"LEGAL TRADITIONS” AND INTERNATIONAL COMMERCIAL ARBITRATION

by

Leon Trakman*

We lawyers have often invoked "cultural differences" to mean a clash of legal processes—such as the different procedures used in Civil and Common Law countries. More recently, "cultural differences" have been invoked by both Civil and Common-law practitioners to criticize—with some justification—the use by U.S. attorneys of litigation-style procedures in the arbitration forum that expand the time and costs of the arbitration process….But another cultural development that has the pendulum swinging in the other direction seems to have gone virtually unnoticed. That is the growing impact of international norms on arbitration practices … William K. Slate II, President and CEO of the American Arbitration Association, in a speech delivered on May 18, 2004, at the 17th ICCA conference in Beijing, China.1

Codes, laws and guidelines governing international commercial arbitration developed by such organizations as the International Court of Arbitration (ICA), the International Bar Association (IBA) and the International Chamber of Commerce (ICC) have been drafted against the background of Common Law and Civil Law values. In balancing these two great legal traditions, it was assumed that together they

* S.J.D. Harvard; Immediate Past Dean and Professor of Law, Faculty of Law, University of New South Wales, Sydney, Australia. My thanks to Stewart Macaulay of the Wisconsin Law School for his insight, Bryan Mercurio, Beverly Moran and Nick Ranieri for their comments on an earlier draft, and the University of New South Wales for funding this study. A particular debt of gratitude is owed to fellow arbitrators on the panels of the American Arbitration Association (AAA), the North American Free Trade Agreement (NAFTA), the International Chamber of Commerce (ICC) and London Court of International Arbitration (LCIA), among others, for inspiring me to write this article.

represent a composite legal tradition governing international commercial arbitration. The result of that assumption was decades of fine work enshrining international arbitration doctrines, principles, and rules of law and procedures that blend these two important legal traditions. From the doctrine of freedom of contract to specific rules of evidence and procedures that govern arbitral hearings, the international arbitration community has sought to maintain the respected legal traditions that lawyer-arbitrators and counsel find familiar and comfortable.

More recent concerns, partly expressed by William K. Slate II, President of the American Arbitration Association, have begun to raise such questions as: How pervasive are the Common and Civil Law traditions? Are they sufficiently uniform in nature and operation to justify their dominant status in formulating codes, laws and rules governing international commercial arbitration? And has international commercial arbitration become unduly reliant upon both the Common and Civil Law traditions at the expense of other legal traditions that operate against the background of different and changing legal cultures?

Part I of this article asks: What is a legal tradition and how should it be distinguished from a legal culture in relation to international commercial arbitration? Part II reflects on the influence of legal culture on international commercial arbitration. Parts III, IV and V investigate the Common and Civil legal traditions in relation to national, regional and international commercial arbitration. Part VI evaluates the public traditions that surround international commercial arbitration. Part VII considers whether change in the traditions of international commercial arbitration represent culture change or culture shock. Part VIII emphasizes the value of building an inclusive international arbitration tradition. Part IX suggests ways in which international commercial arbitration can accommodate diffuse and changing local, regional and global influences upon it.

I. Distinguishing a Legal Culture from a Legal Tradition

A legal culture is distinguishable from, and wider than, a legal tradition. Identifying a legal culture involves an analysis of the parameters of the nature, source and operation of that culture.3

---


3 See generally, Roger Cotterrell, The Concept of Legal Culture, Chapter 1 in David Nelken, ed., Comparing Legal Cultures, 13-31(Aldershot: Dartmouth Publishing Company, 1997); Alan Watson,
The source of a culture may revert back to social, political and economic traditions in which that culture is grounded. For example, its source may be associated politically and economically with the advent of a constitutional democracy, and in particular with liberalism as a philosophy that impacts upon substantive legal norms like freedom of contract.\(^4\) Or, quite differently, the source of a culture may derive from social practice, such as from an informal practice in which businessmen make “deals” over the phone, rather than by relying on strict legal forms and precedents, and lawyers.\(^5\)

The content of a legal culture may find formal expression in a legal tradition, such as in codes, statutes and judicial decisions which are set out in the principles, standards and rules of law governing arbitration. It may also be expressed in the opinions of jurists through which that law is extolled, interpreted and applied.\(^6\) The content of a legal culture may lead to so-called cultural determinism, as when one legal culture is perceived as determining the nature and content of other cultures, as was imputed to the “Civilizing” culture of Rome over the customary legal cultures of pre-medieval Europe,\(^7\) or more controversially, the “Americanization” of commercial law in the

---


\(^5\) Perhaps the most influential school of thought on these propositions is the “law and society” movement in the United States. Their rationale is that significant segments of the American business community place primacy on informal methods of concluding business deals – typically over the phone or coffee, or on the golf course – rather than rely on lawyers and formal contracts that include dispute resolution clauses. The rationale of leading figures like Stewart Macaulay is that businesses operate somewhat in the hopeful expectation that the informal deal that anticipates performance with be more beneficial – and less costly – than the form contract that stresses the risk of non-performance and breach. For now classical commentary, see Stewart Macaulay, *Macaulay, Non-Contractual Relations and Business: A Preliminary Study*, 28 Am. Sociol. Rev. 55 (1963). See too Stewart Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 Law & Soc. Rev. 507 (1977); Stewart Macaulay, *An Empirical View of Contract*, 1985 Wis. L. Rev. 465; Macaulay, *Freedom From Contract: Solutions in Search of a Problem?* 2004 Wis. L. Rev. 777.


Finally, a transcendent legal culture may be sought around unifying attributes in different legal cultures, such as around the rule of law. The development of a legal culture may follow religious, political, or social patterns, or some combination of all three. A legal culture may also evolve out of market forces that impact upon it differently over time, place and space.

The operation of a legal culture may be described in the legal literature that outlines how legal rules ought to work in theory and how they actually function in practice. A legal culture may also develop in response to social values that are attributed to law, for example, rendering the operation of law efficient, comprehensible, or fair. A legal culture may be described in attitudes towards law, such as the attitudes of the international business community to the cost, impartiality and reliability of national courts of law, or the attitudes of politicians to the regulation of international business through domestic legislation. Typifying social attitudes to the operation of law is William’s Slade’s depiction of American lawyers as litigious.

A legal tradition is conceived more narrowly than a legal culture and in some measure is a subset of that culture. Identifying a legal tradition includes analysing the source, development and operation of a legal system itself. For example, a legal tradition may be founded upon Roman law as its primary source. That tradition may be identified with specific institutional sources, such as Justinian’s Sixth Century codification of Roman law. A legal tradition may also follow a determinative history, such as the evolution of Roman law into Civil Law, its reception into the

---

8 See Wolfgang Wiegand, Americanization of Law: Reception or Convergence? In Legal Culture and the Legal Profession, infra note 8.


10 Ehhard Blankenberg, Patterns of Legal Culture: The Netherlands Compared to Neighboring Germany, 46 Am. J. Comp. Law 1 (1998).


16 On the reception of Roman Law into the Civil Law Systems of Europe, see e.g. John Henry Merryman, The Civil Law Tradition 2nd ed (Stanford, CA: Stanford Un Press, 1985); Peter Stein,
“modern” European law and its particularization in different national legal systems with the advent of the modern nation state.\(^\text{17}\)

Study of a legal tradition may assist in identifying diverse sources and influences upon it, such as the influence of Canon Law upon Roman Law,\(^\text{18}\) or the impact of the enlightenment upon Civil Law, or the fracturing of Roman Law in England and the growth of the early Common Law in the wake of William the Conqueror’s invasion of England in 1066 AD.\(^\text{19}\)

The development of a legal tradition as it applies to international commercial arbitration may encompass a particular historical institution, such as the influence of the Medieval Law Merchant upon the evolution of modern international commercial arbitration.\(^\text{20}\) An arbitration tradition may include an amalgam of influences, such as the impact of various European, American and Asian legal systems on the one hand and customary legal systems on the other upon contractual practices associated with commercial arbitration.\(^\text{21}\) The development of an arbitration tradition may also include global traditions, such as the institutionalization of arbitration in international arbitration codes, laws and guidelines and the manner in which commercial arbitration is practiced in a particular region or global community generally.\(^\text{22}\)

In some respects, the Medieval Law Merchant reflects a legal tradition among merchants that both predated and impacted modern international commercial arbitration.\(^\text{23}\) At its most expansive, the Law Merchant was cosmopolitan in incorporating the trading practices of itinerant merchants who travelled across the then known world trading in their wares.\(^\text{24}\) Merchant judges presided over distinctly

---


\(^{21}\) This interface between Civil Law and customary practice, for example in the use and non-use of contract law, is apparent in the law of obligations of Japan, see e.g. W. Gray, The Use and Non-use of Contract Law in Japan, in Law and Society in Contemporary Japan: American Perspectives 243-262 (Dubuque, Iowa: Kendall Hunt, 1988); Zentaro Kitagawa, Use and Non-Use of Contracts in Japanese Business Relations: A Comparative Analysis in Harold Baum, ed., Japan: Economic Success and Legal System 145-165 (Berlin; New York: Walter de Gruyter., 1997); Teruo Doi, International Business Transactions: Contract and Dispute Resolution (Tokyo: The Institute of Comparative Law, 1966).


\(^{24}\) Ibid. In encompassing the legal traditions of merchants, the Medieval Law Merchant included norms, principles and rules of behaviour that governed particular kinds of merchant classes, as distinct
merchant courts. They applied merchant law; and they administered that law in accordance with the customs and practices of merchants who used their services. Merchant courts also sought to arrive at merchant justice in response to the mercantile need for speedy, informal and fair justice, conceptualized as ex aequo et bono. In some respects, it is in this tradition of the Law Merchant that international commercial arbitration has evolved into an alternative means of resolving disputes to national courts of law. It is also in this tradition that modern international commercial arbitration has purported to ground itself in expeditious, low cost, informal and speedy mercantile justice.

However, international commercial arbitration also has a distinctly formal and public law character. Its modern traditions, for example, are reflected in the formal and public stature of the Permanent Court of Arbitration (PCA) that is responsible to resolve disputes between States, including disputes between States and private parties. The traditions of the Permanent Court are clearly public, whereas the traditions of the Law Merchant were decidedly private. So too, the Medieval Law Merchant sought to resolve commercial disputes through the use of informal procedures, while procedures of the Permanent Court are decidedly more formal. At the same time, the PCA describes itself as “… perfectly situated at the juncture between public and private international law to meet the rapidly evolving dispute resolution needs of the international community.”

International commercial arbitration is decidedly more complex today when compared to historical variants of dispute resolution like the Medieval Law Merchant, or even the public law attributes of the Twentieth Century Permanent Court of Arbitration. Our current experience includes the growth, proliferation and partial decline of the nation state; the realignment of regional economic organizations; and ongoing tension between global free trade and the political interests of states and regional organizations in restricting that trade. Given these complexities, one may ask whether a discernible global legal culture can evolve to accommodate social, economic and political differences without being trammelled by them. One may also ask: how such a culture can resolve international commercial disputes through arbitration?

II. Determining the Nature of a Legal Culture

from the local populace. In that sense, it transcended the influences of local princes and kingdoms, while also being associated with particular trades located at market towns and trade fairs.

25 See text accompanying notes 168 & 169.
26 The conception that the Medieval Law Merchant was wholly uniform in nature, wholly insulated from the legal influence of local princes, and evolved in response to the needs of itinerant merchants is perhaps overstated. See Leon E. Trakman, From the Medieval Law Merchant to E-Merchant Law, 53 Toronto L.J.265 (2003).
27 See http://www.pca-cpa.org/ Again, these statements in the text are generalizations; but for the most part they are also apparent on examination of the operation of the Medieval law Merchant, supra note 20, compared to the operation of the Permanent Court, See infra Section VI.
28 The PCA adds: “Under its own modern rules of procedure, which are based upon the highly regarded and widely used UNCITRAL Arbitration Rules, the PCA administers arbitration, conciliation and fact finding in disputes involving various combinations of states, private parties and intergovernmental organizations. Not only do states more frequently seek recourse to the PCA, but international commercial arbitration can also be conducted under PCA auspices.” Cited at http://www.pca-cpa.org/
Determining the nature of a legal “culture” is difficult at the best of times. Social anthropologists identify the development of a “legal culture” with the influence which social, political and economic forces have upon its evolution. However, such an analysis invites a chicken and egg debate over the extent to which social values determine legal cultures, and legal cultures influence social values. For example, to what extent do the tenets of a liberal democracy beget a legal culture that enshrines liberty of contract? Conversely, to what degree does a legal culture imbue respect for contractual promises in the culture of a society? Such discussion is inevitably circular. However, given that arbitration is grounded in party consent, learning how that consent arises in practice within discrete business communities is important in understanding how the culture of international commercial arbitration functions.

Understanding how law impacts on culture and culture upon law also has a significant bearing on the operation of each in relation to the other in the context of international commercial arbitration.

Some may warn against trying to understand the operation of a legal culture in international commercial arbitration largely because the operation of a culture is difficult to measure in a global cultural environment. For example, in contrast with the view that American lawyers may be too litigious is the perception that the American business community often concludes business deals informally and in the expectation of that performance rather than non-performance and breach will eventuate. This latter view typifies a stereotypical view of a domestic business culture that mistrusts lawyers who devise “bullet proof” contracts that are directed more at conflict resolution than conflict avoidance. However, this view of local business culture is less plausible in a global environment in which cultural diversity complicates informal business relationships. It is also difficult to detect substantial evidence of the attributes of a global arbitration culture in the handful of studies that have attempted to measure the impact of different legal cultures upon international commercial arbitration. Such questionnaire and interview analyses as exist are

31 See generally on such debate in relation to the judicial system, Legal Culture and Judicial Reform at http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/LegalCultureBrie.pdf
32 This is not to deny that international business has established informal mechanisms by which organizations can reach agreements and resolve differences with one another. It is simply to note that these mechanisms are likely to be more culturally complex, all other factors being constant, than in domestic business relationships. On the depiction by members of the Law and Society movement of an informal approach by businessmen towards contracts in the United States, see supra note 5.
33 See e.g. Richard W. Naimark & Stephanie E. Keer, Post-Award Experience in International Commercial Arbitration, Dispute Resolution Journal (Feb-Apr 2005). In conducting a questionnaire study specializing in international commercial arbitration, the authors reported: “The survey was administered to the claiming/filing party. We were able to gather data on 118 cases where the claiming/filing party indicated that the award was complied with, at least in part. Of those 118 cases, 18 represented matters in which the claiming/filing party lost the case. For the 100 cases where the claiming/filing party declared itself to be the winner in the case, 74 awards were complied with in full, 4 were partially complied with, and 22 were renegotiated-post award-to establish final settlement terms. For some time we have been aware of discussions about post-award [spelling] negotiations which resulted in alterations to the terms of the award. But prior to this survey, we were uncertain whether any or many such cases would surface. It appears that, while not predominant, renegotiation of the terms of the awards is also not rare.”
prefaced by warnings about the difficulty to identify a reliable sample of respondents in so stratified a community as the international arbitration community.\textsuperscript{34}

Yet another reason posed for being cautious in attempting to identify a legal culture in international commercial arbitration is in realizing that legal cultures are subject to local cultural influences which themselves change over time, place and space. Until several decades ago Japanese businesses were often depicted as being distinctly non-conflictual in their contractual relationships.\textsuperscript{35} Stereotypical Japanese businesses relied on an epic Sixteenth Century tradition of “namawashi” by which they would help their business partners in the face of intervening circumstances beyond control, not because such acts of support formed the basis of expected subsequent reciprocity, but as the embodiment of a consensus around mutual support.\textsuperscript{36} The problem with expanding this tradition beyond Japan’s borders lies in its stereotypical depiction, which cannot fully explicate all its variations and meanings, and the inevitable need to qualify the tradition in relation to a-typical contexts like international trade.\textsuperscript{37} For example, the Japanese Ministry of Foreign Affairs commits itself to maintaining a peaceful and safe international trade environment; but it also undertakes to protect the profits of Japanese business.\textsuperscript{38} Given the perception that the protection of Japanese economic interests often requires an aggressive response to intrusive foreign trade and investment parties, it is understandable that a localized tradition of non-conflictual business relations in Japan may be less fitting in relation to at least some international trade dealings.\textsuperscript{39} So too, one may well expect organizations like the Japan Commercial Arbitration Association not only to encourage the safe conduct of international business, but also to provide processes for resolving commercial disputes in the interests of Japanese business.\textsuperscript{40}

\textsuperscript{34} Ibid. For example, the authors acknowledged limitations in their questionnaire study, in particular that their sample was “non-random” and included only data for those parties to arbitrations who agreed to answer their questionnaire. For a questionnaire on the recognition and enforcement of foreign judgements in Russia, see \url{http://www.ijn.com/articles/pub_267.pdf}


\textsuperscript{37} In recent decades, however, Japan has witnessed a significant increase in reliance on law in domestic not only international business relations. Japanese law schools have sprouted up across the country; the role of lawyers in Japanese society has increased markedly; and Japanese contract lawyers are ever more present in domestic commerce. See generally supra note 35.

\textsuperscript{38} The mission of the Japanese Ministry of Foreign Affairs is “to aim at improvement of the profits of Japan and Japanese nationals, while contributing to maintenance of peaceful and safe international society, and …both to implement a healthy international environment and to keep and develop harmonious foreign relationships.” See \url{http://www.mofa.go.jp/about/index.html}

\textsuperscript{39} Illustrating such trade protectionism, see Lam Peng Er, Japan and the Spratlys Dispute: Aspirations and Limitations, 36 Asian Survey 995 (1996). See generally. Edson W. Spencer, Japan: Stimulus or Scapegoat? Foreign Affairs (Fall 1983); Peter F Drucker, Japan’s Choices, Foreign Affairs (Summer 1987).

\textsuperscript{40} See \url{http://www.jcaa.or.jp/e/index-e.html} On the conduct of business in Japan, see e.g. Kitagawa Zentaro, Doing Business in Japan - Contracts and Business Activities, Commercial Instruments (New
Given complex public and private influences on the legal culture of international commerce, one may conclude that any serious analysis of that culture is likely to be flawed. Any effort to comprehend its nature may lead to over-simplification or even misunderstanding, as when foreign lawyers and arbitrators misunderstand the influence of Japanese culture upon international business relationships. Such misunderstanding, in turn, may lead arbitrators to over- or under-appreciate the relevance of different cultures in reaching decisions.

However, erring in an attempt to gauge the genesis and evolution of cultural norms and practice surely does not justify rejecting the enterprise out of hand. Analysing legal cultures like those associated with international commercial arbitration can at least help to understand not only the attributes of those cultures, but also their disparate application in a changing global community, including international commercial arbitration. By considering trends in legal cultures, one can observe the effect of cultural shifts upon the operation of legal institutions like arbitration. One can observe tendencies, practices, habits and customs that are imputed to a legal culture, as well as perceived changes in those tendencies; and one can develop measured institutional and non-institutional responses to perceptions of cultural change. Illustrating such responses to cultural change in international commercial arbitration is the domestication and regionalization of international commerce, the mushrooming of domestic and regional arbitration centers, the development of a culture of online dispute resolution, and the growth of both non-institutional and ad hoc commercial arbitration. Making an effort to understand legal cultures, warts and all, can also help to model arbitral practice, to implement innovative standards of arbitral practice, and to devise responses to the changing culture among end users, such as by providing “fast track” arbitration in response to industry need.

For a classical commentary on the cultural and legal relationship between states and commercial arbitration, see e.g. Martin Domke & Frances Kellor, Western Hemisphere Systems of Commercial Arbitration, 6 Toronto L.J. 307 (1946).

Having so argued, I find somewhat overstated the comment: “The great strength of the arbitration process lies in its independence from any particular legal culture,” used to advertise the book, Conflicting Legal Cultures in Commercial Arbitration, Old Issues (Institute of Advanced Legal Studies, Kluwer, Aspen Books), at http://www.aspenpublishers.com/Product.asp?catalog_name=Aspen&category_name=&product_id=9041112278&c=1. The great strength of arbitration is surely in its capacity to draw upon different legal cultures in order to develop its own unique and variable strengths.

The localization and regionalization of trade and investment is made all the easier by the capacity to “domesticate” or “regionalize” international instruments, such as those that relate to investment across national boundaries. See e.g. International center for the settlement of investment disputes (ICSID) Rules governing the additional facility for the administration of proceedings by the secretariat of the international center for the settlement of investment disputes (additional facility rules), at http://www.worldbank.org/icsid/basicdoc/partD.htm.

On the distinction between ad hoc and non-institutional arbitration, see infra text accompanying note 133.
However much international commercial arbitration transcends or resists discrete cultural difference, arbitration is unavoidably effected by disparate legal culture. That influence occurs when international commercial arbitration is grounded in distinct legal cultures, such as when Civil Law influences lead to restrictions in the admission of oral testimony in arbitration. Differences in legal culture among end users also lead to the development of novel arbitration services, such as the development of uniform, expedited and enforceable procedures to protect the trade marks of established businesses from infringement and from cyber squatters. Whether these cultural influences arise by deliberate design or by accretion, they impact on the culture of arbitration itself. As a result, international commercial arbitration consists of a variable amalgam of legal cultures. It is not the product of a single, determinative and pre-existing arbitral culture.

The ensuing sections gauge the nature of this amalgam of legal cultures. The purpose is to assess the attributes of that amalgam and how it has altered the character of modern international commercial arbitration. Particular emphasis is given to determining the extent to which arbitration is the product of cultural pluralism derived from a blend of Civil and Common Law traditions, and the degree to which that blend is itself changing in our global environment.

### III. The Common and Civil Law Traditions

Several issues arise here. Firstly, to what extent are the rules and practice of international commercial arbitration influenced by the legal traditions of Civil and Common Law, or by other traditions? Secondly, does that influence arise formally by incorporating those traditions directly into arbitration, or informally through their influence over arbitral conventions, usages and practices? Thirdly, to what extent is the legal tradition governing international commercial arbitration global in nature; or is it localized and regionalized under the influence, *inter alia*, of local and regional

---

48 See further infra text accompanying note 114.


50 See further Carol Weisbrod, *Emblems of Pluralism: Cultural Difference and the State* (Princeton: Princeton University Press, 2002). For a collection of essays on the influence of legal culture on the development of international commercial arbitration, see *Conflicting Legal Cultures in Commercial Arbitration: Old Issues and New Trends* (Institute of Advanced Legal Studies, Kluwer, Aspen Books, 1999.) The essays include contributions by: Dr Christian Borris (discussing Civil Law versus Common Law cultures in arbitration); Professor Andreas F. Lowenfeld (discussing the ‘mix’ of cultures that gives rise to international commercial arbitration); Dr Serge Lazareff (discussing the search to arrive at a Common procedure for international commercial arbitration); Sigvard Jarvis (comparing leading seats of international arbitration); Jonathon Crook (discussing seats of arbitration in the Far East); Ambassador Malcolm R. Wilkey (exploring the practicalities of cross-cultural arbitration); Jean Reed Haynes (dealing with the confidentiality of international arbitration); Dr Horacio A. Grigera Naón (discussing the culture in Latin American arbitration); and Dr Bernardo M. Cremades (evaluating how interactive arbitration can overcome a clash among legal cultures).

As stated above, a legal tradition ordinarily is narrower than a legal culture. A formal legal tradition reflects the genesis and development of a legal system, its norms, doctrines, principles, standards and rules of law. An example of a comprehensive legal tradition is the Western Legal Tradition that encompasses all the legal systems identified with the so-called “West”.

A narrower but still wide legal tradition is associated with two embodiments of that Western Legal Tradition, the traditions of the Civil and Common Law. Then there are sub-sets of each tradition, such as the Common Law of England and the United States, and the Civil Law of France and Germany.

From the perspective of international commercial arbitration, legal traditions can also be broken down into local, regional and international traditions. Local legal traditions encompass the rules and practice of a state or local legal system, such as are embodied in a state’s commercial code. Regional legal traditions include the laws and practices of regional organizations like the European Union (EU) and the North American Free Trade Agreement (NAFTA). International legal traditions include the various institutions adopted by a multitude of states, such as is embodied in the World Trade Organization (WTO).

---

52 In some respects, it may be argued that international commercial law is not truly international at all, but localized in domestic legal systems. After all, the law of such arbitration is the lex situs; and the obligatory or binding force of an arbitral award ordinarily resides in the place in which the award happened to be rendered. While the choice of a particular situs is essentially consensual, the practical reality is that that choice is ordinarily localized. It is on account of this localization of international commercial arbitration, that one the most important jurists on international commercial arbitration, Jan Paulsson, has sought to reverse, namely, to delocalize arbitration from the place in which the award happened to be rendered. See e.g., Jan Paulsson, Delocalisation of International Commercial Arbitration: When and Why It Matters, 32 Intern.&Comp.L.Q.53 (1983). See generally, Siegfried H. Elsing and John M. Townsend, Bridging the Common Law-Civil Law Divide, 18 (1) Arbitration International 59 (2002).


54 On the evolution of the Civil and Common Law traditions, see supra notes 14-19.

55 On the “Americanization” of law, see e.g. supra note 8.


57 On the variety of state arbitration associations, see infra note 130.

58 On European arbitration, see supra note 13.


A stereotypical conclusion is that international commercial arbitration, along with the lawyer-arbitrators and counsel who serve it, emanates primarily from an amalgam of Civil and Common Law traditions that are unified by international organizations like the ICC.\footnote{61} Certainly there is truth to this stereotype. At a formal level, international arbitration codes, laws and practices have evolved in some measure out of Civil and Common Law traditions that are unified in part by international organizations like the ICC. Their pervasive impact upon modern arbitration is reinforced by the realization that traditional business interests served by arbitration have converged at the leading trading cities of Europe and North America where the Civil and Common Law systems prevail.\footnote{62} Consistent with this observation, premier international arbitration centers – the International Chamber of Commerce, the American Arbitration Association and the London Court of International Arbitration – are located in Paris, New York and London respectively.\footnote{63} Further imbedding Civil and Common Law influences is the fact that international commercial arbitrators and counsel alike are drawn significantly from Common and Civil Law ranks.\footnote{64} In addition, arbitrators from Latin America\footnote{65} to Japan\footnote{66} and China\footnote{67} share codes of obligations of one form or another that trace back to Civil Law roots and which form a primary source of their legal systems.\footnote{68}

The Civil and Common Law traditions, arguably, are even more global in their reach. Legal traditions in Africa, Asia and the Americas were determined by centuries of
colonialism. For example, the Common Law was incorporated into legal systems across Southern, South East and South West Africa. Elsewhere in Africa, in addition to the Common Law, Civil Law was implemented by colonial France, Germany, Belgium, Italy, Spain and Portugal. South America, in turn, reflected predominantly Spanish and Portuguese legal traditions, while the United States and Canada acquired an English Common Law heritage. A Common Law legal tradition was also introduced into India and Pakistan. French and Dutch legal traditions have permeated through other parts of Asia; while a German legal tradition was incorporated into Japanese and to some degree Chinese private law. Then, there are states that occupy the hybrid space between Common and Civil Law traditions, Scotland, Quebec, Louisiana, Sri Lanka and South Africa, along with Israel’s combination of Common, Civil and Talmudic law. Completing the circle are a host of countries whose Customary Law traditions were abrogated in whole or part following colonial incursions, and sublimated and replaced by Common and Civil Law traditions.

However, it should not be blindly assumed that international commercial arbitration has simply replicated an amalgam of these traditions. As a matter of practice, Common and Civil Law traditions vary markedly from country to country, as well as over time and space. English lawyers ordinarily engage in a more rigorous formulation of legal doctrine than American lawyers who tend to treat the law in a more piecemeal fashion. Civil Lawyers who follow the French tradition of the

71 See e.g. John Merryman, The Civil Law Tradition: Europe, Latin America, and East Asia (Contemporary Legal Education Series, 1994).
73 J. Mark Ramseyer, review of Brian E. McKnight, Law and the State in Traditional East Asia: Six Studies on the Sources of East Asian Law, 42 Monumenta Nipponica, 502 (1987); Margaret Fordham, Comparative Legal Traditions: Introducing The Common Law to Civil Lawyers in Asia, 1 Asia J. Comp. Law 1 (2006).
74 Percy R. Loney, Jr., Traditions and Foreign Influences: Systems of Law in China and Japan, 52 Law & Contemp. Probs. 129 (1989); Kenzo Takayanag, Contact of the Common Law with the Civil Law in Japan, 4 Am. J. Comp. L. 60 (1955).
76 One would include, here, the legal systems in most countries in modern day Africa, India, Pakistan, and significant parts of Asia. For discussion on the illustrative case of Africa, see infra text accompanying notes 69-70.
Code Napoleon\textsuperscript{78} tend to focus less intensively on the scientific analysis of concepts like “causa” in the law of obligations than those who adhere to the more recent and scientifically textured German Code, the Bürgerliches Gesetzbuch (BGB).\textsuperscript{79}

Relying on Common and Civil Law traditions is also insufficient to serve as the basis for the legal traditions governing international commercial arbitration in the Twenty First Century. Firstly, even if Civil and Common Law traditions were dominant globally historically, that dominance has become both “nationalized” and “regionalized” as a consequence of the advent of the modern state, the influence of local custom on the evolution of law and the development of regional free trade zones respectively.\textsuperscript{80} So too, local legal traditions have evolved that are significantly impacted by domestic political, economic and social forces beyond their early roots in Civil or Common Law Systems.\textsuperscript{81} The Civil Law-Common Law dichotomy also has failed to reckon with the influence of alternative political systems, notably socialist law, in which basic principles like freedom of contact are conceived and applied differently.\textsuperscript{82} Added to this, the transformation of societies along ethnic, religious and social lines has caused radical changes in local legal traditions, placing new demands on the old economic order. Incorporated within this change is the transformation of arbitration itself to accommodate a changing political-economic landscape, such as the significant role now played by China’s International Economic and Trade Arbitration Commission (CEITAC) in international commercial arbitration.\textsuperscript{83}

None of this is to deny the distinctiveness of Civil and Common Law traditions. Trained in a deductive legal tradition, Civil Lawyers certainly have developed important and lasting commercial codes in Europe.\textsuperscript{84} Common Lawyers in the United


\textsuperscript{80} On the nationalization of the Law Merchant, see Leon E. Trakman, The Law Merchant, supra note 20, Ch. 2. On the regionalization of trade generally, see infra note 43. Of interest, some comparative lawyers believe that American law needs to “step out of the shadows” of European law. See e.g., Mathias Reimann, Stepping out of the European Shadow: Why Comparative Law in the United States Must Develop Its Own Agenda, 40 Am. J. Comp. L. 637 (1998).

\textsuperscript{81} These local legal traditions, in turn, impact to varying degrees upon the principles, rules and procedures that are adopted by domestic arbitration centers. See further infra note 130.


\textsuperscript{83} On the role of China and CEITEC (China International and Economic and Trade Arbitration Commission) in relation to international commercial arbitration, see infra text accompanying notes 100 and 104. In the absence of measurable criteria, it is difficult to establish to what extent international commercial arbitration is perceived to have changed in responding to the changing world order, except perhaps that it may not have changed expeditiously or adequately enough. However, in considering events over the last two decades – civil wars, mass relocation of peoples, the virtual collapse of some economic, social and legal systems and the resurrection of others – it is hardly fair to judge the international arbitral community too harshly.

\textsuperscript{84} See e.g. Barbara Pasa & Gian Antonio Bennacchio, The Harmonization of Civil and Commercial Law in Europe (Budapest: Central European Un. Press, 2006).
States have used their inductive legal tradition to create a pragmatic Uniform Commercial Code that serves as part of a “living” and influential codification of a modern Common Law system. However, the historical influence of the Civil and Common Law traditions cannot be taken too literally. Not only are the great commercial codes of Europe and America subject to different constructions, they are also conceived of differently in diverse domestic, regional and international legal settings. Nor does the construction of these great codes by international arbitral tribunals necessarily replicate their construction before domestic courts, given the existence of competing legal traditions, including the legal traditions associated with international commercial arbitration itself.

Finally, as William K. Slate II hints, international commercial arbitration cannot afford to be perceived as being wholly rooted in either a Common or Civil Law tradition any more than it can afford to be seen as dominated by an elite cadre of lawyers who imbed a fixed American or Eurocentric conception into the law of arbitration. As subtle as these perceptions of the culture and tradition of international commercial arbitration may be in our modern era of legalism, they can influence the attitudes of prospective users of alternative modes of dispute resolution not limited to arbitration, and therefore should be carefully considered.

It is appropriate now to inquire: Given the amalgam of different legal traditions, can one detect a distinctively international legal tradition in commercial arbitration? And if so, what is the nature and significance of that tradition?

IV. Legal Tradition in International Commercial Arbitration

There are different principles by which to gauge the legal tradition of international commercial arbitration. The first principle is consensual, namely, that the parties choose arbitration. The parties are free to select the nature, form and operation of

---

87 See e.g. O.F. Robinson et al., An Introduction to European Legal History: Sources and Institutions (Nashville, Tenn: Abingdon, 3rd ed. 2000).
88 See text infra Section IV.
89 See supra note 1.
90 For an explicit reference by the London Court of International Arbitration that international commercial arbitration is driven by the needs of end users, the business community, see infra text accompanying notes 97.
91 This is a point of emphasis among leading international arbitration centers. For example, using the banner statement “The choice is yours”, the ICC states: “The International Chamber of Commerce offers a full spread of dispute resolution services so that you and your business partner can make the best choice.” [emphasis added] at http://www.iccwbo.org/court/adr/id4592/index.html Conceptually, too, it is well established that the first law of international commercial arbitration is the law chosen by the parties. See e.g., Thomas E. Carboneau, Lex Mercatoria and Arbitration (revised ed., Huntington, N.Y.: Juris Publ., 1999); Thomas E. Carboneau, Alternative Dispute Resolution: Melting the Lances
arbitration, whether its nature is *ad hoc* or institutional, whether its form is modelled on European, English, American or “other” legal traditions, whether it is conducted primarily through oral testimony or written submissions, and whether it is impacted by a multi-or bilateral treaty or by discrete customary law influences. The parties to arbitration presumably exercise their choices for distinctive reasons, such as: because the arbitrators supposedly have commercial expertise beyond that of domestic courts of law, because international commercial arbitration is perceived to be lower cost, more efficient and more “party sensitive” than courts of law, or simply to avoid having to rely on the laws and procedures of the legal system and the courts of one party. These reasons for resorting to international commercial arbitration may be misplaced, but they nevertheless are repeatedly invoked as bases for resorting to arbitration.92

A second principle is that parties can make choices that accommodate preferred legal traditions, while still not choosing domestic courts. For example, they may adopt a European-centric model of arbitration, such as that of the ICC, because it more closely resembles Civil Law traditions, even though it is international and does not replicate the proceedings followed by the courts in any one Civil Law jurisdiction.93 Alternatively, parties may choose the English model of the London Court of International Arbitration, or the American model of the American Arbitration Association for much the same reasons,94 along with local options, such as state arbitration before the Swiss Arbitration Association, the Australian Centre for International Commercial Arbitration, or China’s CEITAC.95 Parties may also

---

92 It is almost axiomatic today for domestic, regional and international arbitration associations to refer to the cost and time efficiency of arbitration as a selling feature, including in studies sponsored by organizations like the American Arbitration Association. See e.g. [http://www.adr.org/dw/](http://www.adr.org/dw/). For confirmation of a widely held belief that commercial arbitration is both time and cost effective, including among judges and commercial lawyers, study on behalf of the Canadian Bar Association, see Leon E. Trakman, *The Efficient Resolution of Business Disputes*, 30 Can.J.Bus.Law 321(1998) [being a questionnaire and interview study into perceptions of federal court judges and commercial lawyers in Canada on the efficient resolution of business disputes, conducted as a consultant to the Canadian Bar Association].

93 One need merely examine European conventions to see the influence of Europe on the evolution of modern international commercial arbitration. See e.g. [European Convention on International Commercial Arbitration, 484 U.N.T.S. 364 (April 21, 1961); Agreement relating to application of the European Convention on International Commercial Arbitration, 523 U.N.T.S. 93, CETS No. 042 (Dec. 17, 1962); European Convention Providing a Uniform Law on Arbitration, CETS No. 056, opened to signature January 1, 1966; has not entered into force.](http://www.adr.org/dw/)

94 On the ICC, see *infra* note 97. On arbitration before the International Center for Dispute Resolution of the AAA, see [http://www.adr.org/sp.asp?id=28819](http://www.adr.org/sp.asp?id=28819). On regional models, see e.g., The Commercial Arbitration and Mediation Center for the Americas [CAMCA] (directed at providing commercial parties involved in the NAFTA free trade area with a forum for the resolution of their private commercial disputes); European Court of Arbitration (a private association with its situs in Strasbourg, but with national and local divisions across; Europe); The Inter-American Commercial Arbitration Commission [IACAC] (directed at settling international commercial disputes through conciliation and arbitration).

choose to “domesticate” arbitration, such as by appealing to local customary laws and procedures.96

A third principle is that the manner in which arbitration is conducted may reflect in varying degrees a particular legal tradition and more broadly, a preferred cultural orientation. For example, the influence of the ICC Court in determining the form, content and authority of each ICC award reflects a tradition in which uniformity, consistency and authoritative in decision-making is prized.97 One may conceive of this legal tradition as international, and the ICC is certainly international. However, the ICC also has a legal tradition that reflects many Civil Law values, including: an ethical approach towards the analysis of law; a scientific method of law making; an emphasis on principled decision-making and a deductive method of reasoning adopted by the Court.98 This tradition can be contrasted to varying degrees with that of the American Arbitration Association in which decision-making is more piecemeal and ad hoc, where there is no unifying influence of an ICC-like Court, and where inductive reasoning from particular facts to general rules predominates in arbitral jurisprudence.99 A further tradition may be found in arbitration in China before CEITAC in which disputes with state enterprises, a blend between domestic and international rules and procedures and the influence of local custom on the enforcement of arbitral awards, are prevalent.100

A fourth principle is that particular procedures associated with international commercial arbitration stand out more starkly when they are modelled on a particular legal tradition. For example, all other factors being constant, one may well expect to encounter less reliance on oral testimony before arbitration tribunals like the ICC that before an association like the AAA in which the examination and cross-examination of witnesses, including experts is often extensive.101

96 See further infra text accompanying note 130. See too, Leon E. Trakman, Appropriate Conflict Management, 2001 Wisconsin L. Rev. 919.
97 On the ICC court, see http://www.iccwbo.org/court/. On its home page, the ICC Court is described as “a truly international arbitration institution with an outstanding record for resolving cross-border business disputes.” The London Court also “presides over” the London Court of International Arbitration. However, its jurisdiction is limited compared to the jurisdiction of the ICC Court. For example, the LCIA provides: “[t]he LCIA Court is the final authority for the proper application of the LCIA Rules.” It adds: “Its principal functions are the appointment of tribunals, the determination of challenges to arbitrators, and the control of costs.” See http://www.lcia-arbitration.com/
101 While international arbitrators subscribe to different degrees to this view, it is difficult to establish the extent to which arbitration proceedings in either center are conducted orally or in writing. Neither center, understandable, subscribes expressly to an oral or written tradition in part because both appeal
A fifth principle is that variations in the services provided by international commercial arbitration inevitably are impacted by the customer. The London Court of International Arbitration crisply states: “Changes in commercial dispute resolution procedures are, quite properly, driven by the end-user. That is, by the international business community.”

All these statements are generalizations. For example, ICC arbitration in the United States involving American counsel unavoidably incorporates at least some attributes of American-style advocacy, not least of all the adversarial tendencies of some litigators who litigate and arbitrate cases in cities like New York. Conversely, European and South American trained arbitrators who serve on AAA panels in the United States often add a distinctly civilian flavour to those proceedings, for example when they insist that the parties rely less upon oral testimony and have greater resort to written pleadings. Negative stereotypes are also often unduly attenuated. For example, despite the traditional criticism that CEITAC subsumed international commercial arbitration within its domestic political and legal system, CEITAC has modified its rules and procedures specifically in order to comply with international arbitration standards. Generalizations about international commercial arbitration also fail to recognize the complex array of cultural influences that are exerted upon it. Just as the international business community has much to do with the changing legal traditions of international commercial arbitration, so too do different governments, arbitration centers and even individuals have much to do with changes in these traditions.

The trumpeted achievements of international commercial arbitration sometimes serve as its limitations. For example, the eminently commendable principle by which

to an international legal community that includes Civil and Common Law traditions, because the admission of oral and written testimony under the rules of both centers is governed by the presiding arbitrator(s) who may rule differently in different cases, and because proceedings are influenced by the practice of counsel, including the documents they file and the manner in which they present their cases. Moreover, given the confidentiality of arbitration proceedings, establishing the exact mix of written and oral evidence before particular arbitrators is difficult to establish. See further text immediately below. See too Leon E. Trakman, Confidentiality in International Commercial Arbitration 18 Arbitrational International 1(2003).

See Alternative Dispute Resolution, Introduction at http://www.lcia-arbitration.com/ 102 For a report of the litigiousness of US lawyers in arbitration, see e.g. Richard D. Wilkins, Arbitrate Or Out, CNY Business Journal (Feb.5, 1996). On a challenge to the so-called litigation “crisis” in the United States, see Marc Galanter, The Day After the Litigation Explosion, 46 Md. L. Rev. 3 (1986); Marc Galanter, Reading the Landscape of Disputes: What We Know and Don’t Know (And Think We Know) about Our Allegedly Contentious and Litigious Society, 31UCLA Law Review 4 (1983).

However, an adjudicative process should be distinguished from an adversarial one: Disputes can be adjudicated with different kinds and degrees of adversarialism. See e.g. Jonnette Watson Hamilton, Adjudicative Processes, in Julie Macfarlane, ed., Dispute Resolution Readings and Case Studies 523-582 (Toronto: Emond Montgomery, 1999).

104 For example, CEITAC has confirmed, party autonomy in and confidentiality of arbitration proceedings, as well as the independence of arbitrators from the Chinese State. CEITAC has also revised its arbitration rules to redress conflicts of interest among arbitrators. It has also subscribed to the New York Convention governing the recognition and enforcement of foreign arbitral awards. See generally http://www.cietac.org.cn/english/introduction/intro_1.htm.

105 Consider, for example, the influence over international commercial arbitration of, among others, long-time Chairman of the International Chamber of Commerce, Dr. Robert Briner, a position now held by Marcus Wallenberg. See http://www.iccwbo.org/iccfbcf/index.html

18
national courts recognise and enforce arbitral awards – a suitable response to the vagaries of forum shopping – is undermined when awards that are set aside in one national jurisdiction are enforced in another.106

Nevertheless, the tradition of international commercial arbitration does enjoy remarkable stability, despite its diffuse nature, form and expression. It has been able to model itself on the stable public image of such respected tribunals as the Permanent Court of Arbitration.107 It has benefited from the authority accorded to arbitration awards by the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards.108 The tradition of international commercial arbitration has also been adapted to changing market forces, most notably by crafting modified arbitration services to end users.109

At the same time, the legal traditions of international commercial arbitration today are diffuse in nature. Their diffusion stems, not only from their disparate Civil and Common Law roots, but from the proliferation of arbitration associations and the particular influence of those who devise arbitral rules and procedures, serve as arbitrators, and act as counsel in arbitration proceedings.

The question remains: How can one encapsulate a legal tradition of international commercial arbitration in the face of diverse arbitration rules, procedures and practices?

V. Re-conceiving of an International Arbitration Tradition

A study of the rules of arbitration of different international, regional and local associations reveals that, while commercial arbitration has attributes of a pervasive legal tradition, the rules and procedures through which that tradition are expressed diverge noticeably from one arbitration association to the next.110 Illustrating this

107 See supra note 27 and Section VI.
109 See further Section VII.
wide range of services provided by different arbitration associations is the plethora of arbitration clauses, procedures and evidentiary rules adopted by each.\textsuperscript{111}

This diversity – some would argue, inconsistency -- in arbitral practice across the global arbitral community does not imply that the legal tradition surrounding international commercial arbitration is either convoluted or a sham. A set of arbitration rules and procedures directed at parties within NAFTA jurisdictions ought surely to be different from the rules and procedures that apply to parties within EU jurisdictions. One can debate the nature, extend and value of those differences, but it would be an error to insist, as a matter of principle, that rules and procedures in international commercial arbitration should be uniform in nature.\textsuperscript{112}

The point is also \textit{not} that a legal tradition of international commercial arbitration should resist uniformity any more than it should replicate the already over-generalized traditions of the Civil or Common Law. The point \textit{is} that, inasmuch as international arbitration proceedings transcend proceedings before national courts, its traditions should differentiate it from those national law traditions.\textsuperscript{113} A further point is that an international arbitration tradition may well warrant having diverse constituent parts, not only because arbitration associations should be free to market their distinct

\begin{itemize}
\end{itemize}
services, but because parties should be free to choose different arbitration options based on their discrete circumstances and their free choice. Similarly, parties ought to be able to choose among arbitration associations according to their perceptions of the expertise of the association, its reputation, its rules and procedures, the quality of its roster of arbitrators, its costs, and its record of having its awards recognised and enforced in particular foreign jurisdictions. At the same time, the more expansive and complex the choices available to the parties, the greater is the potential for one party to pressure another to acquiesce in preferred arbitration rules.

Even a single arbitration association may provide a variety of arbitration clauses for adoption at the discretion of the parties. The ICC, for example, states: “Four alternative ICC ADR clauses are suggested. They are not model clauses, but suggestions, which parties may adapt to their needs, if required. Their enforceability under the law applicable to the contract should be evaluated,” cited at http://www.iccwbo.org/court/adr/id5346/index.html Further provision is made for “Optional ADR”, namely, “The parties may at any time, without prejudice to any other proceedings, seek to settle any dispute arising out of or in connection with the present contract in accordance with the ICC ADR Rules.” supra in note.


Of note, parties can also identify and assess the credentials of prospective arbitrators online. See e.g. The Dispute Resolution Directory of Martindale-Hubbell at http://www.martindale.com/xp/Martindale/Dispute Resolution/Search Dispute Resolution Directory/qual_search.xml; ICC Expertise Dispute Resolution Services at http://www.iccwbo.org/drs/english/expertise/all_topics.asp See also Smit’s Roster of International Arbitrators (Guide to International Arbitrators, 3rd ed), supra note 12.
and procedures, as when those rules closely resemble the dominant party’s domestic rules and procedures.\footnote{117}

One might ask at this point: In what respects is the tradition of international commercial arbitration supported by a distinctively international tradition?

VI. The Private and Public Traditions of International Arbitration

International commercial arbitration has evolved primarily against the background of two unifying international traditions: the private international legal tradition directed at the harmonization of laws; and the public international law tradition committed to reducing global barriers to trade, including more recently to protecting the interests of developing countries.

The harmonization movement is most readily identified with the adoption of the United Nations Convention on Contracts for the International Sale of Goods (CISG) in 1980.\footnote{118} Not only did the CISG establish a comprehensive code governing the formation of international sales contracts, including remedies: it also helped to shepherd in an international harmonization movement that continues to regulate the application of contract rules to international sales transactions. Such harmonization, in turn, has provided a foundation stone not only for the formation and performance of contracts, not limited to sales, but also for their non-performance and breach. It is in this latter respect that parties choosing international commercial arbitration have had the benefit of a comprehensive body of law that transcends national law and domestic courts, that has evolved into transnational jurisprudence, and that allows for the legal analysis of an international corpus of law. That jurisprudence is most evident in international codifications of the law of arbitration itself, notably, the Model UNCITRAL Law of International Commercial Arbitration.\footnote{119}


Key among the public law successes of the international community is the 1948 General Agreement on Tariffs and Trade, the GATT, which sets out a framework for reducing barriers to international trade. The GATT was followed in 1993 by the Uruguay Round which established the World Trade Organization, the WTO. The WTO, in turn, has set out important principles governing trade among member states as well as establishing various WTO agreements. These international trade agreements have demonstrated, not only the capacity of the international commercial community to redress the disparate interests of states in reducing barriers to global trade. They have helped to create a global climate that supports private trade and investment in goods and services, including for the benefit of developing countries. In this respect, international commercial arbitration has the capacity to respond to a widening array of business disputes that arise out of increased trade across national boundaries, most recently under the General Agreement on Trade in Services (GATS).

The more recent growth of bilateral trade and investment treaties do challenge the vitality of multilateral trade system and place distinct strains on the WTO. However, that development also heralds prospective change in the conduct of global business by corporations and individuals, notably in compartmentalizing disputes and their solutions along bilateral lines. As a result, a new regime of international

---

Protocol on Arbitration Clauses, 27 LNTS 157, signed September 24, 1923 and entered into force July 28, 1924. In some respects, the Protocol normalized the use of international commercial arbitration by regularizing the use of arbitration clauses in contracts. On related efforts to harmonize international commercial practice more generally particularly in relation to the UNIDROIT, see Bonnell, supra note 117.

http://www.wto.org/english/docs_e/legal_e/legal_e.htm


124 Given the private and confidential nature of arbitration proceedings, it is difficult to assess the volume of increased arbitration traffic arising from bilateral and investment treaties. However, arbitration associations do release figures about the number of cases they have heard in particular periods of time, including the substance of such disputes. The Singapore International Arbitration
commercial arbitration grounded in the particular interests of states is evolving alongside multilateral trade and responding to discrete business disputes. In some measure, this bilateralism supports international commercial arbitration, as when the NAFTA expressly provides for Chapter 11 arbitration. Article 2021 exhorts the NAFTA Parties “to encourage and facilitate the use of arbitration and other means of alternative dispute resolution” to resolve disputes between private parties in the NAFTA zone. Trade agreements like the NAFTA are likely to lead to an increased volume in trade and investment across national boundaries, a greater number of disputes from that trade, and increased use of international commercial arbitration to resolve those disputes.

Despite the fragmentation of global trade along bilateral and regional lines, international commercial arbitration has remained a vital, yet adaptable, constant in the world trade equation. Not only have many states adopted the New York Convention on the recognition and enforcement of foreign arbitration awards, they have also adopted the Convention on the Execution of Foreign Arbitral Awards. While studies still suggest that a minority of international arbitration awards are not executed in full, the rate of successful executions remains significant in an otherwise diffuse -- and somewhat bilaterally focused -- global community.

The question remains: Can international commercial arbitration adjust culturally to meet the future needs of a new economic and political world order?

VII. Culture Change or Culture Shock?

Centre (SIAC), for example, provides details of the number of cases heard before different international and regional arbitration centers from 2000 to 2005 based on self-reporting by each arbitration center. According to the 2005 figures, the number of cases heard, in descending order were: AAA-ICDR (580 cases), ICC (512 cases); CEITAC (421 cases); LCIA (118 cases); SCC (53 cases); KCAB (53 cases); SIAC (45 cases); JCAA (9 cases); KLRCA (7 cases); BCIAC (2 cases); PDRC (0 cases); HCIAC (n/a). What makes this information less than ideal is the fact that it relies on self-reporting, that there is insufficient information available on the quantum in dispute in each case, the kind and size of awards, and the type of dispute in issue. What is also not always clear is whether each Center includes cases in which it provides all arbitration services, or only some of them, or whether the Center simply serves as a location for the parties to hold their own arbitration proceedings. SIAC, for example, excludes the HCIAC from its list, supra in note, on grounds that the HCIAC does not differentiate between arbitration it conducts and arbitration in which it serves only as the dispute solving locale.


On a limited study that so suggests, see supra note 34. For a now classical collection of lectures that deal with the interface between public and international commercial arbitration, see InterArbitration.net, at http://www.interarbitration.net/; S.M. Schwebel, International Arbitration: Three Salient Problems (Cambridge, UK: Grotius Publications, 1987).
Emanating from diffuse economic, social and political environment, parties contemplating international commercial arbitration today can choose from a range of sophisticated instruments that suggest what, when and how to arbitrate disputes. They can choose arbitration forums and rules based on the perceived stability of the applicable arbitral systems, the development of their jurisprudence and their record of successfully concluded and enforced arbitrations. Parties can also choose from an increasing number of national and regional arbitration centers that accommodate different legal traditions and respond differently to disparate legal cultures. They can adopt a variety of arbitration clauses, duly adapted to meet their particular needs.

129 There are various websites that provide prospective parties with copious “how to” arbitrate information, from choosing law firms to identifying the form of arbitration or other alternative to litigation to adopt. See e.g. http://www.hg.org/adr.html; http://interarb.com/v1/; http://www2.lib.uchicago.edu/~llou/intlarb.html; On how to make a choice of forum and choice of law decision in arbitration, see Gary B. Born, International Arbitration and Forum Selection Agreements - Planning, Drafting and Enforcing. The Hague; Boston: Kluwer Law International, 1999); Peter E. Nygh, Choice of Forum and Law in International Commercial Arbitration (Kluwer Law International, 1997); William W. Park, International Forum Selection (Kluwer Law International, 1995).

130 For an extensive but still incomplete list of national and/regional institutions that provide arbitration services, see Arbitration Court of the Bulgarian Chamber of Commerce and Industry; Arbitration Institute of the Stockholm Chamber of Commerce (AISCC); Centro de Arbitraje de México; Belgian Centre for International Arbitration and Mediation; Australian International Commercial Arbitration Centre; Cairo Regional Centre for International Commercial Arbitration; British Columbia International Commercial Arbitration Centre; Chile, Santiago Arbitration and Mediation Center; China International Economic and Trade Arbitration Commission; Croatia, Permanent Arbitration Court at the Croatian Chamber of Commerce; Czech Republic, Arbitration Court Attached to the Economic Chamber of the Czech Republic; Egypt, Cairo Regional Centre for International Commercial Arbitration; Estonian Chamber of Commerce and Industry; France, Arbitration Chamber of Paris; France; Centre de Médiation et d'Arbitrage de Paris; German Institution of Arbitration – Deutsche Institution für Schiedsgerichtsbarkeit; Hong Kong International Arbitration Centre; India, Indian Council of Arbitration (ICA); Indonesian National Board of Arbitration; Iran-United States Claims Tribunal; Italy, Chamber of National and International Arbitration of Milan; Japan Commercial Arbitration Association; Korean Commercial Arbitration Board; Malaysia, Kuala Lumpur Regional Centre for Arbitration; Mexico, Centro de Arbitraje de México; Netherlands Arbitration Institute; Poland, Court of Arbitration at the Polish Chamber of Commerce; Portugal. Centre for Commercial Arbitration, Lisbon Trade Association, Portuguese Chamber of Commerce; Romania, Court of International Commercial Arbitration Attached to the Chamber of Commerce and Industry of Romania and Bucharest; Russia, St. Petersburg International Commercial International Arbitration Court; Scottish Council for International Arbitration; Singapore International Arbitration Centre; Southern Africa, Arbitration Foundation of Southern Africa; Sweden, Arbitration Institute of the Stockholm Chamber of Commerce; Switzerland, Swiss Chambers’ Arbitration; Tunisia, Center for Conciliation and Arbitration of Tunis; United Kingdom, London Court of International Arbitration; United Kingdom, Chartered Institute of Arbitrators; United States, Chicago International Dispute Resolution Association; United States, International Center for Dispute Resolution.

Cultural change is also taking place in the international arbitration services that are now provided, including the noticeable growth of specialised areas of arbitration, in sport and intellectual property arbitration, among others.\textsuperscript{132}

In addition, parties are not only able to make choices among different types of international commercial arbitration. They can tailor those choices to their own diverse needs and preferences. For example, parties were always free to choose non-institutional or \textit{ad hoc} arbitration.\textsuperscript{133} However, they often found doing so burdensome due to difficulties in gaining access to neutral premises for non-institutional arbitration and the comparative lack of pre-existing rules and procedures by which to conduct \textit{ad hoc} arbitration.\textsuperscript{134} International commercial arbitration associations today provide, not only for institutional arbitration based on their own rules and procedures, but for non-institutional and \textit{ad hoc} arbitration as well. For example, non-institutional arbitration, previously provided by only a few regional centers like the British Columbia International Arbitration Centre,\textsuperscript{135} now is also provided to varying degrees by mainstream international centers.\textsuperscript{136} The result is that parties can adopt a cafeteria style approach, opting to use the facilities of a particular

\begin{itemize}
\item Perhaps most pronounced of these growth areas in international commercial arbitration relate to maritime law historically, sports law especially since the 2000 Sydney Olympic Games and intellectual property law. On maritime law arbitration, see Society of Maritime Arbitrators, Inc. (SMA) at \url{http://www.smany.org/} On sports arbitration, see Court of Arbitration for Sport (CAS) at \url{http://www.tas-cas.org/default.htm} On intellectual property, see esp., The World Intellectual Property Organization Arbitration and Mediation Center \url{http://www.arbitration.wipo.int/index.html}.
\item Non-institutional arbitration is sometimes inaccurately referred to as “\textit{ad hoc}” arbitration. Non-institutional arbitration takes place independently of an arbitration association like the ICC, AAA or London Court. \textit{Ad hoc} arbitration involves the adoption of arbitration at the time of a dispute, rather than in consequence of an arbitration clause in a pre-existing contract. Non-institutional and \textit{ad hoc} arbitration often coincide in fact. However, they diverge, for example, when the parties submit their \textit{ad hoc} dispute for resolution in accordance with the rules and procedures of a particular arbitration association. See text immediate below.\textsuperscript{134}
\item On the relationship between legal culture and non-institutional arbitration, see supra text accompanying note 42.
\item The BCIAC states directly on its web homepage, “Established in 1986, the BRITISH COLUMBIA INTERNATIONAL COMMERCIAL ARBITRATION CENTRE (BCICAC) is an organization committed to offering businesses alternatives to litigation. Alternative dispute resolution includes mediation and arbitration which are effective and cost-efficient methods for achieving resolution of commercial disputes. Unlike litigation, these processes are also confidential…. The Centre is available to provide information and assist in the smooth conduct of the arbitration or mediation. As an administrator, the Centre provides Rules of Procedure, establishes timelines, and appoints independent and qualified mediators and expert arbitrators.” [bold face in the original.] On careful examination, it is apparent that, while the Centre has its own arbitration rules and procedures, it also serves as a locus in which parties can choose to arbitrate their disputes according to their own arbitral rules or for that matter, the rules of any other arbitration center. See \url{http://www.bcicac.com/}.
\item International arbitration centers, like the Hong Kong International Arbitration Centre [HKIAC] sometimes fail to distinguish between cases they administer and arbitrations that use their facilities. See \url{http://www.hkiac.org/HKIAC/HKIAC_English/main.html} But see Neil Kaplan, et al., \textit{Hong Kong and China Arbitration: Cases and Materials} (Butterworths, 1994). Other arbitration centers provide alternative services to arbitration conducted by the center, with limited discussion other than by stating that parties interested in these services can contact the secretariat or other administrative body of the center. The London Court of International Arbitration, for example, so provides in regard to “Expert Determination, Adjudication and Other Services”, at \url{http://www.lcia-arbitration.com/}.
\end{itemize}
arbitration association, selecting which rules, procedures and regulations to adopt, choosing from an assortment of sample model arbitration clauses, and accessing the association’s panel of arbitration experts for arbitrators that they sometimes can hire independently of the association.137 Certainly there are risks to arbitration associations providing non-institutional services, particularly when parties who otherwise might have opted for full services from the association instead choose limited cafeteria services. There is also the risk that a dominant party may pressure the other party into accepting a cafeteria approach that favors the former. However, if international commercial arbitration is to accommodate new needs – along with the changing culture of prospective parties – than this shift to cafeteria style arbitration is a sensible response to a global marketplace in arbitration services, notwithstanding these risks.

International commercial arbitration has also entered the global culture of the Internet.138 A few arbitration associations provide all their arbitration services online, such as the resolution of domain name disputes under the auspices of the World Intellectual Property Association (WIPO).139 Mainstream local, regional and international arbitration associations also offer various online services, including online resources and the ability to file cases online, carefully protected by sophisticated and pass-protected gateway services.140 With a global community that is reliant on the services of the Internet, such changes in international arbitration services are inevitable. It is also likely that we have just seen the tip of the proverbial iceberg in that changing cultural landscape.141

There is also evidence that arbitration centres that were once regarded with suspicion in the international business community, are becoming not only more competitive, but

137 Interestingly, the Singapore International Arbitration Centre provides two lists of cases it has administered between 2000 and 2005, the first list consists of cases administered under its own SIAC rules (52 cases in 2005); the second list consists of cases administered under “other rules” (22 cases in 2005). One can reasonably assume that these other rules include ad hoc arbitration in which the parties use SIAC facilities but adopt to varying degrees, their own or some other association’s rules and procedures. See http://www.siac.org.sg/. See further supra note 119 and infra note 146.

138 For conferences and papers on the development of an Internet culture provides for online filling. See http://adr.org/sp.asp?id=21890 Similarly, the Hong Kong International Arbitration Centre (HKIAC) does so as well in domain name, e-commerce and Internet Keyword disputes. See http://hkiac.org/HKIAC/HKIAC_English/main.html In contrast, the ICC does not appear to provide online services, although it does provide significant information about arbitration on its home site. See e.g. http://www.iccwbo.org/court/adr/id4424/index.html

140 The American Arbitration Association, including its International Center for Dispute Resolution provides for online filling. See http://portal.acm.org/citation.cfm?id=722390

141 A formidable barrier to developing an “Internet culture” in arbitration relates to a combination of concerns about maintaining the confidentiality of proceedings and the comfort level of arbitrators and parties with Internet services. It is apparent that gateways and passwords can do a great deal to offset the former criticisms, particularly with the massive advent of increasingly secure Internet banking. The latter impediment is partially generational and will recede as younger arbitrators and parties demonstrate their comfort with the Internet, including in relation to dispute resolution. One can also speculate over the prospect of additional Internet features being added for arbitration, including video-Internet-conferencing, podcasting, and other recent and prospective developments. For conference and workshop debates on these and other issues relating to the development of an Internet culture, see http://portal.acm.org/citation.cfm?id=722390 For an interesting perspective on the future of online dispute resolution in relation to international commercial arbitration, see Jasna Arsic, International Commercial Arbitration on the Internet: Has the Future Come Too Early?, 14 J. Int’l. Arb. 209 (1997).
also readier to provide transparent services and enforceable results. Criticisms directed at CEITAC, as being wholly China-centric are less supportable today as CEITAC has modernized its rules and procedures to accommodate the needs and interests of a stratified global business community.\textsuperscript{142}

Finally, centers that are directed primarily at providing arbitration education have evolved to assist parties to decide whether and how to use arbitration, varying from advising them on how to draft arbitration clauses and choose arbitrators to how to form realistic expectations about the time and costs involved in arbitrating disputes.\textsuperscript{143}

International commercial arbitration will face ongoing cultural challenges, not least of all arising from disparate regional practices and procedures, and the choice of inappropriate arbitration institutions or procedures.\textsuperscript{144} While it is not always easy for parties to know the full extent of the complexity and cost of arbitration, it is important that arbitration not be perceived to be unduly complex or costly by those who might otherwise use its services. Added to this is the need for international arbitration to take account of a range of growing impediments to the efficient resolution of disputes: the distance of arbitrators from the situs, the hazards associated with international travel, and the psychological and physical impediments to holding even preliminary hearings by video link. These barriers are most serious when prospective users of arbitration view them as the source of increased cost and delay in the rendering of awards.

Again, the culture of arbitration has changed to cater to these concerns. For example, some regional arbitration associations stress their ability to deliver low cost and speedy arbitration services. They provide online services and expedited procedures; they use local and regional arbitrators who are readily accessible; and they partner

\begin{footnotes}
\end{footnotes}
with other international arbitration to mutual advantage. Again, “localization” and “regionalisation” of arbitration is neither good nor bad in itself. It is simply evidence of arbitration reacting to new opportunities. It is also part and parcel of an unfolding shift in the culture of international commercial arbitration itself.

Several key questions remain: Is the culture surrounding international commercial arbitration potentially exclusionary of other cultures? If so, how might such exclusion be evaluated and where appropriate, remedied?

VIII. A Culture of Inclusion?

For William Slate II, President of the American Arbitration Association, arbitrating in the United States suffers from the perception that American lawyers are too litigious. Slate also appreciates the mistrust of institutions that are perceived as being unduly influenced by a legal tradition of adversarialism. He nevertheless finds solace in the view that the American business increasingly situates commercial disputes in the global context of arbitration.

The problem of cultural myopia, however, is larger than William Slate acknowledges. It is also bigger than wooing Chinese business to international commercial arbitration and to the AAA in particular. Part of the problem lies in the failure of international arbitration properly to accommodate legal traditions and cultures that diverge from its own pre-existing cultural norms and contributing legal traditions. Yet another part of the problem lies in the growing trend to “domesticate” arbitration in somewhat disparate ad hoc proceedings and thereby to decentralize both the culture and the tradition of international arbitration.

145 For example, the International Center for Dispute Resolution of the American Arbitration Association stresses the convenience of its streamlined rules and procedures, including online services and filing. http://www.adr.org/sp.asp?id=21890

146 The Singapore International Arbitration Centre [SIAC] has established itself as a cost-effective regional center with the significant advantage of being a commercial hub. The last promotional bullet on its home page states, unashamedly, that SIAC provides: “Lower cost than in almost any other major centre of arbitration.” See “What Singapore has to offer” at http://www.siac.org.sg/ Over time, this refrain is likely to become increasingly commonplace as arbitration associations compete for local, regional, and also international business.


Take the situation of international commercial arbitration in Africa. As articulated above, different parts of Africa readily fell under the colonial rubric of Civil and Common Law traditions. Whether these traditions derived from conquest or settlement or both, different African countries have adopted variants of English, French, Dutch, German, Belgian, Portuguese, Spanish or Italian Law. One can debate endlessly to what extent these colonial incursions gave rise to pure, or impure, variations of Common or Civil Law. One can also discuss at length the influence of customary practice upon the legal traditions of a multitude of African countries. But none of these debates address the central issue: that the current incantation of international commercial arbitration, whether Common or Civil Law in genesis, may be inadequate to satisfy the needs of many African environments. In particular, modern international commercial arbitration came of age in the latter half of the Twentieth Century in the great cities of Europe and America. Neither African nor Asian countries participated much in its evolution. With few exceptions, African countries could not then – nor indeed now – boast of having large cosmopolitan commercial cities in which international commercial disputes could be resolved. Key attributes of international commercial arbitration were not easily satisfied in African jurisdictions in which difficulties of access and procedural delays were common place compared to cosmopolitan venues elsewhere to which arbitrators, parties and witnesses had easy access. Many African cities were also considered unsuitable as arbitration venues due to the perception that they were economically, socially and politically unstable. Lines of communication to and from African destinations were viewed as slow and susceptible to disruption. Some African cities still face difficulties of access; and legal practice there often is marginal when compared to practice at venues in London, New York and Paris. The African Continent in general also lacks a critical mass of established international commercial lawyers who practice as counsel or arbitrators in arbitration proceedings.

International Arbitration in a Changing World (Cambridge, Mass.: Kluwer Law & Taxation, 1993). An insidious quality attributed to “domestication” of arbitration is that nation states may attempt to subsume international commercial arbitration within their domestic legal systems. The fear is that this will result in sacrificing key features of international commercial arbitration: their independence from nation states and domestic courts of law. This “domestication” of international commercial arbitration was a central criticism directed at China’s International Economic and Trade Arbitration Commission (CEITAC); although the critique is less sustainable today as CEITAC has modified its rules and procedures to reflect international arbitration standards. On CEITAC, see supra notes 100 & 104. See supra notes 67 & 73.

152 For commentary on this view, see generally Amazu A. Asouzu, supra note 149. See too Colloquium on International Commercial Arbitration, ADR and African States, at http://www.kcl.ac.uk/depsta/law/events/colloquium-speakers.html

153 Ibid.

154 See generally Kenneth Kaoma Mwenda, Principles of Arbitration Law (Parkland, Florida: Universl Publishers & Brown, Walker Press, 2003). It should be noted that the focus on harmonisation in law in Africa includes an emphasis on arbitration. See e.g. Organisation pour l’Harmonisation du Droit des Affaires en Afrique (OHADA), Treaty on the Harmonization of Business Law in Africa. Title IV concerns arbitration (Juris International).

Despite all this, Africa is a part of the global community. It has political power by virtue of its combined voting strength in international and regional trade organizations. It has economic importance, *inter alia*, in the export of agricultural goods and the import of durable consumer goods; and it is a testing ground for the principle that freedom to trade is inextricably linked to the equitable distribution of wealth.\(^{156}\)

One might respond by indicating that African business is but a fraction of the business of international commercial arbitration, and that African interests are insufficiently important to justify overhauling the entire arbitration system. One might add that it is unwise to modify the character of international commercial arbitration in the absence of a pressing *universal* need. However, the same might have been said about much of Asia thirty years ago that was similarly marginalized as a *locus* for arbitration.\(^{157}\)

Today, arbitration recognizes the considerable importance of Asia, not least of all China, to the truly global character of international dispute resolution. One cannot say the same of Africa at this time, and to some extent South America and the Middle East,\(^{158}\) although arbitration in the last mentioned case has grown in importance with the advent of major oil related disputes.\(^{159}\) One can say that international commercial arbitration needs to be vigilant so as to avoid being dubbed culturally myopic in times of change.

One reaction is that international commercial law is *already* all about customary legal traditions, including the customs, usages and practices of a diverse international business community. This is true: international arbitration is closely intertwined with the incorporation of business practice into a “modern” Law Merchant that is directed at the efficient resolution of business disputes.\(^{160}\) However, the significance of local

---

\(^{156}\) See generally Mwenda, *supra* note 155; Amazu A. Asouzu, *supra* note 150.


\(^{159}\) Of note, William Slate, *supra* note 1, cites a critical statement directed at transnational arbitration by Mr. Ahmed El-Kosheri, a noted Arab arbitrator, at an ICCA conference in Seoul in 1996. “In general, the legal community throughout the Arab world is still manifesting its hostility to transnational arbitration ... [T]he continuing attitude of certain western arbitrators being characterized by a lack of sensitivity towards the national laws of developing countries and their mandatory application, either due to the ignorance, carelessness, or to unjustified psychological superiority complexes, negatively affecting the legal environment required to promote the concept of arbitration in the field of international business relationships.” *But see* Arab Convention on Commercial Arbitration, signed April 14, 1987, entered into force June 25, 1992, and deposited with the Secretary General of the League of Arab States. *See too* Roger Alford, Islamic Law and International Arbitration, *Opinio Juris* (2006), at [http://www.opiniojuris.org/posts/1148605897.shtml](http://www.opiniojuris.org/posts/1148605897.shtml)

customs is not always made clear in arbitration proceedings. Nor does the examination and cross-examination of witnesses invariably make those customs clear. At the same time, it is important that arbitrators take account of local customs in reaching awards that comply with law, while also being fair to the parties.\footnote{For a now classical analysis of the influence of custom on the proliferation of commercial arbitration, see Donald B. Straus, The Growing Consensus on International Commercial Arbitration 6 Am. J. Int’l. L. 709 (1974).}

Nor is the problem of international commercial arbitration failing to take account of customary law limited to ignoring customs in developing countries. Consider, for example, the significance of custom in relation to property law in investment arbitration under Chapter 11 of the NAFTA. Property is peculiarly influenced by the custom of the \textit{locus}. Chapter 11 of the NAFTA deals at length with the rights and duties of the parties in the event of an expropriation of property, but deals only cursorily with the concept of property itself.\footnote{On investment disputes under Chapter 11 of the NAFTA, see Leon E. Trakman, Resolving Disputes Under Chapter 19 of the NAFTA in Doing Business in Mexico (New York: Transnational Leg. Publ., 2004 release); Leon E. Trakman, Arbitrating Investment Disputes under Chapter 11 of the NAFTA 17 J.Int’l.Arb.285 (2001).} The Chapter presumes that international standards will give content to property law, even though those international standards are poorly defined and unevenly applied across domestic legal systems.\footnote{For commentary on property in relation to Chapter 11 of the NAFTA, and the difficulties faced by arbitrators, see Marc Poirier, The NAFTA Chapter 11 Expropriation Debate Through The Eyes of A Property Theorist, 33 Env’tl L. 851 (2003); Celine Levesque, Distinguishing Expropriation From Regulation: Making the Link Explicit to Property, Kevin C. Kennedy, ed., The First Decade of NAFTA: The Future of Free Trade in North America (Ardsley, New York: Transnational Publishers, 2004).} As a result, arbitrators who are appointed under Chapter 11 of the NAFTA might be called upon to decide the legal consequences of a government taking, without significant guidance on the standard of property to apply.\footnote{See Trakman, \textit{ibid}. Part of the problem perhaps lies in the reluctance of the drafters of Chapter 11 of the NAFTA to deal the issue of “what is property” for the purpose of expropriation, given the complex nature of property and problems in the interpretation and application of disparate conceptions of property. See further supra note 164.} They might respond by incorporating local conceptions of property law into their analysis, or by treating those conceptions as extraneous. Alternatively, they might identify a gap or \textit{casus omissus} in Chapter 11 in relation to property and purport to fill it. However, if arbitrators are to fill gaps in intergovernmental agreements, to what extent they can rely upon their own backgrounds and proclivities rather than authoritative international sources? One possibility is for Chapter 11 arbitrators, as for arbitrators appointed under other regional and bilateral trade agreements such as the Free Trade Association of the Americas (FTAA), to engage in selective arbitral activism.\footnote{On the FTAA, see \textit{http://www.ftaa-alca.org/} This attempt to arrive at a free trade agreement across the Americas is not without its detractors. See \textit{http://www.globalexchange.org/campaigns/ftaa}.} For example, they might follow the European Court of Human Rights by adopting a “general margin of appreciation” doctrine, relaxing the technical application of Chapter 11 in order to “appreciate” different domestic conceptions of property. Such appreciation might provide arbitrators with a contextual “margin” in which to assess cultural differences in the conception and application of property law.\footnote{The doctrine originated in the jurisprudence of the European Court of Human Rights, to allow for fundamental human rights to be interpreted according to the cultural traditions prevailing within individual nation states. While some view the doctrine as encouraging healthy cultural relativism, 32
However, the process of injecting principles like the “margin of appreciation” into international commercial arbitration will not be easy. Arbitrators still need to assess the distinctiveness of a local custom, to appreciate how that distinctiveness ought to be considered in an arbitration setting, and to comply with the applicable law while also being fair to the parties. Nor should one expect arbitrators summarily to introduce revitalized conceptions of amiable composition and ex aequo et bono into general arbitral practice under the rubric of doctrines like “the margin of appreciation”, without considering the risk of being challenged on grounds of acting contrary to law. International arbitrators ultimately need to demonstrate their capacity to accommodate customary change, while also acting in accordance with law. With powers come responsibilities.

X. Reflections

National, regional and international arbitration centers have become increasingly sophisticated in the range of arbitration services that they provide to an increasingly savvy business clientele. These centers are driven somewhat by the need to satisfy the interests of an ever-widening array of parties who have ready access to informed sources, including at various sophisticated arbitration websites. International arbitration associations also increasingly respond to competition from ad hoc and non-institutional arbitration by providing facilities for ad hoc and non-institutional proceedings, while continuing aggressively to market their own arbitration clauses and services. How this tension between institutional and non-institutional arbitration others believe that it may lead to undue accommodations being made to the cultural peculiarities of and in each nation state. The real issue, however, is how courts – and as proposed here, arbitrators – may invoke the doctrine in practice. See Shany, Yuval. Toward a General Margin of Appreciation Doctrine in International Law? 16 Eur. J. Int’l L. 907 (2005); Aaron A. Ostrovsky, What’s So Funny About Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals, 1 Hanse Law Review 47 (2005); Yuval Shany, Toward a General Margin of Appreciation Doctrine in International Law? 16 European J.Int’l Law 907 (2006); John H. Barton, James Lowell Gibbs, Victor H. Li & John Henry Merryman, Law in Radically Different Cultures (American Casebook Series, 1983).

167 To this should be added that conceptions like the “rule of law” sometimes have a different meaning and application in different legal traditions that can influence arbitration practice. See e.g. discussion on the rule of law in Japan and China respectively, Carl F. Goodman, The Rule of Law in Japan: A Comparative Analysis 213 (The Hague; London; New York: Kluwer Law, International 2003); Karen Turner, James Feinerman & R. Kent Guy, eds., The Limits of the Rule of Law in China. (Seattle: University of Washington Press, 2000).

168 In so stating, it is relevant to note that the international arbitration community has a revitalized interest in the suitability of deciding cases ex aequo et bono and by amiable composition, with the ICC having established a task force in 2005 with the mandate: “(1) to identify the essential features of “amiable composition” and of “ex aequo et bono ” and (2) to study the role of the arbitrators when acting as “amiable compositeurs” or when deciding “ex aequo et bono ” (e.g. jurisdictional, procedural or substantive problems that may arise).” Task Force on “Amiable Composition and ex aequo et bono”, at http://www.iccwbo.org/policy/arbitration/id6566/index.html See generally Leon E. Trakman, The Law Merchant, supra note 19, Chapter 1.

169 On different systems of control over international adjudication and arbitration generally, see e.g. Michael W. Reisman, Systems of Control in International Adjudication & Arbitration: Breakdown and Repair (Durham, NC: Duke University Press, 1992).

170 See Leon E. Trakman and Sean Gatien, Rights and Responsibilities Ch. 1 (Toronto: University of Toronto Press, 1999).
will play out remains unclear. However, the legal culture driving international commercial arbitration is expanding to accommodate, not only new arbitration providers, but also new types of parties with different cultural and political roots. Included among these new parties are those from socio-political environments that used to decry arbitration, notably China during earlier incantations of its cultural revolution, but which has since adopted its own variant of international commercial arbitration.

By its very nature, international commercial arbitration services sometimes fall short of the central tenets of arbitration: to provide a time and cost efficient alternative to domestic courts of law. Legal cultures surrounding international commercial arbitration have grown both more diffuse and more complicated in operation, while arbitral institutions sometimes have failed to adapt to the demands of changing markets for their services. International commercial arbitration needs to address those legal cultures and traditions which arbitration ignored historically, but which now carry far greater political and economic weight. The warning message, following William Slate is that to ignore these legal traditions and cultural influences will be at the peril of arbitration itself.

This is not to suggest that international commercial arbitration has stood still. Significant progress has been made by local, regional and international organizations at demystifying arbitration. Information is increasingly available that explains to parties how arbitration works, including answers to frequently asked questions about the process, as well as the cost and time involved in arbitrating commercial disputes.\(^\text{171}\) There is also an impressive body of online databases that clarify what, when, how and where to arbitrate, along with the inclusion of a host of conventions, codes, laws, rules and practices on international commercial arbitration.\(^\text{172}\) The Internet has also spurned high-end information sites that provide both original


\[\text{\textsuperscript{172}}\text{For example, on a detailed compilation of arbitration treaties and conventions, national laws, arbitration institutions, among other resources, see, Lawrence J Bogard & George W. Thompson, Transnational Contracts (Dobbs Ferry, NY: Oceana Publications, 1997-); Rosabel E. Goodman-Everard’s Directory of Arbitration Websites and Information on Arbitration Available Online. For searchable databases on international commercial arbitration, see The WWW Virtual Library Section on Private Dispute Resolution; Electronic Information System for International Law (EISIL)(created by the American Society of International Law); International Commercial Arbitration: Resources in Print and Electronic Format; La Conciliation, La Médiation Et L’arbitrage; T.M.C. Asser Institute for Private and Public International Law - International Commercial Arbitration; The Scoreboard of Adherence to Transnational Arbitration Treaties. One of the most comprehensive list of books on arbitration, published by Kluwer International [now a division of Aspen Books] can be found at http://www.aspenpublishers.com/search.asp?Mode=SEARCH&keyword=arbitration&ISBN=&Author=&Sort=DEFAULT&SearchOption=Title}\]
materials and useful commentary, including the most recent books and articles, speeches, notes and comments on arbitration.¹⁷³

Despite these developments, international commercial arbitration is unlikely to be a panacea for all the dispute resolution needs of the global community. The most formidable threat to arbitration remains that it is sometimes perceived as being insensitive to the interests of important prospective users. It is this threat that needs to be creatively and decisively addressed if international commercial arbitration is to thrive. In the words of William K. Slade II, President of the AAA:

We need to recognize cultural prejudices and be sensitive to cultural traditions lest we unintentionally offend our real and would-be friends. At the same time, we need to pay attention to culturally induced personal behaviors of our own that could be perceived in an unflattering light.¹⁷⁴


¹⁷⁴ William K. Slate II, supra note 1.