the transaction was in the United States and that it appeared natural to all parties to choose U.S. arbitration. Finally, the contract could have involved the U.S. subsidiary of the Asian party and thus was treated as a domestic transaction. Whatever the circumstances, it is likely that if such circumstances led the parties to choose ICDR arbitration in the United States, they also led them to choose U.S. state law to govern their contract.

Experienced practitioners confirm the hypothesis that the parties provide for the application of the law of a U.S. state in the vast majority of ICDR arbitrations involving Asian parties. Mr. Hough explained that, in all the ICDR arbitrations involving an Asian party to which he had been a participant, the substantive law chosen by the parties was the law of a U.S. state (New York or California). When asked whether he thought this would be the case in the vast majority of ICDR arbitrations involving Asian parties, he wrote that he believed so.[69] Likewise, Dr. Moser wrote that his personal experience has been that, in the vast majority of ICDR arbitrations involving

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[66] E-mail from Dr. Michael J. Moser, sole practitioner, to Gilles Cuniberti, Professor of Private Int'l Law, Univ. of Lux. (June 25, 2015) (on file with author).

[67] ICDR AWARDS & COMMENTARIES (G. Hanessian ed., 2012).

[68] *Id.* at 99 (ICDR Case no 152-04, involving parties from the United States and India seated in New York), 155 (ICDR Case no 251-04, involving parties from New York and China seated in New York), 209 (ICDR Case no 379-04, involving parties from Taiwan and Korea seated in New York), 225 (ICDR Case no 526-04, involving one party from China and a party of unreported nationality and seated in Washington).

[69] E-mail from James E. Hough, Partner, Morrison Foerster, to Gilles Cuniberti, Professor of Private Int'l Law, Univ. of Lux. (Feb. 24, 2015) (on file with author).

Asian parties, the law governing the contract is a US law.[70] Finally, in Mr. Kim's opinion, the substantive law chosen by the parties in most ICDR arbitrations involving Asian parties was the law of a U.S. state.[71] However, in the few ICDR arbitrations with a seat outside of the United States in which he was involved, the parties had chosen Asian laws.[72] This hypothesis also is confirmed by the few awards involving Asian parties that the ICDR has published.[73] In the absence of any contrary evidence, I conclude that parties to ICDR arbitrations involving Asian parties and a U.S. seat overwhelmingly choose U.S. laws to govern their contracts.

While there is no evidence that these parties choose non-U.S. laws, such a conclusion could appear to be inconsistent with the data gathered by the three other major Asian arbitration institutions. U.S. laws are virtually never chosen in cases going to SIAC or HKIAC and are chosen less often than English law in ICC arbitration. The most convincing explanation for these differences is that the circumstances characterizing Asian ICDR arbitrations are simply not present in cases going to other institutions. There are significantly more U.S. parties in the ICDR than in SIAC, HKIAC, and Asian ICC arbitrations combined.[74] This itself is evidence that ICDR is the preferred arbitration institution for U.S. parties. If this is correct, it suggests that agreements selecting ICDR arbitration reveal the U.S. party's strong bargaining power while agreements selecting any other arbitral institution indicate that the U.S. party's bargaining power was either lower or comparable to that of the other party.

Table 17: Number of U.S. Parties in Asian Arbitrations

	2011				**2012**			
	SIAC	HKIAC	ICC	**Total**	SIAC	HKIAC	ICC	**Total**
U.S. parties	11	15	155 x 0.2 = 31	**57**	25	8	145 x 0.22 = 32	**65**
ICDR cases	**174**				**237**			

[70] E-mail from Dr. Michael Moser, *supra* note 66.

[71] E-mail from Kap-You Kim, *supra* note 63.

[72] *Id*. (In one case, the seat was Singapore and the substantive law was Indonesian; in another, the seat was Japan and the substantive law was Japanese.). *See also Yoon*, *supra* note 64.

[73] *See* ICDR AWARDS & COMMENTARIES, *supra* note 67, at 99 (ICDR Case no 152–04, seated in New York, choice of the laws of New York and Massachusetts), 155 (ICDR Case no 251–04, seated in New York, choice of New York law), 209 (ICDR Case no 379–04, seat in New York, choice of Massachusetts law), 225 (ICDR Case no 526–04, seated in Washington, choice of Washington law).

[74] *See infra* Table 17.

For the purpose of this article, I therefore assume that in 80–90% of ICDR cases involving Asian parties, the law chosen by the parties was the law of a U.S. state. I further assume that, in the few cases where this is not the case, the law of the Asian party would have been chosen.[75] Since the most represented Asian nationalities in ICDR arbitration are Japanese, Indian, and Australian,[76] the assumption is that the law of one of these three jurisdictions would typically be selected.

B. Analysis of Aggregate Data

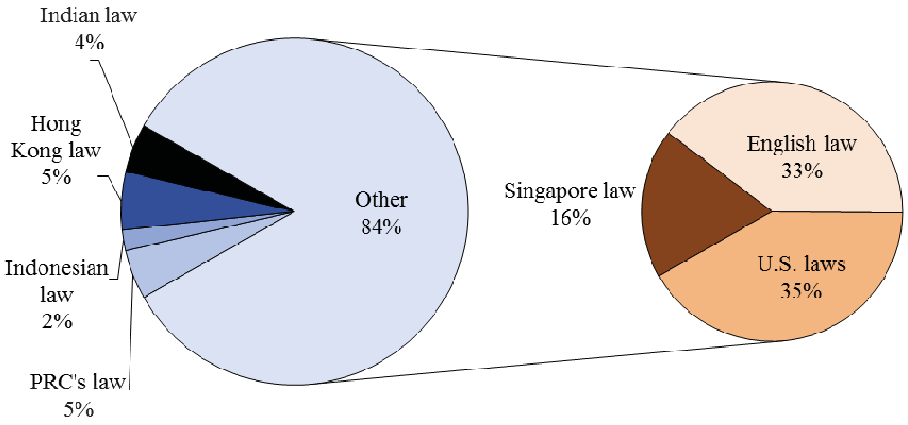
The aggregate data of all four institutions reveal that, despite the varied origin of commercial parties operating in Asia, parties to Asian arbitrations generally choose one of three laws to govern their transactions: U.S. law, English law, and Singaporean law. Combined, these three laws represent almost 85% of all choice of law selections in Asian arbitrations. No other law is chosen in more than 5% of the cases.

Table 18: Laws Chosen in Asian International Arbitrations: Aggregate Results (Cases)

	2011					**2012**				
	SIAC	HKIAC	ICC	ICDR	**Total**	SIAC	HKIAC	ICC	ICDR	**Total**
English law	31	111	19	0	**161**	31	122	30	0	**183**
U.S. laws	0	9	15	162 – 183	**186 – 207**	1	4	11	139 – 157	**155 - 173**
Singapore law	69	0	5	0	**74**	76	2	9	0	**87**
Hong Kong law	2	66 - 44 = 22	2	0	**26**	0	84 - 62 = 22	8	0	**30**
Indian law	2	0	9	2	**13**	14	5	14	2	**34**
Indonesian law	6	0	3	0	**9**	6	0	5	0	**11**
PRC's law	2	8	5	0	**15**	3	27	3	0	**33**

[75] *Yoon*, *supra* note 64 (anecdotal evidence confirms this assumption).
[76] *See supra* Table 12.

Chart 2: Laws Chosen in Asian International Arbitrations, 2011-12



The prevalence of U.S., English, and Singaporean law varies by arbitral institution. It originates from essentially one single institution for U.S. laws (ICDR) and Singapore law (SIAC), while English law is very successful in three out of the four major Asian institutions.

U.S. laws dominate transactions going to ICDR arbitration; however, they are virtually never chosen in transactions going to other Asian arbitral institutions. Though this conclusion is not based on actual data for the methodological difficulties mentioned before, it rests on credible assumptions. That being said, however credible they may be, they nonetheless remain assumptions.

The choice of Singapore law generally originates from cases going to SIAC arbitration. Singapore law seems to benefit a great deal from the success of SIAC as an arbitral center. In Europe, Swiss contract law also benefits strongly from the success of the country as an arbitral venue. Switzerland's success as an arbitral hub is corroborated, as far as the Swiss arbitration institution is concerned, by the frequency with which parties choose Swiss law and Switzerland as the seat of the arbitration—more than

70% of the cases.[77] While the same is likely true for ICC arbitration, there is only indirect evidence supporting this conclusion.[78] Singapore law dominates SIAC arbitration, but it is rarely chosen as governing law in ICC arbitration, though Singapore is the preferred Asian seat in ICC arbitration.[79] It seems, therefore, that Singapore law benefits from SIAC rather than from its attractiveness as an arbitral venue.

Finally, the success of English law is more widespread than that of its two competitors. English law completely dominates HKIAC arbitration. It is also the most chosen law in ICC arbitration involving Asian parties—though U.S. laws are a close second—and the second most often chosen law in SIAC arbitration, after Singapore law.

IV. ASSESSING THE INTERNATIONAL ATTRACTIVENESS OF CONTRACT LAWS IN ASIA

International contracts, whether assisted by a lawyer or not, are typically concluded by parties based in different jurisdictions. Each knows the contract law of his particular jurisdiction but typically does not know the law of other jurisdictions, including the law of the other party's jurisdiction. Parties would, therefore, prefer to submit their contract to their own law not only to avoid the additional costs associated with learning a foreign law, but also because it is psychologically more comfortable to apply familiar law to their business relationships.[80]

However, in international contracts involving parties from different jurisdictions, it is not possible to satisfy all parties in this respect. Rather, the parties must settle on one of two solutions. The first is to choose the law of one of the parties. In doing so, parties may be motivated by reasons unrelated to the perceived quality of the chosen law. For example, one party may have greater bargaining power and thus simply be able to impose his own law for no reason other than it being familiar and, as such, more comfortable. Alternatively, assuming this is a bilateral contract, the second solution would be to choose the law of a third jurisdiction unrelated to those of the contracting parties ("third-state law"). Despite the fact that both parties have to shoulder the costs of learning a foreign law when this option

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[77] *See* SWISS CHAMBERS' ARB. INST., ARBITRATION STATISTICS 2012 1 (2012), https://www.swissarbitration.org/sa/download/statistics_2012.pdf.

[78] Cuniberti, *supra* note 7, at 480.

[79] *See supra* Table 9.

[80] *See, e.g.*, Vogenauer, *Regulatory Competition*, *supra* note 14, at 23; Gary Low, *A Psychology of Choice of Laws*, 24 EUR. BUS. L. REV. 363, 374 (2013).

is chosen, conventional wisdom suggests that parties select this option when they are unable to agree on either party's national law.[81] Indeed, in some situations, this solution is the only way to resolve an otherwise intractable issue. If so, selection of a third-state law is driven by purely negative circumstances: neither party wants the law of the other to apply. However, once that negative decision is made, the choice of which third-state law becomes a positive choice: the parties agree on a third-state law that is attractive to both of them. A highly attractive foreign law might even convince efficiency-minded parties to choose it if they believe that it will result in important benefits that outweigh the associated costs. One such benefit could be that the third-state law is perceived as superior to either party's national law.

My thesis, therefore, is that the attractiveness of a given country's contract law can be assessed by determining the number of cases in which it is chosen as a third-state law. Of course, it is possible that a party to a given transaction would choose the law of the other because both are convinced of the qualities of that law. However, it is impossible to distinguish such cases from those in which the choice would have been dictated by the stronger bargaining power of one of the parties. Furthermore, if the law of one of the parties appears as attractive to the other, it should also appear so to parties to other unrelated transactions and thus be chosen as a third state law. It is highly unlikely that a given country's contract law would only be attractive to parties originating from the relevant jurisdiction. Thus, the number of cases where a given contract law is chosen as a third-state law should be a fair measure of the overall attractiveness of that particular contract law and represent its minimum international attractiveness.

In order to assess whether parties to international contracts choose one of their own laws or a third-state law, the following methodology is applied. Data on the nationalities of parties to international contracts and the law chosen are gathered. The minimum number of cases in which a given contract law was chosen as a third-state law is the difference between the cases where that law was chosen and the number of cases where one of the parties originated from the country of the said law. When data on the latter are unavailable, I assume that most cases involved two parties and that, those cases being international and thus involving parties from different jurisdictions, the number of parties originating from one given jurisdiction is

[81] *See, e.g.*, Vogenauer, *Regulatory Competition*, *supra* note 14, at 24.

a reasonable proxy for the number of cases in which one party from that jurisdiction was involved.

Below, I apply this methodology to the data provided by the four Asian arbitration institutions that are the focus of my study and calculate the international attractiveness of English, U.S., Singapore, and Hong Kong law. I also calculate the international attractiveness of Swiss, French, and German law because these three laws are among the five laws that are often chosen as third-state laws in ICC arbitration.[82]

A. Assessment of International Attractiveness in Each Arbitral Center

1. The Singapore International Arbitration Center

SIAC provided me with data on choice of law and publishes data on the nationalities of parties.[83] These two sets of data are analyzed to calculate the international attractiveness of seven laws. The results appear in Table 19.

Table 19: Attractiveness of Contract Laws in SIAC Arbitration

	2010			**2011**			**2012**		
	Chosen Law	Parties	**Attract.**	Chosen Law	Parties	**Attract.**	Chosen Law	Parties	**Attract.**
United Kingdom	33	2	**31**	31	39/15[84]	**16**	31	1	**30**
Switzerland	0	3	**-3**	0	7	**-7**	1-2	6	**-4**
United States	1	13	**-12**	0	11	**-11**	1	25	**-24**
France	0	2	**-2**	0	0	**0**	2	3	**-1**
Germany	0	2	**-2**	0	1	**-1**	2	4	**-2**
Singapore	69	107 – 26 x 2	**36**	69	79 – 37 x 2	**64**	76	146 – 36 x 2	**2**
Hong Kong	0	26	**-26**	2	23	**-21**	0	18	**-18**

[82] Cuniberti, *supra* note 7, at 472.

[83] *See* SIAC, 2010 REPORT, *supra* note 27; SIAC, 2011 REPORT, *supra* note 27; SIAC, 2012 REPORT, *supra* note 27; SIAC, 2013 REPORT, *supra* note 27 (with respect to Singapore, SIAC Annual Reports do not distinguish between parties involved in domestic and international arbitration. I thus subtract from the number of Singaporean parties twice the number of domestic arbitrations).

[84] The figure for 2011 is 39. However, one single investment dispute involved 25 of them. *See* 2011 CEO'S ANNUAL REPORT, *supra* note 27, at 6 (for the purpose of this article, 15 is thus a more meaningful figure).

2. The Hong Kong International Arbitration Centre

HKIAC provided me with data on both choice of law and nationalities of the parties. These two sets of data are analyzed and used to calculate the attractiveness of the same seven laws. The results appear in Table 20.

Table 20: Attractiveness of Contract Laws in HKIAC Arbitration

	2011			**2012**		
	Chosen Law	Parties	**Attract.**	Chosen Law	Parties	**Attract.**
United Kingdom	111	1	**110**	122	6	**116**
Switzerland	1	1	**0**	0	7	**-7**
United States	9	15	**-6**	4	8	**-4**
France	0	3	**-3**	0	0	**0**
Germany	0	1	**-1**	2	8	**-6**
Singapore	0	14	**-14**	2	38	**-36**
Hong Kong	66 – 44 = 22	100 – 44 x 2 = 12	**10**	84 – 62 = 22	179 – 62 x 2 = 55	**-33**

3. The ICC International Court of Arbitration

The ICC has long published data on both choice of law and the nationalities of parties but has not organized this information by region. It provided data on choice of law broken down to cases involving at least one Asian party but not with the corresponding data on non-Asian nationalities in the relevant cases. In order to determine the number of European or American parties involved in those cases, this article assumes, *ceteris paribus*, that parties from those regions are as likely to be involved in a transaction with an Asian party as with a party from another region of the world. As ICC cases involving Asian parties represented respectively 20% and 22% of ICC cases in 2011 and 2012,[85] this article assumes that the same percentage of European or American parties were involved in these cases. The results appear in Table 21.

[85] There were respectively 163 and 169 ICC cases involving an Asian party in 2011 and 2012, respectively 796 and 759 cases filed with the ICC in 2011 and 2012. *See* Int'l Ct. of Arb., *2011 Report*, *supra* note 38; Int'l Ct. of Arb., *2012 Report*, *supra* note 38 (cases involving an Asian party thus represented respectively 20.47% and 22.26% of the total in those two years).

Table 21: Attractiveness of Contract Laws in Asian ICC Arbitration						
	2011			**2012**		
	Chosen Law	**Parties**	**Attract.**	**Chosen Law**	**Parties**	**Attract.**
United Kingdom	19	88 x 0.2 = 18	**1**	30	49 x 0.22 = 11	**19**
Switzerland	8	65 x 0.2 = 13	**-5**	10	59 x 0.22 = 13	**-3**
United States	15	155 x 0.2 = 31	**-16**	11	145 x 0.22 = 32	**-21**
France	0	144 x 0.2 = 29	**-29**	3	124 x 0.22 = 27	**-24**
Germany	3	118 x 0.2 = 24	**-21**	5	132 x 0.22 = 29	**-24**
Singapore	5	13	**-8**	9	24	**-15**
Hong Kong	2	11	**-9**	8	26	**-18**

4. The International Centre for Dispute Resolution

Finally, because the data on choice of law in ICDR arbitrations are unavailable, I have assumed that that all ICDR cases involved one U.S. party and that in 80–90% of cases, the parties had chosen the law of a U.S. state. The consequence of such assumptions is that ICDR cases are largely neutral for determining the attractiveness of contract laws in Asia. The two assumptions essentially cancel each other out with respect to U.S. parties and the choice of U.S. laws since the vast majority of the cases, possibly all, involve one U.S. party and in the vast majority of the cases the parties chose the law of a U.S. state. Furthermore, those cases likely do not involve any U.K., Swiss, French, or German parties. As such, the law of these jurisdictions is unlikely to be chosen.

The only impact of these ICDR cases relates to Singapore and Hong Kong law. A small number of parties originating from each of these jurisdictions are involved each year in ICDR arbitrations.[86] It is likely that, in most cases, the applicable law is the law of a U.S. state, but there is anecdotal evidence of ICDR cases where an Asian law was chosen as the governing law.[87]

ICDR data would probably reveal that the international attractiveness of U.S., Singapore, and Hong Kong laws is negative. In the absence of any precise figures,[88] I simply chose to omit the ICDR altogether for this reason.

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[86] *See supra* Table 12.

[87] *See* note 64 and accompanying text.

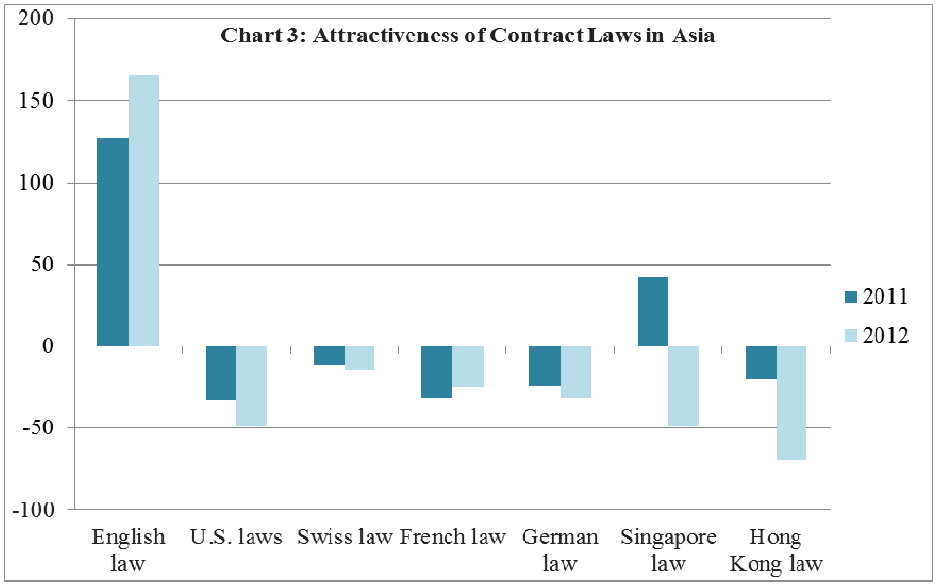
[88] The number of parties originating from Hong Kong and Singapore are known. 2011: 12 parties from Hong Kong and 7 from Singapore. 2012: 11 parties from Hong Kong and 6 from Singapore. *See supra* Table 12.

B. Overall Attractiveness of Contract Laws in Asia

The aggregate results of the international attractiveness of contract laws in Asia appear in Table 22. They reveal that only one law has a positive international attractiveness in Asia: English law. In 2011, the international attractiveness of Singapore law was also positive, but it was negative in 2012. All other laws have a negative international attractiveness.

Table 22: Attractiveness of Contract Laws in Asia: Aggregate Results (Cases)

	2011				**2012**			
	SIAC	HKIAC	ICC	**Total**	SIAC	HKIAC	ICC	**Total**
English law	16	110	1	**127**	30	116	19	**165**
U.S. laws	-11	-6	-16	**-33**	-24	-4	-21	**-49**
Swiss law	-7	0	-5	**-12**	-4	-7	-3	**-14**
French law	0	-3	-29	**-32**	-1	0	-24	**-25**
German law	-1	-1	-21	**-24**	-2	-6	-24	**-32**
Hong Kong law	-21	10	-9	**-20**	-18	-33	-18	**-69**
Singapore law	64	-14	-8	**42**	2	-36	-15	**-49**



These results suggest that the domination of English law over the Asian market for third-state laws is absolute. When parties to Asian

business transactions look for a third-state law, they almost uniformly choose English law. In this market, English law simply has no competitor. The results are so straightforward that they minimize the impact of the assumptions that are necessary to make these calculations. The only exception might be Singapore law. However, the present study does not allow any definitive conclusions on this issue given the disparate results between the international attractiveness of Singapore law in 2011 and 2012.

Of course, as previously noted, this does not mean that all Asian business transactions are governed by English law. Only about one-third are.[89] The other two-thirds are governed by various laws, typically, the law of one of the parties to the transaction. In particular, one-third of Asian business transactions are governed by U.S. law. However, since one of the parties is typically a U.S. company, the most convincing explanation for this choice is likely not the perceived quality of U.S. laws in Asia, but rather the relative bargaining power of the U.S. party. If U.S. laws were attractive in Asia, the combination of U.S. economic power and the attractiveness of U.S. laws should have resulted in a greater share of Asian business transactions being governed by U.S. laws and, in particular, greater success in the number of transactions going to SIAC or HKIAC. To the contrary, the fact that parties to SIAC and HKIAC proceedings virtually never choose U.S. laws suggests that its international attractiveness is limited.

In conclusion, it seems that parties to Asian business transactions choose either English or U.S. laws for very different reasons. Choice of U.S. laws appears to be the function of the success of U.S. corporations. U.S. laws are not chosen for any inherent superiority, real or perceived; they are chosen because U.S. companies demand it. By contrast, English law is overwhelmingly chosen in transactions that do not involve any English party. It is thus chosen for itself, and it is essentially the only one in Asia to be chosen for this reason.

This difference is important from an economic perspective. Choosing the law of a given jurisdiction to govern a contract brings business to lawyers admitted to practice the law of that jurisdiction, whether at the concluding stages of contract formation or during any subsequent disputes that arise. Both English and U.S. lawyers benefit from the fact that their laws are often chosen in Asian business transactions. For U.S. lawyers, the U.S. economy drives this additional stream of business and U.S. corporate

[89] *See supra* Chart 2.

activity in Asia (or Asian corporate activities in the U.S.). By contrast, for English lawyers, the source of this additional business is the attractiveness of English law. This means that, remarkably, the English legal profession generates its own business regardless of the economic activity of English corporations or businesses.

V. EXPLAINING THE INTERNATIONAL ATTRACTIVENESS OF ENGLISH LAW IN ASIA

The prevailing myth is that of two titans, New York and English laws, clashing over dominance of the global legal market. My study debunks this misconception, suggesting that, at least in Asia, English law is the only titan: the Cronus that dwarfs and engulfs competing laws. While U.S. laws govern a significant number of Asian business transactions, they are chosen in transactions involving U.S. parties and thus seem to benefit from the might of the U.S. economy rather than their own attractiveness.

Below, I seek to explain the remarkable success of English law in Asia. Intuitively, one would think that parties to international commercial transactions are typically sophisticated actors, and therefore the choice of a given law should reveal that this law affords rules which are better suited to the interests of these international commercial actors. I first explore whether certain substantive aspects of English law might explain its attractiveness.

There are, however, a number of factors other than the intrinsic qualities of specific contract laws which could influence the choice of law in international contracts. In the Asian context, one is particularly convincing: the presence of international firms. I turn to these factors next.

A. Substantive Differences

The most important factor contributing to the international attractiveness of a particular contract law ought to be its intrinsic qualities. All other things being equal, international parties should prefer the law that best fits their needs. Thus, one would expect the most attractive contract laws to be the best thereof, at least from the perspective of the parties. Below, I explore whether certain qualities of English law could explain its success, highlighting the ways it differs from New York state law.[90]

[90] I have already explored differences between English law and the laws of civil law jurisdictions, in particular Swiss law, in a previous article. *See* Cuniberti, *supra* note 7, at 497−500.

At the outset, it is important to note that comparing the contract laws of two sophisticated jurisdictions such as England and New York is a delicate exercise. Commercial transactions are very diverse. They can be governed by general contract law or special rules applicable only to certain types of contracts. It is possible that the disparate attractiveness of the two laws varies depending on the particular type of contract under scrutiny. The nature of the data from Asian arbitral centers does not allow for distinctions between different kinds of contracts. Yet, when the English and the New York legal professions issued brochures marketing the contract law of their respective jurisdictions,[91] they chose to remain at a surprisingly high level of generality. This suggests that the drafters were not aware of any critical differences unique to particular kinds of contracts.

One obvious reason to prefer one law over another is the existence of mandatory rules prohibiting certain types of contract clauses or even certain types of transaction altogether. Commercial parties can be expected to avoid contract laws that contain such restrictions and to gravitate towards more liberal ones. Therefore, it could be that some types of transactions or particular contract terms are authorized under English law, while forbidden under many other laws.[92] This is certainly the general claim made by the Law Society of England and Wales in marketing materials issued in 2007.[93] Despite the general claims made by advocates of English law, it is unclear whether it is significantly more liberal than the commercial laws of other liberal states. In particular, I am unable to identify differences in this respect between New York and English law.

Logically, once parties to commercial transactions have determined that their contract will be found valid and enforceable in the relevant competent jurisdiction, one would presume their next concern would be performance thereunder. Thus, the rules applicable to the interpretation and performance of commercial contracts should be of critical importance. When parties conclude a commercial contract, the expectation is that they

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[91] L. SOC'Y OF ENG. & WALES, ENGLAND AND WALES: THE JURISDICTION OF CHOICE (2007), http://www.eversheds.com/documents/LawSocietyEnglandAndWalesJurisdictionOfChoice.pdf; N.Y. ST. BAR ASS'N, CHOOSE NEW YORK LAW FOR INTERNATIONAL COMMERCIAL TRANSACTIONS (2012), https://www.nysba.org/Sections/Dispute_Resolution/Dispute_Resolution_PDFs/Choose_New_York_Law_For_International_Commercial_Transactions.html (last visited Nov. 20, 2015).

[92] It is important to note that I am only discussing mandatory contract rules. Many other regulatory regimes are irrelevant for our purposes because their territorial scope of application is left untouched by choice of law clauses. Competition law, for example, regulates transactions without regard to which contract law is chosen by the parties to govern their contract.

[93] *See* L. SOC'Y OF ENG. & WALES, *supra* note 91.

will agree on a law that will strictly enforce its specific terms. Similarly, although the issue is hotly debated among legal scholars,[94] it is reasonable to assume that commercial parties want the language of their contract to be taken seriously and, thus, any interpretation thereof to be as literal as possible. Conversely, one could expect that contract laws that allow a court to rewrite provisions of negotiated contracts and to otherwise assess the fairness of their terms will be viewed with a high level of scrutiny.

These assumptions and hypotheses were empirically tested by Geoffrey Miller[95] on the basis of data gathered in a study that he conducted with Theodore Eisenberg of 2,800 U.S. commercial contracts.[96] Miller and Eisenberg's study revealed that U.S. commercial parties chose New York state law in 46% of their contracts and California state law in only 8% of them.[97] Miller then set about comparing New York and California state law on a wide range of issues, finally concluding that the essential difference between the two could be found in their respective rules on interpretation and enforcement of contracts. While Miller characterized New York state judges as "formalists" with "little tolerance for attempts to rewrite contracts to make them fairer or more equitable" and found that they "look[ed] at the written agreement as the definitive source of interpretation," Miller asserted that California judges "more willingly reform or reject contracts in the service of morality or public policy; they place less emphasis on the written agreement of the parties and seek instead to identify the contours of their commercial relationship within a broader context framed by principles of reason, equity and substantial justice."[98] American scholars cite Miller's study as evidence that commercial parties prefer "formalist" or "textualist" contract laws (i.e., laws strictly enforcing the contract's agreed-upon terms and relying on "plain meaning" rules of interpretation).[99]

English law has also traditionally been perceived as textualist with judges strictly enforcing contractual obligations. English law places strong emphasis on written agreements, following an objective approach with respect to the determination of contractual terms and to contract

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[94] *Compare* Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 927 (2010) *with* STEVEN J. BURTON, ELEMENTS OF CONTRACT INTERPRETATION (2009).

[95] *See* Miller, *Bargains Bicoastal*, *supra* note 3.

[96] *See* Eisenberg & Miller, *Flight to New York*, *supra* note 3, at 1475.

[97] *Id*. at 1490.

[98] Miller, *Bargains Bicoastal*, *supra* note 3, at 1478.

[99] *See, e.g.*, Schwartz & Scott, *supra* note 94, at 957.

interpretation.[100] The intent of the parties is to be determined principally through objective criteria such as the language used by the parties rather than under subjective criteria.[101] In this respect, the English parole evidence rule, which excludes the use of extrinsic evidence to add to, vary, or contradict the plain meaning of the written terms of a contract, is key[102] and was presented by Lord Hobhouse as "one of the main reasons for the international success of English law."[103]

English law also favors a formalist approach to contract interpretation. Interpretation focuses on the language in the document itself. English law does not typically allow the consideration of pre-execution negotiations[104] or the manner in which performance has been rendered post-execution[105] to determine the meaning of contractual clauses. That is not to say that English courts inevitably interpret contracts in a formal, literal manner. Although the general rule is that words should be given their plain and ordinary meaning, it has long been accepted that drafting mistakes can be made.[106] In such circumstances, a contextual interpretation is necessary, focusing on how reasonable commercial actors would construe the contract, rather than on how the particular actors might have interpreted it.[107] More importantly, English courts are not easily convinced that the drafted language in a written contract did not, in fact, represent the intent of the parties at the time of execution, such that a resort to contextual interpretation is required.[108]

There is, however, an important difference between New York law and English law. English law has always rejected the duty of good faith in both the formation and performance of contracts.[109] By contrast, New York was the first U.S. jurisdiction to adopt the implied covenant of good faith

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[100] *See generally* JOHN CARTWRIGHT, CONTRACT LAW: AN INTRODUCTION TO THE ENGLISH LAW OF CONTRACT FOR THE CIVIL LAWYER 96 (2nd ed., 2013).

[101] *Id*., at 62. *See also* Chartbrook Ltd. v. Persimmon Homes Ltd. [2009] UKHL 38 [39], [2009] 3 WLR 267.

[102] *See generally* NEIL ANDREWS, CONTRACT LAW 405 (2011).

[103] Shogun Finance Ltd. v. Hudson [2003] UKHL 62, [49].

[104] *See, e.g.*, Prenn v. Simmonds [1971] 1 WLR 1381 (HL); Persimmon Homes Ltd. [2009] UKHL 38 at [38]

[105] *See, e.g.*, L. Schuler AG v . Wickman Machine Tool Sales Ltd. [1974] AC 235, [252] (HL).

[106] *See, e.g.*, Investors Compensation Scheme Ltd v. West Bromwich Bldg. Soc'y [1997] UKHL 28.

[107] Simmonds [1971] 1 WLR at [1384]; Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] AC 749 (HL). In recent years, the U.K. highest court has adopted such a purposive approach in a number of cases. S*ee, e.g.*, Chartbrook Ltd, Re Sigma Fin. Corp. [2009] UKSC 2 (in *Chartbrook Ltd*, for instance, Lord Hoffmann held that as the literal meaning of a clause would make certain other provisions in the agreement appear arbitrary and irrational, the business purpose of the clause should be considered to interpret it).

[108] *See, e.g.*, Investors Compensation Scheme, [1997] UKHL 28.

[109] CARTWRIGHT, *supra* note 100, at 61.

and fair dealing in its common law of contract.[110] The rule also appears in the version of the Uniform Commercial Code that New York adopted in 1962.[111] Advocates of New York law explain that the duty of good faith "protects the fruits of a party's bargain"[112] and make New York law "stand in an interesting 'middle' position between the civil law, on the one hand, and English law, on the other."[113] However, when confronted with criticism that good faith leads to uncertainty, those same advocates insist that "in the case of New York, it is clear that the principle of good faith has been handled very cautiously and with great discretion,"[114] and that "in an age where more and more contracts between commercial parties are written with the assistance of counsel, the need and inclination of New York courts to use the covenant for the purpose of essentially supplementing or revising contracts can be said to have waned."[115]

A careful study of New York cases might reveal that the duty of good faith has little impact on New York's strict adherence to the written terms of commercial agreements. It is unlikely, however, that commercial parties in Asia or elsewhere in the world would conduct such a study prior to deciding between English or New York law. The perceptions of businessmen[116] of the qualities of various laws, if any, would almost certainly be based on simple propositions. One such proposition might be that New York law recognizes the duty of good faith while English law does not, and thus English law will more strictly enforce commercial agreements.

If this conclusion were correct, it would mean that the relevance of Eisenberg and Miller's study should be considered as limited to U.S domestic transactions. The success of New York law in U.S. domestic transactions would be explained by the lack of more textualist competitors on the U.S. market. In the kingdom of the blind, the one-eyed man is king.

A number of American lawyers have offered an alternative theory to the impact of the existence of the duty of good faith on the international attractiveness of New York law. They argue that, as the duty of good faith is

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[110] *See* MICHAEL W. GALLIGAN, CHOOSING NEW YORK LAW AS GOVERNING LAW FOR INTERNATIONAL COMMERCIAL TRANSACTIONS 9 (2012).

[111] U.C.C. § 2−103 (AM. LAW INST. & UNIF. LAW COMM'N 2001).

[112] N.Y. ST. BAR ASS'N, *supra* note 91, at 9.

[113] GALLIGAN, *supra* note 110, at 8.

[114] *Id*. at 11.

[115] *Id*. at 9.

[116] Of course, parties could be assisted by counsel, but the involvement of lawyers in the negotiation of an international contract raises an agency problem that I address below in Section C.

found in many civil law jurisdictions and international instruments such as the CISG, it is the international norm and parties originating from such countries would rather choose a law that conforms to, rather than deviate from, such a standard.[117] In their opinion, strict adherence to a purely formalist approach to contract construction might lead to a "disproportionate allocation of risks that the parties may well not have contemplated."[118] The results of my study contradict this theory, at least with respect to Asia.

B. Colonial Empire

A factor contributing to the attractiveness of English law in Asia might be the fact that a number of Asian jurisdictions are former British colonies. As such, many of these colonies have modeled their laws on English law. Not only did they become common law jurisdictions, but they often follow the case law of England's highest court, the House of Lords (now the U.K. Supreme Court). Indeed, until recently, a last recourse to the Judicial Committee of the Privy Council of the Queen of England, dominated by senior English judges, was available to litigants in all of these jurisdictions.[119] As a result, although English precedents are not binding in these jurisdictions, they are very often cited as authoritative and typically followed. The contract laws of Hong Kong, Singapore, and, to a lesser extent, Australia are very close to English contract law. Because courts in these countries are not strictly bound by English precedent, their law may have evolved slightly differently. But the big picture is that the laws of all these jurisdictions are quite similar, and that a lawyer trained in any of these countries would be very comfortable in practicing in others.

In Singapore, for instance, the Application of English Law Act of 1993 provides that "the common law of England (including principles and

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[117] GALLIGAN, *supra* note 110, at 32; Michelle F. Herman & Nick J. Xu, *Choosing Between New York and English Law in Chinese Aviation Agreements,* MONDAQ (Dec. 14, 2012), http://www.mondaq.com/x/211636/Aviation/Advice+on+Practical+Problems+for+Aviation+in+Asia; Paul Cohen & Gabrielle Farina, *Rue Britannia: Why English Law Is A Poor Choice For International Commercial Arbitration*, GLOBAL ARB. REV. (Apr. 1, 2014), http://www.tklaw.com/files/Publication/b8272ce1-2188-4997-9ada-5e4d36fde7e4/Presentation/PublicationAttachment/c5482026-bd8e-4faa-873c-6772e14d3470/Rue%20Britannia_%20why%20English%20law%20is%20a%20poor%20choice%20for%20international%20arbitratio.pdf.

[118] GALLIGAN, *supra* note 110, at 30. *See also* Cohen & Farina, *supra* note 117 (arguing that English law is backward and that parties would prefer a more nuanced doctrine of contractual interpretation).

[119] Recourse to the Judicial Committee of the Privy Council of the Queen was opened both in criminal and civil matters. It was eventually abolished in Australia in 1986, in Singapore in 1994 and in Hong Kong in 1997. It remains available for a number of Commonwealth countries. *See* THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, https://www.supremecourt.uk/docs/beginners-guide-to-the-jcpc.pdf (last visited Nov. 16, 2015).

rules of Equity) . . . shall continue to be in force in Singapore . . . so far as it is applicable to the circumstances of Singapore and its inhabitants and subject to such modifications as those circumstances may require."[120] In the field of contract law, there have been some departures from English law,[121] but Singapore courts regularly state that there should not be departure from received English law for its own sake[122] and that, in the commercial context, there is greater likelihood and desirability for uniformity.[123] As a consequence, "much of Singapore contract law is consistent with the prevailing English law."[124]

The implications of the existence of this English common law community are many. The first, which will be developed below,[125] is that lawyers trained in England, Australia, Singapore, or Hong Kong are essentially interchangeable and thus transferable between these jurisdictions. This explains why so many lawyers in Singapore or Hong Kong were educated in other British common law jurisdictions, in particular England and Australia.

Second, for parties originating from any of these jurisdictions, English law is not genuinely foreign law. In international negotiations where the other party would not be willing to accept their law, English law would appear as a great second best option. This would be obvious where all parties originate from former English colonies.[126] Even in transactions involving only one such party, one could predict that it would propose English law first, and that the offer might be accepted in a significant number of cases.[127]

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[120] Application of English Law Act (Cap 7A, 1994 Rev Ed) § 3.

[121] ANDREW B.L. PHANG & GOH YIHAN, CONTRACT LAW IN SINGAPORE 65 (2012).

[122] *See CHS CPO GmBH (in bankruptcy) and Another v. Vikas Goel and Others* [2005] 3 SLR 202, at [87] (Sing.).

[123] *See Man Financial (S) Pte Ltd v. Wong Bark Chuan David* [2008] 1 SLR 663, at [133] (Sing.).

[124] ANDREW B.L. PHANG & GOH YIHAN, *supra* note 120, at 66.

[125] *See infra* Part C of this section.

[126] For anecdotal evidence, see *Award of 2008 in ICC case no 14269* (parties from Hong Kong and Singapore, choice of English law and Swiss seat of arbitration). *See also Award of 2000 in ICC case no 10228*, 21 ICC BULLETIN 61, 61−62 (2010) ("In considering the matter, I think it is perfectly possible that a Cypriot party, whose law closely has followed the law of England and a party from a British Colony would quite naturally wish to apply English law, especially as the other possibilities—French, Swiss and Ukrainian—would probably be quite unknown, but known to be different from the law they were used to.").

[127] For anecdotal evidence, see *Award of 1999 in ICC case no 9594*, 12 ICC BULLETIN 73 (2001) (parties from Spain and India, choice of English law and English seat of arbitration).

There is no doubt that parties originating from jurisdictions that closely follow English law represent a significant percentage of the parties involved in the arbitration proceedings that are the focus of this article. In ICC arbitrations, parties originating from India, Hong Kong, Singapore, and Malaysia represented 36% and 43% of all Asian parties involved in ICC arbitrations in 2011 and 2012.[128] Likewise, in ICDR arbitrations, parties originating from the same four jurisdictions, Australia, and New Zealand accounted for 48% and 46% of all Asian/Pacific parties involved in ICDR arbitrations in 2011 and 2012.[129] Finally, in SIAC arbitrations, parties originating from the same six jurisdictions, Canada,[130] the United Kingdom, and Samoa accounted for 34% and 44% of all parties involved in SIAC international proceedings in 2011 and 2012.[131]

However, it does not seem possible to establish any correlation between the number of parties originating from jurisdictions closely following English law and the number of cases where English law is chosen. While English law dominates in SIAC and ICC arbitrations, it clearly does not in ICDR arbitrations. Yet, almost half of Asian/Pacific parties involved in ICDR arbitrations originate from jurisdictions that closely follow English law. [132]

The influence of the origin of the parties to Asian business transactions on their choice of law preference remains unclear. It might be that the feeling of belonging to a wider legal community has waned in some jurisdictions, and only remains strong in others. It might also be that this factor only plays a minor role compared to other factors.

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[128] 2011: 110 parties out of 303; 2012: 128 parties out of 299. *See supra* Table 10. The nationality of non-Asian parties to these proceedings is unknown.

[129] 2011: 113 parties out of 243; 2012: 96 parties out of 208. *See supra* Table 12. The nationality of non-Asian/Pacific parties to these proceedings is unknown.

[130] It is assumed that Canadian parties to SIAC arbitrations are more likely to come from Common Law Canada than from Quebec.

[131] 2011: 88 parties (including 5 from Singapore, 15 from the U.K., and 2 from Canada) out of 254; 2012: 158 parties (including 74 from Singapore and 1 from the U.K.) out of 356. *See supra* Tables 3 and 4.

[132] In addition, although it is not possible to identify trends by analyzing data for two years only, it is interesting to note the two following evolutions. While the share of parties originating from British common law jurisdictions in SIAC arbitrations increased between 2011 and 2012 (from 34% to 44%), the share of English law actually decreased during the same period (from 24% to 19%). *See supra* Table 13. To the contrary, in ICC arbitrations, the share of parties originating from British common law jurisdictions increased between 2011 and 2012 (from 36% to 43%), and so did the share of English law, which increased as well (from 11% to 17%). *See supra* Table 16.

C. Reach of Law Firms

When counsel is involved in the selection of an international commercial contract's governing law, an obvious agency problem is created, as lawyers are self-interested in the final choice. This is because lawyers will typically be admitted to practice the law of one country and will therefore have the possibility to advise clients only if this law is applicable. Thus, when a client is faced with the issue of choosing the law governing an international contract, lawyers have a strong incentive to see the parties agree on the application of the law they practice. If they do, the lawyers will be able to advise the client on the validity and enforceability of the contract and might be consulted in the future should any issue arise between the parties. By contrast, if the parties provide for the application of any other law, the lawyer will lose this opportunity with respect to the particular transaction in the short and in the long term. It is therefore reasonable to expect lawyers to advise their clients to provide for the application of their law, irrespective of whether another law might be better suited to the needs of their client.

It would be wrong to think that such agency problems do not exist in international firms. For any given lawyer, the fact that a law other than the one he or she practices is made applicable by client choice in a contractual negotiation means that he or she will lose business to another lawyer, even if the lawyer works in another office of the same firm. Each of the two lawyers will likely have financial targets to meet and helping partners meet their own target does not improve one's business or help to meet one's own target. Some international law firms have attempted to remedy this agency problem by granting some recognition to lawyers bringing business to others in the firm (client origination), but there is no evidence that such attempts have changed the overall situation.[133]

The interest of lawyers to see parties to international transactions choose the law that they practice raises the question of whether an important factor in the success of English law in Asia could be that there are simply far

[133] According to the 2015 Global Partner Compensation System Survey of Edge International, client origination is "extremely important" in the determination of partners' compensation in 60% of the U.S. law firms, but only in 25% of U.K. law firms. *See* http://www.edge.ai/wp-content/uploads/2015/03/Edge-Compensation-Survey_20150302.pdf (last visited Nov. 20, 2015). What is not known is whether it would be so important that a partner would equally consider keeping a case or forwarding it to another partner. Furthermore, the second most important factor remains personal performance, which likely translates into targets that each of the partners must still meet.

more English lawyers involved in Asian international business transactions and, in particular, far more English lawyers than U.S. lawyers.

There is no available data on the origin and profile of lawyers advising parties to Asian international business transactions. Myriads of such transactions are concluded each day and unreported. Data gathered by arbitral institutions would be enlightening, but these institutions do not report on the lawyers involved in the cases they handle and have even less information on the lawyers who drafted the contracts out of which the disputes arose. A good proxy for determining the profile of lawyers advising parties to Asian international business transactions, however, is to study the profile of lawyers based in Asia. Of course, lawyers assisting such parties need not be based in Asia. Transactions linked to Asian investments directed to the United States or to Europe should logically involve lawyers of the place of the investment, i.e., lawyers based in the United States or in Europe. Yet, for transactions with a strong nexus in Asia, it is likely that parties would seek lawyers with expertise in Asia. While it is conceivable that lawyers with such expertise may be based outside of Asia, most would be found in Asia. Furthermore, everything else being equal, Asian parties would probably prefer to hire a lawyer based in Asia rather than a lawyer based on the other side of the globe, if only for reasons of convenience, such as being in same time zone, the possibility of meeting in person, etc. The growing number of international law firms with offices in major Asian centers also demonstrates that a significant part of Asian legal business is done in Asia.

This article therefore assumes that the respective numbers of English and U.S. lawyers based in Asia would give interesting indications as to the profile of lawyers advising parties to Asian international business transactions. Before presenting data on international lawyers practicing in Asia, a number of preliminary remarks are in order. First, the practice of law is not open to foreign lawyers in all Asian jurisdictions. India, Indonesia, the Philippines, and Thailand all have legal markets reserved to local lawyers where foreign lawyers may not practice.[134] South Korea and Malaysia have only recently liberalized their legal markets.[135] Aside from

[134] *See* Advocates Act, No. 25 of 1961, INDIA CODE (1961); Law Relating to Advocates, No. 18 of 2003, Indonesia (2003); RULES OF CIVIL PROCEDURE, 138 § 2; CONST. art. XII, §14 (Phil.); FOREIGN BUSINESS ACT B.E. 2542 § 8 (1999) (Thai).

[135] *See* Attorney General's Chambers of Malaysia, LEGAL PROFESSION (LICENSING OF INTERNATIONAL PARTNERSHIPS AND QUALIFIED FOREIGN LAW FIRMS AND REGISTRATION OF FOREIGN LAWYERS) RULES (ATTORNEY GENERAL'S CHAMBERS OF MALAYSIA 2014); Jeanne Lee John, *The Korus*

Mainland China, international firms have primarily opened offices in Singapore, Hong Kong, and Japan. I therefore focus on these three jurisdictions. Second, I assume that decisions to advise clients to provide for the application of a given law will only be made by partners or (of) counsels, and therefore exclude all other categories of lawyers from my inquiry. Third, I look at the primary legal education received by international lawyers based in Asia. I assume that lawyers will, for the most part, practice the law in which they received this primary education and have incentives to advocate for this law to be chosen by their clients. I therefore ignore graduate education in other countries and, in particular, ignore the fact that lawyers might have received an LL.M. from a U.S. law school.[136] For instance, Japanese lawyers who received primary legal education in Japan and a U.S. LL.M. will practice Japanese law after returning to Japan and will then become partners, possibly in U.S. law firms, for the purpose of advising clients on Japanese law.

Finally, it is important to again consider[137] how similar the contract laws of Hong Kong, Singapore, and, to a lesser extent, Australia are to English law. A lawyer trained in one of these jurisdictions can easily practice and advise in the law of any other of these jurisdictions. This means that, for an Australia- or a Hong Kong-educated lawyer, the decision of a client to provide for the application of English law to his contract does not mean that he or she would be unable to continue to advise the client with respect to the relevant transaction. This explains why many partners in Asian offices of U.K. law firms not only were educated in Hong Kong and Singapore, but also in Australia. They certainly do not practice Australian law in Singapore or Hong Kong, but rather either English law or the local common law (i.e., Singapore or Hong Kong law). For the purpose of this article, therefore, it is meaningless to distinguish between English-educated lawyers and lawyers educated in other British common law jurisdictions. When it comes to international business transactions, they all belong to the extended British common law family.

FTA on Foreign Law Firms and Attorneys in South Korea—A Contemporary Analysis on Expansion into East Asia, 33 NW. J. INT'L L. & BUS. 237 (2012).

[136] I know from personal experience that while such degrees might be an important factor to be recruited in a foreign office of a U.S. firm, lawyers holding such degrees will then practice the law of the local jurisdiction where they are hired.

[137] *See supra* Part V. B (discussing colonial influence).

1. Singapore and Hong Kong

The Singapore and Hong Kong international legal markets are dominated by English law firms. According to Asian Legal Business,[138] six of the ten biggest Singapore offices of international law firms and six of the ten biggest Hong Kong offices of international law firms are offices of English law firms.[139] Two others in Singapore and one other in Hong Kong are offices of English firms that have merged with U.S. firms.[140] Unsurprisingly, offices of English law firms are staffed with British common law-educated lawyers.[141]

Remarkably, offices of U.S. law firms are also dominated by British common law-educated lawyers. The biggest offices of U.S. firms in Singapore and in Hong Kong rely on British common law-educated professionals, who represent 65–95% of the partners based in Singapore and 85–97% of the partners based in Hong Kong. Some U.S. firms have a different model: smaller offices with a bigger proportion of U.S.-educated partners, who then constitute about half of the partners based in the relevant Singapore office, but never more than 35% of the partners based in the relevant Hong Kong office.[142]

Table 23: Education of Partners in Offices of Selected U.S. Law Firms in Singapore

U.S. Law Firm	British Common Law	U.S.
Baker & McKenzie, Wong & Leow	25	1
Jones Day	10	5
Latham Watkins	11	3
Morrison Foerster	3	4
Sidley Austin	5	4

[138] *Asia's Top 50 Largest Law Firms*, ASIAN LEGAL BUSINESS (Nov. 2014), http://www.legal businessonline .com /features/asia%E2%80%99s-top-50-largest-law-firms/68885.

[139] *Id*. The list of large English law firms in Hong Kong includes Clifford Chance, Linklaters, King & Wood Mallesons, Allen & Overy, Reed Smith Richards Butler, and Herbert Smith Freehills.

[140] *Id*. The English firms merged with U.S. firms that are active in Singapore are Norton Rose Fullbright and Hogan Lovells. The English firm merged with a U.S. firm active in Hong Kong is Freshfields Bruckhaus Derringer.

[141] *See infra* Tables 23 & 26.

[142] *See infra* Tables 23 & 25.

Table 24: Education of Partners in Seven of the Largest Offices of International Law Firms in Singapore[143]

Law Firm	British Common Law	U.S.	Other
Baker & McKenzie, Wong & Leow	25	1	
Clifford Chance	16	2	
Norton Rose Fullbright	19		
Allen & Overy	12		
Linklaters	9	2	2
Jones Day	10	5	
Latham Watkins	11	3	

Table 25: Education of Partners in Largest Offices of U.S. Law Firms in Hong Kong

U.S. Law Firm	British Common Law	U.S.	PRC
Mayer Brown	59	1	1
Baker & McKenzie	52	7	
DLA Piper	24	3	1
Jones Day	16	7	2
Latham Watkins	13	8	
Sidley Austin	15	5	
Morrison Foerster	7	5	2

Table 26: Education of Partners in the Seven Largest Offices of International Law Firms in Hong Kong

Law Firm	British Common Law	U.S.	PRC	Other
Mayer Brown	59	1	1	
Baker & McKenzie	52	7		3
Clifford Chance	28	2	1	2
Linklaters	24	2		2
DLA Piper	24	3	1	
King & Wood Mallesons	14	4	2	
Allen & Overy	18	3		

In the seven biggest offices of international law firms in Singapore and in Hong Kong, 87% and 86% of the partners or counsels working in the relevant offices of the two cities received their education in a law school of the British common law world, i.e., essentially Singapore, Hong Kong,

[143] Watson Farley and Williams and Herbert Smith Freehills are excluded from the inquiry because their websites do not report consistently on the education of the partners.

England, and Australia.[144] The incentive for these lawyers to advise their clients to choose English, Singapore, or Hong Kong law over any other is obvious.

2. Japan

According to Asian Legal Business, the presence of American law firms in Japan is much higher than in the rest of Asia.[145] The five largest offices of international firms in Japan are all offices of U.S. firms. If one focuses on the number of partners—as opposed to fee-earners—U.S. firms represent the eight largest offices of international firms in Japan.

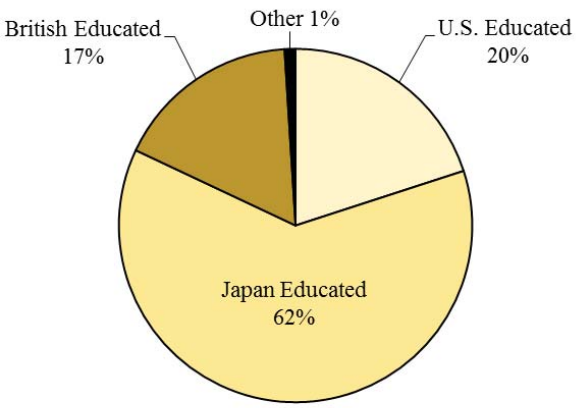
Unlike Southeast Asia, offices of U.S. firms in Japan are staffed with U.S.-educated lawyers and Japanese lawyers. They rarely have British common law-educated lawyers as partners. By contrast, the partners at English firms are typically British common law-educated.[146] As a result, there is roughly an equal number of U.S.-trained and British common law-trained lawyers based in Japan.[147]

Table 27: Education of Partners in the 14 Largest Offices of International Law Firms in Japan

Law Firm	U.S.	Japan	British Common Law	Other
Baker & McKenzie	3	57	6	1
Morrison Foerster	29	25	0	0
Bingham McCutchen	1	33	0	0
White & Case	6	7	4	0
Jones Day	7	16	0	0
K&L Gates	3	6	0	1
Orrick, Herrington & Sutcliffe	5	6	0	0
Hogan Lovells	2	5	5	1
Freshfields, Bruckhaus, Derringer	0	7	5	0
Ashurst	1	1	7	0
Clifford Chance	0	4	4	0
Linklaters	0	5	3	0
Herbert Smith Freehills	0	0	6	0
Allen & Overy	0	1	6	0
Total	57	173	46	3

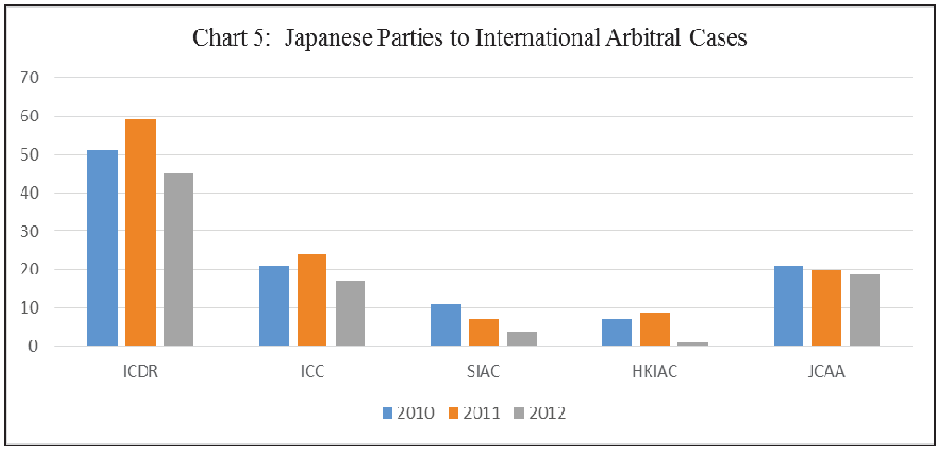
[144] *See supra* Tables 24 & 26.
[145] *Asia's Top 50 Largest Law Firms*, *supra* note 138.
[146] *See infra* Table 27.
[147] *See infra* Chart 4.

Chart 4: Lawyers Practicing in the 14 Largest Offices of U.S./U.K. Firms



An interesting question is whether there is a correlation between the high number of U.S. lawyers practicing in Japan and the choice of U.S. laws in international business transactions involving Japanese parties. The question can be answered indirectly by noting that Japanese parties were the most represented parties in ICDR arbitration from 2010 until 2012, a close second in 2013,[148] and that ICDR handles twice as many cases involving Japanese parties as the ICC, SIAC, and HKIAC combined.[149] Between 2010 and 2012, 49% of cases involving Japanese parties were handled by ICDR, while the ICC, SIAC, and HKIAC handled 20%, 7%, and 5% of such cases, respectively, and the Japanese arbitral institution (JCAA) 19%.

[148] *See supra* Table 12.
[149] *See infra* Chart 5.



As previously explained,[150] it is highly likely that, in the vast majority of ICDR cases involving Asian parties, the substantive law chosen by the parties was a U.S. law. It follows that there indeed appears to be a correlation between the number of U.S. lawyers practicing in Japan and the number of transactions where parties chose a U.S. law as the applicable substantive law.

Of course, it must be underscored that Japan and the United States are major economic partners. According to the U.S. Congressional Research Service, which issues reports on U.S. direct investment abroad,[151] Foreign direct investment in the United States,[152] and U.S. International Trade[153] each year, Japan has consistently received more U.S. direct investment (investment placed in holding companies excluded) than any other country of the Asia/Pacific region since 2008[154] and has consistently spent far more direct investment in the United States than any other country of the Asia/Pacific region. Furthermore, between 2007 and 2011, Japan has

[150] *Supra* notes 61–64 and accompanying text.

[151] *See, e.g.*, JAMES K. JACKSON, CONG. RESEARCH SERV., RS21118, U.S. DIRECT INVESTMENT ABROAD: TRENDS AND CURRENT ISSUES (2013), https://www.fas.org/sgp/crs/misc/RS21118.pdf.

[152] *See, e.g.*, JAMES K. JACKSON, CONG. RESEARCH SERV., RS 21857, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES: AN ECONOMIC ANALYSIS (2013), https://www.fas.org/sgp/crs/misc/RS21857.pdf.

[153] *See, e.g.*, BROCK R. WILLIAMS & J. MICHAEL DONNELLY, CONG. RESEARCH SERV., RL33577, U.S. INTERNATIONAL TRADE: TRENDS AND FORECASTS, (2012), https://www.fas.org/sgp/crs/misc/RL33577.pdf; DICK K. NANTO & J. MICHAEL DONNELLY, U.S. INTERNATIONAL TRADE: TRENDS AND FORECASTS, (2011), http://fpc.state.gov/documents/organization/174192.pdf; DICK K. NANTO, SHAYERAH ILIAS & J. MICHAEL DONNELLY, CONG. RESEARCH SERV., RL35377, U.S. INTERNATIONAL TRADE: TRENDS AND FORECASTS (2010), http://fpc.state.gov/documents/organization/152627.pdf.

[154] China included: China receives about half of the amounts invested in Japan. In 2008, Australia ranked first, as it received slightly more U.S. investment than Japan (USD 74 billion against USD 73 billion for Japan). *See* JACKSON, *supra* note 151.

consistently been the second trading partner of the United States in the region after—and gradually losing ground to—China. It is therefore logical that Japanese and U.S. parties conclude many international business transactions each year and that Japan is the most represented nationality in ICDR arbitration. In turn, it is only logical that the high number of commercial transactions between the two countries led many U.S. lawyers to focus on Japan and some of them to move there. Yet, this does not change the fact that there are many more U.S. lawyers in Japan than in any other Asian country and that this might be an essential reason why U.S. laws are chosen as the law governing so many contracts concluded between Japanese and U.S. parties. After all, if the presence of U.S. lawyers had been as low in Japan as it is elsewhere in Asia, it is likely that local parties would have hired English lawyers, as they do in the rest of Asia, and that these lawyers would have advised to provide for the application of English law and for ICC, SIAC, or HKIAC arbitration. Whichever part of the legal business requiring local presence would have been lost. Again, it is unclear how much of the business requires a local presence. For instance, U.S. lawyers would probably have been hired anyway by Japanese companies willing to invest in the U.S. But, as previously argued, there is no doubt that a part of the business does require local presence and that U.S. lawyers were able to capture this business because they were present.

D. Fear of the American Way of Law

American lawyers and scholars correctly underscore American exceptionalism. The American way of law is unique.[155] As a result, a number of rules of U.S. law are not found in any other jurisdiction and are looked at with amazement by the rest of the world. And for that purpose, there is no need to be a graduate student in a U.S. law school. The continuous flow of American movies and series featuring the American legal and judicial system will have exposed the vast majority of educated people throughout the world to its most striking particularities.

Those particularities do not make the American legal system better or worse. But there is no doubt that they generate incomprehension and wonder in the rest of the world, and that incomprehension stirs up suspicion and fear. In this respect, stories of old ladies obtaining millions in damages

[155] *See generally* ROBERT A. KAGAN, ADVERSARIAL LEGALISM—THE AMERICAN WAY OF LAW (2001).

for being served a hot coffee in a fast food restaurant are extremely damaging. [156]

In 2011, a Task Force of the New York State Bar Association circulated a questionnaire among New York legal professionals asking what factors make New York law less desirable as governing law for cross-border commercial transactions. One of the two published responses stated: "U.S. litigation time, cost and anomalous aspects such as punitive damages; submission to U.S. jurisdiction for foreign entities and U.S. style discovery."[157] The same questionnaire also asked about factors that make New York courts less desirable as fora for resolution of international legal disputes. One of the published responses stated: "Generally, three things put off foreign contracting parties: punitive damages, jury trials and absence of loser pays."[158]

Many of the peculiarities of U.S. law are procedural in character: jury trials, discovery, class actions and the like. Thus, they would only be relevant to cases litigated in the United States. By contrast, these three peculiarities and the threat of punitive damages would be plainly irrelevant in the context of arbitration in Singapore or Hong Kong.[159] Parties to Asian business transactions could thus choose New York or California state law as the law governing the substance of their transaction with a clause providing for arbitration in Asia without fear of these peculiarities coming into play. But the distinction between venue and substantive law is a delicate one for non-lawyers and possibly even for some lawyers.[160] Indeed, parties often link both when drafting their contract, as is demonstrated by the success of Singapore law in cases going to SIAC and the success of Swiss law in cases going to arbitration in Switzerland. [161] For many commercial parties, it may appear safer to simply avoid any reference whatsoever to the American system, venue or applicable law because the distinction is simply too

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[156] Liebeck v. McDonald's Restaurants, P.T.S., Inc., 1995 WL 360309 (D.N.M. 1994) (the award was reduced by the judge, and the parties eventually settled, but the story remains of note).

[157] FINAL REPORT OF THE NEW YORK STATE BAR ASSOCIATION'S TASK FORCE ON NEW YORK LAW IN INTERNATIONAL MATTERS 73 (2011), http://www.nysba.org/internationalreport [hereinafter NEW YORK BAR ASSOCIATION TASK FORCE].

[158] *Id*. at 75.

[159] Punitive damages are typically excluded in international commercial arbitration, except in the United States. *See, e.g.*, Flintlock Const. Services, LLC v. Weiss, No. 156278/12, 2012 WL 5305213 (N.Y. Sup. Ct. 2012) (upholding the power of arbitrators seated in New York to award punitive damages), *aff'd by* 991 N.Y.S. 2d 408 (2012).

[160] *See* NEW YORK BAR ASSOCIATION TASK FORCE, *supra* note 157 and accompanying text (the response to the first question of the questionnaire of the task force reported).

[161] *See supra* notes 76–78 and accompanying text.

sophisticated. The data of SIAC and HKIAC, which show that U.S. laws are rarely chosen in arbitration under the aegis of these institutions, confirm this intuition.

VI. CONCLUSION

My analysis identifies four factors that likely contribute to the remarkable success of English law in Asia. While it is not possible to determine the relative importance of each of these factors, it seems that the presence of British common law-educated lawyers in Asia and the fear that the U.S. legal system generates are the most important. If this is correct, it means that English law may owe its success to factors unrelated to the intrinsic quality of English contract law. This conclusion would confirm the finding that parties to international business transactions are not necessarily sophisticated from a legal point of view or can suffer from cognitive limitations.[162]

This article's primary purpose was to inquire as to whether there are regional variations in party preferences with respect to the law applicable to their business transactions. The data studied in this article compared to that of the ICC clearly show that such regional differences exist, at least between Asia and Europe. Received wisdom is that parties' preferences in South America are also different.[163] It would indeed be interesting to conduct similar studies in both North and South America, if comparable data can be found.[164]

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[162] Cuniberti, *supra* note 7, at 508.
[163] *See generally* THE ECONOMIST, *supra* note 1.
[164] The author is presently conducting such research on Latin America.