

The Culture of Arbitration

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Recent years have seen growing attention to the relationship between “legal culture” and the practice of international arbitration. Arbitration is seen as a meeting point for different legal cultures, a place of convergence and interchange wherein practitioners from different backgrounds create new practices. Some have suggested that this process has led to an emergent “international arbitration culture” fusing together elements of the common law and civil law traditions.¹ Others see arbitration as a locus of conflict among traditions,² or competition among various players.³

This comment contests the view that the current state of convergence in arbitration is properly considered a cultural phenomenon. It argues that the phenomenon of convergence is driven primarily by economic rather than cultural factors, and that claims of an arbitration culture reflect the anticompetitive impulse of those in the business already. I argue that convergence in rules and norms is better understood as the result of competition to capture network benefits in the rapidly expanding field of international commercial arbitration.

I. Legal Culture and Arbitration

Legal scholars talk about culture in two ways. First there is the notion of a general legal culture, which is usually taken to mean those aspects of national culture that find expression in the legal system.⁴ We speak regularly of Japanese legal culture, French legal culture and American legal culture, as well as, more broadly, a civil law and common law culture. As Friedman put it, legal culture consists of the “attitudes, values

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¹ INTERNATIONAL DISPUTE RESOLUTION: TOWARDS AN INTERNATIONAL ARBITRATION CULTURE (ALBERT JAN VAN DEN BERG, ED. 1998); Gabrielle Kaufmann-Kohler, _____, ____ VAND. J. TRANSNAT'L L. ___, ____ (2003); Siegfried H. Elsing and John M. Townsend, *Bridging the Common Law-Civil Law Divide in Arbitration*, 18 ARB. INT'L 59 (2002); Marcus S. Jacob, *The Adversarial vs. Inquisitorial Principles of Dispute Resolution Within the Context of International Commercial Arbitration*, 16:12 MEALEY'S ARB. REP. 32 (2001); Lara M. Pair, *Cross-Cultural Arbitration: Do the Differences Between Cultures Still Influence International Commercial Arbitration Despite Harmonization?* 9 ILSA J. INT'L COMP. L 57 (2002).

²See CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS (STEFAN N. FROMMEL AND BARRY A.K. RIDER, EDS., 1999).

³ Christian Borris, *The Reconciliation of Conflicts Between Common Law and Civil Law Principles in the Arbitration Process*, in CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS 1-18 (STEFAN N. FROMMEL AND BARRY A.K. RIDER, EDS., 1999) (cultural conflict); Michael Kerr, *Concord and Conflict in International Arbitration*, 13 ARB. INT'L 121 (1997); YVES DEZALAY AND BRYANT GARTH, *DEALING IN VIRTUE* 54 (1996) (competition).

⁴ David Nelken, *Toward a Sociology of Legal Adaptation*, in ADAPTING LEGAL CULTURES 7, 25 (D. NELKEN AND JOHANNES FEEST, EDS., 2001) (Legal culture “points to differences in the way features of law are themselves embedded in larger frameworks of social structure and culture which constitute and reveal the place of law in society.”); see also CSABA VARGA, *COMPARATIVE LEGAL CULTURES* (1992); *COMPARING LEGAL CULTURES* (DAVID NELKEN, ED., 1997).

and opinions held in society with regard to law, the legal system and its various parts.”⁵ These values might be expressed as a preference for arbitration over litigation, for oral procedures over written ones, or for punitive remedies, to take just a few random examples.⁶

This approach focuses on culture as a feature of the decision-making environment of legal actors. It argues that certain choices, either procedural or substantive, will be preferred over others because of prior cultural endowments. The preferences of legal actors are exogenously produced by the national culture or legal tradition, and will shape behavior. This approach emphasizes the relative immutability and constraining effect of culture on legal choices. It also implies that culture will dictate outcomes even when it is costly, that is when the same result would not be reached through a rational cost-benefit calculation.

A second notion of culture has to do with shared norms and expectations *produced* by legal actors. Culture is produced by actors engaged in repeated interaction over time. Lawyers form an epistemic community, that is, a community of professionals with common training and expertise.⁷ This common training and expertise, combined with interactive practices, produce a common set of expectations. These expectations, in turn, shape behavior, though they are also subject to change as new norms arise. This notion emphasizes the dynamism of culture. It is culture as a product of law rather than constraint on law, an effect rather than a cause.

Broadly speaking, globalization leads to pressure on legal cultures in the first sense of fixed endowments of ideas: national legal cultures that were more or less autonomous are now subject to a variety of external pressures because of the growing rate of cross-national interaction. But precisely because of this cross-national interaction, globalization produces culture in the second sense. One arena in which this plays out is international commercial arbitration. Hence, there is increasing discussion of something called a culture of arbitration, a transnational culture common to practitioners, arbitrators and parties involved in arbitral practice.⁸ The culture of arbitration typically refers to the

⁵ LAWRENCE FRIEDMAN, *LAW AND SOCIETY: AN INTRODUCTION* 76 (1977); *see also* LAWRENCE FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* 15 (1975) (legal culture is “those parts of general culture—customs, opinions, ways of doing and thinking, that bend social forces toward or away from the law.”) For a critique, see Roger Cotterell, *The Concept of Legal Culture*, in *COMPARING LEGAL CULTURES* 13-14 (DAVID NELKEN ED., 1997).

⁶ Richard H. Kreindler, *Arbitration or Litigation? ADR Issues in Transnational Disputes*, 52 *DISP. RES. J.* 79 (1997) available on WESTLAW; *see also* Amanda Stoddard, *Joining The Culture Club: Examining Cultural Context When Implementing International Dispute Resolution*, 17 *OHIO ST. J. DISP. RES.* 463, 463 (2002) (international disputes involve collision of “dispute resolution cultures.”)

⁷ *See* Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 *INT’L ORG.* 1, 3 (1992). (“An epistemic community is a network of professionals with recognized expertise and competence in a particular domain and . . . [has] a common policy enterprise—that is, a set of common practices associated with a set of problems to which their professional competence is directed, presumably out of conviction that human welfare will be enhanced as a consequence.”)

⁸ *INTERNATIONAL DISPUTE RESOLUTION: TOWARD AN INTERNATIONAL ARBITRATION CULTURE* (1998); Dezalay and Garth, *supra* note 3; Alan Rau and Edward Sherman, *Tradition And Innovation In International Arbitration Procedure*, 30 *TEXAS INT’L L. J.* 89 (1995); Horacio A. Grigera Naón, *Latin American Arbitration Culture and the ICC Arbitration System* in *CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS* 117, 117 (STEFAN N. FROMMEL AND BARRY

gradual convergence in norms, procedures and expectations of participants in the arbitral process.

Professor Kaufmann-Koehler's paper describes this phenomenon quite nicely.⁹ She demonstrates the phenomenon of convergence in a number of areas. She argues that the dominant test for determining the law governing arbitration proceedings is now the objective or territorial test, in which the law of the seat of the arbitration applies.¹⁰ Professor Kaufmann-Koehler also notes convergence on the role of the tribunal in setting its rules and in deciding procedural matters.¹¹ Procedures have also converged around a blend of oral and written procedure, with a strong tendency toward oral hearings, written witness statements, and reliance on experts, but subject to limitations and control by the panel.¹² Even the dreaded Anglo-American discovery practice has been adopted in a limited form, tamed by the moderating influence of commercial arbitration.¹³

Further convergence is found in the ability of the tribunal to determine its own jurisdiction, the so-called *kompetenz kompetenz*,¹⁴ and provisions for severability of the arbitral clause, without which arbitration would be severely constrained.¹⁵ Another example argued to reflect cultural convergence is the substantial agreement on the general principles of arbitration, such as party autonomy and the need for procedural fairness.¹⁶ Finally, the spread of the Model Law and the New York Convention have been major forces pushing toward uniformity.¹⁷

A.K. RIDER, EDS., 1999); Brett Fulkerson, *A Comparison of Commercial Arbitration: the United States and Latin America*, 23 HOU. J. INT'L L. 537, 566 (2001) (NAFTA harmonizing arbitration culture); Leonel Pereznieta Castro, *Commercial Arbitration in Mexico* 13 FL. J. INT'L L. 39 (2000) (foreign awards enforced even if not from New York Convention signatories).

⁹Gabrielle Kaufmann-Koehler, *Globalization of Arbitral Procedure*, __ VAND. J. TRANSNAT'L L. __ (2003).

¹⁰ See UNCITRAL Model Law Art. 1(2)

¹¹ ICC Rules Art. 15 (1998) (panel can decide procedural rules where none provided or chosen rules silent); LCIA Rules Art 22 (1998) (a range of procedural powers); AAA Int'l Rules, Art 16 (1997) (subject to the rules, tribunal can conduct arbitration "in whatever manner it considers appropriate.")

¹² Lowenfeld, *id.* at 24 (oral procedures); Serge Lazareff, *International Arbitration: Towards a Common Procedural Approach*, 31, 35 CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS 19, 26 (STEFAN N. FROMMEL AND BARRY A.K. RIDER, EDS., 1999) (limited hearing).

¹³ Andreas Lowenfeld, *International Arbitration as Omelette: What Goes into the Mix*, CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS 19, 26 (STEFAN N. FROMMEL AND BARRY A.K. RIDER, EDS., 1999) (discovery in arbitration a "genuine compromise"); Elsing and Townsend, *supra* note 1, at 61 (compromise over discovery); see also IBA Rules on the Taking of Evidence in International Commercial Arbitration (1999).

¹⁴ Sec. 30, English Arbitration Act (1996).

¹⁵ Lazareff, *supra* note 12, at 31.

¹⁶ Kaufmann Kohler, at __; see also Borris, *supra* note 3, at 3 (arbitration laws converge on principles of party autonomy).

¹⁷ See PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION IN MODEL LAW JURISDICTIONS (2000); ALBERT JAN VAN DEN BERG, ED., IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION (ICCA Congress No. 9, 1999).

It is worth noting, parenthetically, that the emergent arbitration culture does *not* reflect the hegemony of the Anglo-American law firm, as some would have it.¹⁸ On balance, the various shifts may have moved arbitration in the direction of becoming more like Anglo-American style litigation, but this shift is far from complete. Indeed, there are signs that United States arbitration practice may be shifting toward international practice on a number of dimensions. The American Arbitration Association has recently amended its Rules for Commercial Arbitration so that party-appointed arbitrators are expected to be neutral, as in all international rules, unless the parties specify otherwise.¹⁹ Professor Park's paper in this symposium, calling for modest amendment of the FAA along the lines of the Model Law with regard to judicial review of international awards, is another example.²⁰ Park's paper is really a call for the United States to join the global arbitration culture on this point, displacing our national "legal culture" of judicial autonomy, rights consciousness and inconsistent decision-making. In this sense, both the papers by Professor Kaufmann-Kohler and Professor Park are about responses to globalization, with Kaufmann-Kohler's approach being descriptive and Park's more normative.

II. Whose Culture?

Arbitral practice has indeed converged to a certain degree. But because of the private structure of arbitration, it is difficult to tell if all this is really "culture" in the sense of expectations of participants in the process. Much of the evidence for convergence comes from the evolution of rules of arbitral institutions and national law, but we really do not know how extensively these are used as a percentage of total arbitration practice. Empirical research on arbitration is notoriously difficult to conduct, since the only cases we learn about are those that are reported for some reason or are appealed.²¹ Indeed, much of what we do know about arbitration is from these possibly aberrant cases.²² Although certain sources for arbitral decisions exist, such as Mealey's Arbitration Reporter and the ICC redacted awards, they are but a tip of the iceberg of all

¹⁸ Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEG. STUD. 383 (2003) (U.S. legal hegemony requires 'resistance'); see also Bryant G. Garth, *Building Strong and Independent Judiciaries Through the New Law and Development: Behind the Paradox of Consensus Programs and Perpetually Disappointing Results*, 52 DEPAUL L. REV. 383, 397 (2002) (U.S. expertise is hegemonic); but see Dezalay and Garth, *supra* note 3, at 60-61 (results of contest over arbitration not clear and will be provisional).

¹⁹ Rule R-12(b). For the traditional distinction between American and international practice in this regard, see Andreas F. Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 TEX. INT'L L. J. 59 (1995); Richard M. Mosk, *Party-Appointed Arbitrators in International Arbitration: The Experience of the Iran-U.S. Claims Tribunal*, 1 TRANS. LAW. 253 (1988).

²⁰ William Park, _____, _____ VAND. J. TRANSNAT'L L. _____ (2003).

²¹ See Christopher R. Drahozal, *Of Rabbits and Rhinoceri: A Survey of Empirical Research on International Commercial Arbitration*, 20 J. INT'L ARB. 23, 24 (2003) (empirical studies are few but growing in number).

²² Such as the *Alghanim v. Toys R Us* case discussed by Park. 126 F.3d 15 (2d. Cir. 1997).

the cases produced.²³ Furthermore, the ICC awards are an explicitly biased sample, as the ICC seeks to publish particularly interesting or unusual awards.²⁴

In this context, an important source of information on arbitration in practice is the work of various scholar-practitioners (such as Professors Kaufmann-Kohler and Park) who draw on their experiences in producing articles that both describe and develop arbitration. In arbitration, perhaps more than any other field of law, the line between scholar and practitioner is blurred, so that many leading scholars are involved in arbitrations and many leading arbitrators take the time to write academic articles and books.²⁵ Like the grand civil law tradition, the law and technique of arbitration is produced by scholarly commentary.²⁶ The role of scholars is enhanced because the other potential sources of lawmaking, namely legislators and judges,²⁷ are called on only when the relatively autonomous system of commercial arbitration turns to national legal systems for support or enforcement. Nor can arbitral *practice* directly contribute to the norm-creation function because of the need for confidentiality. Scholarly (and institutional) production of arbitration law and rules fills the void.

III. Explaining Arbitration Culture

Dezalay and Garth's influential study, *Dealing in Virtue*, uses Pierre Bourdieu's construct of a social field to understand the transformation of arbitration into the preferred mode of international dispute resolution.²⁸ Their story is one of competition among "the grand old men" and the large Anglo-American law firm over the rules of the game. Arbitration has moved from a small number of "grand old men" (who in many cases shared a culture in our first sense of being from a common legal tradition) to a broad-based practice of major law firms operating in a global market.²⁹ Each group seeks and deploys "symbolic capital" in these struggles. This contested process has produced the current (unstable) state of affairs that others call the culture of arbitration.

I agree with the outlines of Dezalay and Garth's basic story, but do not think we need notions of "symbolic capital" or culture to understand it. I do not see the production of rules and commentary by scholars and institutions as an effort to build up "symbolic capital."³⁰ Their notion does not really explain why convergence has occurred or have the potential to account for why we have seen the particular convergences we have.

²³ ICC ARBITRAL AWARDS 1971-85 (SIGVARD JARVIN & YVES DERAIS, EDS, 1990); ICC ARBITRAL AWARDS 1986-90 (SIGVARD JARVIN, ET AL., EDS., 1994) AND ICC ARBITRAL AWARDS 1991-95 (JEAN-JACQUES ARNALDEZ ET AL, EDS, 1997). Arbitrations involving states have produced more volume.

²⁴ W. LAURENCE CRAIG, ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 338n.62, 639n.39(3D. ED., 2000).

²⁵ See, e.g., W. LAURENCE CRAIG, ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION (3D. ED., 2000); CHARLES N. BROWER AND JASON D. BRUESCHKE, THE IRAN-UNITED STATES CLAIMS TRIBUNAL (1996); GEORGE ALDRICH, JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL; JULIAN D.M. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION (1987).

²⁶ JOHN MERRYMAN, THE CIVIL LAW TRADITION (2d. ed. 1985); see also Marela, _____, ____ Vand J. Transnat'l L. _____, ____ (2003) (UNIDROIT principles produced by "cultural mediation of legal scholars.")

²⁷ R. VAN CAENEGEM, JUDGES, LEGISLATORS AND PROFESSORS (1987).

²⁸ Dezalay and Garth, *supra* note 3, at 16

²⁹ Dezalay and Garth, *supra* note 3.

³⁰ Dezalay and Garth, *supra* note 3, at 18.

I want to suggest instead that there is a relatively simple economic explanation for the production of the common arbitral culture under conditions of globalization. In doing so I draw on a recent article by Professor Anthony Ogus, providing an economic perspective on legal culture, which I find useful in thinking about the culture of arbitration.³¹ Ogus focuses on the concept of network benefits. Networks in economics are systems in which users are linked, and network goods are those wherein a user's benefits increase with the number of other users of the network.³² The paradigm network good is the telephone, which is useless unless others also own telephones, and becomes even more useful the more people own them. Another prominent example is the Windows operating system—having established itself as the standard, one incurs costs to switch to a new one in the form of lost network benefits.

A legal culture, Ogus argues, is a combination of procedures and concepts that “constitute a network which, because of the commonality of usage, reduces the costs of interactive behavior.”³³ Culture becomes a kind of template for social interaction, and members of the same legal culture find it easier to work with each other than outsiders. When there are competing legal cultures, members also benefit the more people are members of their particular network or legal culture, explaining some of the intense competition to educate and train lawyers from around the world, or the export rules from a home jurisdiction.³⁴

Arbitration culture can be described similarly as a network. The rapid spread of arbitration makes it more likely that parties will be familiar with it as a dispute resolution option, creating more business for arbitrators. But it also creates demand for new rules and intense competition to define the network. We thus see a spread and continuous updating of arbitration rules to capture some of the “market” for arbitral business and also to set the standard for future interactions. We see the emergence of draft rules, contract terms, and principles from organizations like UNIDROIT, the International Bar Association, and UNCITRAL, to name only a few. The rules of various arbitral institutions, which reflect substantial convergence on many important questions, are another example.³⁵ We also see practitioner-scholars competing with each other to establish and influence the shape of the law.

Another sign of the rush to establish and join networks is the modernization of national arbitration laws. The numbers of arbitrations held in most jurisdictions would hardly justify the legislative effort to pass a new arbitration law designed to make the jurisdiction an attractive situs.³⁶ But when one factors in the network benefits to be

³¹ Anthony Ogus, *The Economic Basis of Legal Culture*, 22 OXFORD J. LEG. STUD. 419 (2002).

³² Ogus, *id.* at 422; see also Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479, 481 (1998).

³³ Ogus, *supra* note 31, at 420.

³⁴ Garth, *supra* note 18.

³⁵ See, e.g., Richard Mosk and Tom Ginsburg, *Becoming an International Arbitrator: Qualifications, Disclosures, Conduct and Removal*, in PRACTITIONERS HANDBOOK OF INTERNATIONAL ARBITRATION AND MEDIATION (RUFUS RHOADES, ET AL., EDS, 2001) (describing institutional rules on disclosure, appointment, and other areas).

³⁶ Compare Christopher Drahozal, *The Effect of Competition Among Arbitral Venues on Choice of Situs in ICC Arbitration Proceedings*, (University of Kansas School of Law Working Paper 2002) (finding a

obtained by conforming one's own law to that of others, the rapid production of new laws makes more sense. Having domestic lawyers with a working familiarity with the Model Law, for example, can not only help those lawyers compete for business overseas, but can also make them more sophisticated negotiators with foreign investors concerning arbitration clauses. Particularly when one thinks of the Model Law jurisdictions, the spread of regulatory structures conducive to arbitration may benefit all states in the sense of making arbitration easier abroad, as well as at home.

Another good example of a network- type rule in arbitration is the New York Convention. By requiring enforcement of foreign arbitral awards with relatively minimal scrutiny, the New York Convention resolves a collective action problem among states. Each jurisdiction might ideally desire to exercise strong review of awards for conformity with local law, but if they do so, other jurisdictions won't enforce awards in favor of their nationals. All economies are better off with recognition of foreign arbitral awards. These benefits are enhanced as more economies observe the Convention, since lawmakers cannot anticipate in advance where their entrepreneurs will need to enforce awards.

In thinking about the particular details of convergence, an economic perspective would contrast those areas of law where we would expect a single "network" standard to emerge and those where we would not. If there are efficiency advantages to particular rules, we might expect a trend toward harmonization under conditions of market competition. Indeed, long time observers of the arbitral process have observed greater efficiencies over time.³⁷ (Note that I am not making a broad claim about the efficiency of arbitration as a whole: secrecy in arbitration prevents any mechanism of case-by-case lawmaking such as has been claimed to lead to the efficiency of the common law.³⁸ But the transparent nature of institutional rules and competition for business among the institutions might lead to at least an evolution of efficient procedural rules.)

In other areas, where there are not substantial efficiency gains to uniformity or harmonization, we might expect more divergence. Here competition to establish the network standard may be associated with monopolistic behavior and may be undesirable. Ogus expects that in national jurisdictions, lawyers will control the content of legal culture, and will use the notion defensively against outside competition.³⁹ In this view, culture can be an anti-competitive product. Those inside the relatively closed world of international arbitration can use claims of an "arbitration culture" to highlight their own expertise. Those who "outside the culture" are less desirable participants.

We can now see why it is that claims about a "culture of arbitration" have expanded in recent years. As arbitration has expanded, the value of controlling the network standard has increased, leading to new efforts to promulgate rules and standards.

statistically significant increase in ICC proceedings in a country after adoption of a new statute, but of very small magnitude); KLAUS PETER BERGER, *INTERNATIONAL ECONOMIC ARBITRATION* at 6 n.55 (new statutes a signal to international arbitration community.)

³⁷ Andreas Lowenfeld, *International Arbitration as Omelette: What Goes into the Mix* 19, 19 *CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS* (STEFAN N. FROMMEL AND BARRY A.K. RIDER, EDS., 1999).

³⁸ Paul H. Rubin, *Why Is the Common Law Efficient?* 6 J. LEGAL STUD. 51, 53 (1977) (common law likely to be efficient because of pressures to overturn bad precedent).

³⁹ Ogus, *supra* note 31, at 427.

The larger and more diverse the network, the more need for common expectations. At the same time, claims of culture help to keep out outsiders. We ought to be cautious about embracing this latter characteristic of arbitration culture.

In short, the main *mechanisms* of convergence are likely to be not cultural, but economic. At the same time, economic factors may in part explain why it is so common to describe the results of convergence as being a cultural phenomenon. Pressures for more rules lead to competition to establish new network standards. The network standards provide a template for action, which everyone benefits by following. Culture becomes a shorthand way of referring to this set of standards.

This approach also provides a language for predicting and evaluating the precise areas of convergence in arbitration, to the extent we can overcome the empirical problems to learn what is actually happening. In this sense, it is superior to Dezalay and Garth's undifferentiated notion of "symbolic capital," which predicts only that observed convergences are the result of power struggles and hence unstable. Symbolic capital does not tell us why the winners won, whereas economics can help us understand why particular rules become the network standard and others do not.

Conclusion

This comment has highlighted the economic role in creating the international arbitration culture. As institutions evolve under competitive pressures, expectations converge and there is a demand for a "culture" of common practice. It is culture in the internal sense, a product of law rather than something that explains the outcome or constrains the process. The arbitration culture can be facilitative, encouraging effective communication and an efficient arbitration process. Or it can be monopolistic, trying to keep new entrants out with culture claims. As the culture of arbitration evolves, it will be interesting to see which outcome obtains.