STEPS TOWARD AN INTERNATIONAL ARBITRATION CULTURE? A DISSENTING VIEW FROM THE PEOPLE'S REPUBLIC OF CHINA

By Anne-Marie Loong*

I. INTRODUCTION

The relationship between legal culture[1] and the practice of international commercial arbitration has received increasing attention in recent years. International commercial arbitration is said to provide "a meeting point for different legal cultures, a place of convergence and interchange wherein practitioners from different backgrounds create new practices."[2] Indeed, in the context of globalization, arbitral proceedings are increasingly conducted in a uniform manner regardless of the place of arbitration and any governing national law.[3] This article evaluates the recent hype surrounding the concept

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* B.A. (McGill, 2001), LL.B, B.C.L. (McGill, 2006). The author wishes to thank Neil Kaplan and Christopher To for their invaluable comments on previous drafts of this article. The views expressed herein are solely the author's.

[1] This concept will be discussed in section B below. Briefly, legal culture encompasses (i) the differences between civil and common law traditions, and (ii) the aspects of national or regional cultures that find expression in the legal system. *See* PHILLIP R. HARRIS & ROBERT T. MORGAN, MANAGING CULTURAL DIFFERENCES (1996) (broadly defined, culture "give[s] people a sense of who they are, of belonging, of how they should behave, and what they should be doing."); David Nelken, *Toward a Sociology of Legal Adaptation*, *in* ADAPTING LEGAL CULTURES (David Nelken & Johannes Feest eds.,2001) (legal culture 'points to differences in the way features of law are themselves embedded in larger frameworks of social structure and culture which constitute and reveal the place of law in society').

[2] Tom Ginsburg, *Symposium: International Commercial Arbitration: The Culture of Arbitration*, 36 VAND. J. TRANSNAT'L L. 1335 (2003).

[3] A detailed discussion of procedural convergence in international arbitration law is beyond the scope of this article. Briefly, in considering whether an autonomous set of a-national rules has emerged, a sort of *lex mercatoria*, two factors can be examined: the instruments shaping arbitral procedure and the actual implementation of the standardised arbitral procedures. *See* Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VAND. J. TRANSNAT'L L. 1313, 1319 (2003) [hereinafter Globalization]. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.Y.S. 3, 21 U.S.T.

of an International Commercial Arbitration Culture ('International Arbitration Culture'), which typically refers to the gradual convergence in norms, procedures, and expectations of participants in the arbitral process.[4] Specifically, the author will argue throughout that International Arbitration Culture provides an unsatisfactory explanation or basis for the greater harmonization[5] in arbitral proceedings, an opinion which runs contrary to several views expressed at the 1996 International Counsel for Commercial Arbitration ('ICCA')[6] Conference in Seoul. The author suspects that the notion of International Arbitration Culture is a Western innovation that will not necessarily resonate with the experiences of non-Western countries and their respective arbitral practices. As such, the author does not accept the third component of the above mentioned definition of International Commercial Arbitration which pertains to a convergence in the expectation of participants in the arbitral process. Instead, procedural harmonization is

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2517, T.I.A.S. No. 6997 [hereinafter New York Convention] and UNCITRAL Model Law on International Commercial Arbitration, June 21, 1985, Art. 11, UN Doc. A/40/17, Annex 1 (1985) are hailed as the main architects of International Arbitration Culture. The former has been instrumental in creating a uniform standard for international arbitration practice while the latter has made significant contributions toward the unification of arbitration law and rules. *See* Bernardo M. Cremades, *Introductory Remarks: International Dispute Resolution – Towards an International Arbitration Culture*, *in* Dispute Resolution: Towards an International Arbitration Culture, ICCA CONGRESS SERIES NO.8, 13, 35 (Albert Jan van den Berg ed., 1996) [hereinafter ICCA CONGRESS]. There are, however, manifold instruments of procedural convergence. Those of primary importance include the UNICITRAL Arbitration Rules of 1976 and the 1999 International Bar Association ('IBA') Rules on the Taking of Evidence in International Commercial Arbitration. Equally important are the arbitration rules produced by major European institutions, such as the International Chamber of Commerce, the London Court of International Arbitration, Vienna and Stockholm Chambers of Commerce, Arbitration Centre of the World Intellectual Property Organization, and the International Arbitration Rules of the American Arbitration Association. In Asia, there are the Rules of the Hong Kong International Arbitration Centre. Further, one should not forget the *ad hoc* rules set by the arbitrators at the beginning or during the course of proceedings which seek to accommodate different legal cultures whenever the parties are from diverse backgrounds. The actual implementation of these instruments has led to the progressive standardisation of arbitral procedure. The invaluable merit is the merging of different procedural practices, principally evident in the fusion of the civil and common law approach to civil procedure law as well as the decreasing importance of national law over arbitral proceedings. For a detailed discussion, see Globalization. *Id.* This is despite the fact that the domestic law of the forum officially governs in matters of procedure. *See* ALBERT VENN DICEY, DICEY AND MORRIS ON THE CONFLICT OF LAWS 169 (1993).

[4] ICCA CONGRESS, *supra* note 3, at 31-34.

[5] The term 'harmonisation' will be used interchangeably with convergence.

[6] Since its inception, the ICCA has been devoted to the promotion of international arbitration and other forms of dispute resolution by means of meetings and subsequent publications. *See* ICCA, *About ICCA*, obtainable from <http://www.arbitration-icca.org/about_icca.htm> (visited August 15, 2005).

better understood as a result of competition to capture network benefits. In the rapidly expanding field of international commercial arbitration, standardized rules reduce the cost of interactive behavior.

In the first part of this article, the author will highlight factors that undermine the idea of procedural convergence in international arbitration law as a cultural phenomenon. Due to the private nature of arbitration, it is difficult to obtain comprehensive empirical data that supports the notion of an International Arbitration Culture. Further, the practice of arbitration does not have established roots in the legal traditions or social fabric of any particular country or region that are independent of litigious or conciliatory cultures. Finally, through the use of the People's Republic of China ('China') as a case study, the author will demonstrate that any assertion of an International Arbitration Culture ignores the impact of rule of law problems in transitional legal systems on enforcement of arbitral awards. In the second section of this article, the author will briefly consider the Chinese paradox of high foreign investment and low arbitral enforcement rates. Certainly, rational foreign investors seek legal certainty with respect to the binding nature and enforceability of their contracts. Why then are foreign parties still investing in China at a steady rate? To what extent is an effective and reliable enforcement mechanism a necessary basis for establishing an International Arbitration Culture or further convergence in international arbitration law?

Due to the prevalent discourse that links the phenomenon of procedural convergence to the 'Americanization'[7] of international commercial arbitration, a comparison with the United States ('U.S.') will be engaged in section D.

II. THE CULTURE OF INTERNATIONAL COMMERCIAL ARBITRATION

The concept of International Arbitration Culture, as discussed by the ICCA in 1996, has been chosen as the point of reference because the ideas presented at the conference were published in a book edited by Albert Jan van den Berg[8] which is now widely cited.[9] At the 1996 ICCA conference,

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[7] The term 'Americanization' suggests that the international arbitration process is akin to the adversarial dispute resolution system of the United States. *See* YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1996). *See also* Bryant G. Garth, *Building Strong and Independent Judiciaries through the New Law and Development: Behind the Paradox of Consensus Programs and Perpetually Disappointing Results*, 52 DEPAUL L. REV. 383 (2002) (the dominance of Anglo-American law firms are responsible for arbitral convergence); Susan L. Karamanian, *Overstating the 'Americanization' of International Arbitration: Lessons from ICSID*, 19 OHIO ST. J. ON DISP. RESOL. 5 (2003).

[8] ICCA CONGRESS, *supra* note 3.

[9] *See, e.g.*, Charles N. Brower & Jeremy K. Sharpe, *International Arbitration and the Islamic World: The Third Phase*, 97 A.J.I.L. 643 (2003); Ginsburg, *supra*

several participants from the Western World generally agreed that the current trend is towards a single International Arbitration Culture.[10] Participants equally admitted, however, that the extent, shape, and expected future growth of International Arbitration Culture could not be easily assessed with precision.[11] Perhaps the hegemony of the Anglo-American law firm or, more broadly, 'Americanization,' contributed to the concept that International Arbitration Culture should embody a sense of shared expectations.

At the 1996 ICCA conference, theories of procedural convergence as reflective of an emergent International Arbitration Culture were advanced on the basis of two forms of legal culture. The first concept of culture encompasses those aspects of national culture that find expression in the general legal system.[12] This embodies notions of U.S. legal culture, Japanese legal culture, and more broadly, civil law and common law cultures or even litigious and conciliatory cultures. In effect, legal cultures consist of 'attitudes, values and opinions held in society with regard to the law, the legal system, and its various parts.'[13] For instance, these values may be expressed as a preference for mediation over litigation or for oral procedures over written ones. The second type of culture consists of shared norms and expectations created by legal actors that engage in repeated interactions. Culture is thus 'the result of long-term developments and interrelated influences of factual, political, sociological, and legal factors.'[14] Lawyers form a community of professionals with common training and expertise which, when combined with regular professional interactions, result in a common set of expectations.[15] According to one participant of

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note 2; Tiffany J. Lanier, *Where on Earth Does Cyber-Arbitration Occur?: International Review of Arbitral Awards Rendered Online*, 7 ILSA J INT'L & COMP L. 1 (2000); Matthias Lehmann, *A Plea for a Transnational Approach to Arbitrability in Arbitral Practice*, 42 COLUM. J. TRANSNAT'L L. 753 (2004); Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT'L L. 341 (2002).

[10] Out of 21 contributors to ICCA CONGRESS, *supra* note 3, there were participants from America (3); Austria (1); Brazil (1); China (1); Egypt (1); France (1); Germany (1); Hong Kong (1); Hungary (1); India (1); Italy (1); Japan (1); Korea (1); Mexico (1); Nigeria (1); Russian Federation (1); Spain (1); Switzerland (2). This list does not include the participants who delivered opening, welcoming. and congratulatory addresses.

[11] *See, e.g.*, Gerold Herrmann, *UNCITRAL's Basic Contribution to the International Arbitration Culture*, *in* ICCA CONGRESS, *supra* note 3, at 49; Karl-Heinz Böckstiegel, *The Role of National Courts in the Development of an Arbitration Culture*, *in* ICCA CONGRESS. *id.* at 219.

[12] Giorgio Bernini, *Is There a Growing International Arbitration Culture?*, *in* ICCA CONGRESS, *supra* note 3, at 41. *See also* Nelken, *supra* note 1.

[13] LAWRENCE M. FRIEDMAN, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE 15 (1975).

[14] Bernini, *supra* note 12.

[15] Ginsberg, *supra* note 1, at 1337.

the 1996 ICCA conference, International Arbitration Culture is based on decency, defined as a desire to preserve the integrity of the arbitral process, to honor commitments and to carry out obligations in good faith.[16] For example, parties to an arbitration agreement will not refuse to appoint an arbitrator as previously agreed.[17] Thus, it is argued that the expectation of decency shapes the behavior of parties during interactive practices and is a component of International Arbitration Culture.

1. The Volume of Arbitration Applications and Investment in China

Given the Western context from which the concept emerged, the best way to assess the plausibility of an International Arbitration Culture is to examine its presence in a non-Western context. China has been chosen as a point of reference for two reasons. Firstly, with respect to the volume of new cases filed each year, China is one of the world's leading sites for the conduct of institutional international commercial arbitrations. Between 1995 and 2004 inclusive, the China International Economic and Trade Arbitration Commission ('CIETAC') received 7,174 new international commercial arbitrations and, since 1997, the Hong Kong International Arbitration Centre ('HKIAC') received 2,207, totaling 9,394 new arbitrations in China.[18] As a note of caution, due to the lack of reliable statistics, these figures do not include all the 'foreign element' cases heard by all Chinese commissions nor the thousands and perhaps tens of thousands of *ad hoc* cases happening around the world. Secondly, the volume of

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[16] Herrmann, *supra* note 10.

[17] In public international law, it can be argued that decency requires a domestic court that acts as an organ of the state for whose actions that state is internationally responsible to recognize arbitral awards as binding and enforceable and to not refuse recognition and enforcement on the grounds that they do not or may not fall within the bounds of Article V of the New York Convention. Stephen Schwebel, former President of the International Court of Justice, in an article presented in Paris on November 21, 2003 to *the Institut pour l'Arbitrage International* during the course of a seminar devoted to the problem of anti-suit injunctions explains:

> A party to a treaty is bound under international law — as codified by the Vienna Convention on the Law of Treaties — to perform it in good faith. As the Vienna Convention prescribes, a party may not invoke the provisions of its internal law as justification not to perform a treaty. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context in light of its object and purpose. The object and purpose of the New York Convention is to ensure that agreements to arbitrate and the resultant awards — at any rate, the resultant foreign awards — are recognised and enforced

See Neil Kaplan, *The Good the Bad and the Ugly*, 70(3) ARB.183, 187-88 (2004).

[18] Hong Kong International Arbitration Centre (HKIAC), *Statistics: International Arbitration Cases Received*, obtainable from <http://www.hkiac.org/main.html> (visited August 25, 2005).