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

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I. INTRODUCTION

The relationship between legal culture¹ and the practice of international commercial arbitration has received increasing attention in recent years. International commercial arbitration is said to provide “a meeting point for different legal cultures, a place of convergence and interchange wherein practitioners from different backgrounds create new practices.”² Indeed, in the context of globalization, arbitral proceedings are increasingly conducted in a uniform manner regardless of the place of arbitration and any governing national law.³ This article evaluates the recent hype surrounding the concept

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


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

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

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

5 The term ‘harmonisation’ will be used interchangeably with convergence.

6 Since its inception, the ICCA has been devoted to the promotion of international arbitration and other forms of dispute resolution by means of meetings and subsequent publications. See ICCA, About ICCA, obtainable from <http://www.arbitration-icca.org/about_icca.htm> (visited August 15, 2005).
better understood as a result of competition to capture network benefits. In the rapidly expanding field of international commercial arbitration, standardized rules reduce the cost of interactive behavior.

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

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

II. THE CULTURE OF INTERNATIONAL COMMERCIAL ARBITRATION

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

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8 ICCA Congress, supra note 3.

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

At the 1996 ICCA conference, theories of procedural convergence as reflective of an emergent International Arbitration Culture were advanced on the basis of two forms of legal culture. The first concept of culture encompasses those aspects of national culture that find expression in the general legal system. This embodies notions of U.S. legal culture, Japanese legal culture, and more broadly, civil law and common law cultures or even litigious and conciliatory cultures. In effect, legal cultures consist of ‘attitudes, values and opinions held in society with regard to the law, the legal system, and its various parts.’ For instance, these values may be expressed as a preference for mediation over litigation or for oral procedures over written ones. The second type of culture consists of shared norms and expectations created by legal actors that engage in repeated interactions. Culture is thus ‘the result of long-term developments and interrelated influences of factual, political, sociological, and legal factors.’ Lawyers form a community of professionals with common training and expertise which, when combined with regular professional interactions, result in a common set of expectations. According to one participant of note 2; Tiffany J. Lanier, Where on Earth Does Cyber-Arbitration Occur?: International Review of Arbitral Awards Rendered Online, 7 ILSA J INT'L & COMP L. 1 (2000); Matthias Lehmann, A Plea for a Transnational Approach to Arbitrability in Arbitral Practice, 42 COLUM. J. TRANSNAT'L L. 753 (2004); Catherine A. Rogers, Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration, 23 MICH. J. INT'L L. 341 (2002).

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

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

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


14 Bernini, supra note 12.

15 Ginsberg, supra note 1, at 1337.
the 1996 ICCA conference, International Arbitration Culture is based on
decency, defined as a desire to preserve the integrity of the arbitral process,
to honor commitments and to carry out obligations in good faith.\footnote{16} For
example, parties to an arbitration agreement will not refuse to appoint an
arbitrator as previously agreed.\footnote{17} Thus, it is argued that the expectation of
decency shapes the behavior of parties during interactive practices and is a
component of International Arbitration Culture.

I. The Volume of Arbitration Applications and Investment in China

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

\footnote{16} Hemmann, \textit{supra} note 10.

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

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


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foreign direct investment (‘FDI’) in China signals strong prospects for long-term arbitration activity. In 2002, China became the largest FDI recipient, surpassing the U.S. for the first time, by attracting a record high of (U.S.) $52.7 billion. World Bank statistics reveal that net inflows of FDI in China reached (U.S.) $53.5 billion in 2003. According to the US-China Business Council, FDI continued to flow strongly into China during the first quarter of 2005. These figures are not surprising considering the estimated 300,000 foreign-invested entities (‘FIE’) in China, including joint ventures and wholly foreign-owned Chinese entities. Knowing the total number of CIETAC awards issued every year or the volume of FDI, however, is not enough. An assessment of the existence of an International Arbitration Culture requires an examination of what happens once an award is rendered. Rule of law problems and their impediment to the enforcement of arbitral awards is therefore of particular importance.

2. Types of Awards

Under Chinese law, there are three distinct types of arbitral awards: domestic awards, ‘foreign element’ awards, and international awards rendered outside of China. Chinese law pertaining to enforcement of arbitral awards treats each type of award differently. This article will discuss primarily the enforcement of non-domestic ‘foreign element’ arbitral awards rendered in China, i.e., the second category of arbitral awards; however, international awards are sometimes used to demonstrate general enforcement trends. Traditionally, ‘foreign element’ awards were only rendered by the two key international arbitration commissions in China — CIETAC and CMAC.25


23 To avoid any confusion, note that the term "international award" is used interchangeable with "foreign award."


25 Since the Arbitration Law expanded the jurisdiction for local commissions other than CIETAC and CMAC to handle international arbitration, there are now over 150 arbitral institutions in China which are permitted to hear claims involving a ‘foreign element.’ Furthermore, the Hong Kong courts have enforced awards
The CIETAC deals with all types of commercial disputes while the CMAC handles maritime and related disputes. A 'foreign element' is found where 'one of the parties to the arbitration is a foreign company or where the object of the dispute is located abroad. The recent expansion of the jurisdictional scope of CIETAC, CMAC, and domestic arbitration commissions has blurred the distinction between 'foreign element' and domestic awards: all arbitrations commissions located in China's major cities can now, in certain circumstances, deal with both domestic and 'foreign element' awards. Thus, distinctions pertaining to domestic versus 'foreign-related' awards now turn on the underlying dispute rather than the actual arbitration body which administered the arbitration proceedings.

III. ENFORCEMENT IN CHINA

China’s record of enforcement — meaning the number of times foreigners have actually been able to collect a monetary judgment against a Chinese company in a People’s Court — is widely recognized as unsatisfactory. It is difficult to gauge with certainty the extent of problems actually encountered by parties in the enforcement process. This is largely due to the fact that China does not maintain accessible centralized statistics on enforcement rates, nor is there a comprehensive reporter or other publication that documents court decisions on anything other than a highly selective basis.

from Chinese arbitral institutions, such as Beijing Arbitration Commission, Dalian Arbitration Commission, etc. Such cases would not have been brought to Hong Kong unless they involved a 'foreign-element.' Special thanks for Neil Kaplan for the latter insight.

26 Tao, supra note 23, at 17.


29 Id.


The CIETAC and Supreme People’s Court claim an enforcement success rate of around 90% for ‘foreign related’ or international awards, as compared to a 99% enforcement rate for Chinese arbitrations.\(^{32}\) Further, CIETAC and the Supreme People’s Court contend that approximately 80% of cases referred to the Supreme People’s Court for possible non-enforcement under the Notice of the Supreme People’s Court on Several Issues Regarding the Handling by the People’s Court’s of Certain Issues Pertaining to Foreign-Related Arbitration and Foreign Arbitration (‘1995 Notice’)\(^{33}\) are rejected by the court, meaning the award is accepted for enforcement.\(^{34}\) Randall Peerenboom, perhaps the only academic thus far to have combined official Chinese sources with first-hand empirical research compiled on the basis of interviews with judges as well as arbitral parties and their lawyers, finds, however, higher unenforcement rates. Based on a sample size of seventy-two cases, Randall Perenboom finds that:

Almost half of all foreign and CIETAC awards were enforced in the sense that the party recovered at least some amount. The enforcement rate for foreign awards was 52%, slightly higher than the 47% success rate for CIETAC awards. Furthermore, investors can expect to recover 75-50% of the award amount in 34% of the cases and half of the award at least 40% of the time.\(^{35}\)

These statistics can easily be misleading. Considering the overall case load in CIETAC, the number of applications made to the courts for enforcement and the number of unsuccessful enforcement cases is comparatively small. Moreover, unenforcement figures do not speak to the number of voluntary post-award settlements initiated by the losing Chinese party or the cases in which the Chinese party wins, i.e., cases in which the issue of enforcement within China does not arise. Those cases in which enforcement is abandoned either due to the lack of assets against which an award can be enforced economically or otherwise are also not accounted for in the available enforcement statistics. Nevertheless, because the following discussion addresses the notion of shared culture in international arbitration, it is best to focus on situations in which universal expectations are not met before the courts, despite any lack of hard statistics.


\(^{33}\) See Notice of the Supreme People’s Court on Several Issues Regarding the Handling by the People’s Court’s of Certain Issues Pertaining to Foreign-Related Arbitration and Foreign Arbitration; issued by the Supreme People’s Court on and effective from August 28, 1995 [hereinafter 1995 NOTICE]. This notice implemented an improved system of centralised review of enforcement decisions in relation to ‘foreign-related’ arbitration awards.

\(^{34}\) ARBITRATION IN CHINA, supra note 31, at 297.

\(^{35}\) Foreign in this quotation refers to international awards. Enforcement, supra note 29, at 254.
Throughout this discussion, one must bear in mind that court systems all over the world suffer enforcement problems. In the U.S., a percentage of civil judgments go unenforced. Further, in approximately 10% of reported cases involving the New York Convention, a court has refused enforcement of a foreign arbitral award. Thus, it is a problem that cannot necessarily be avoided in any legal system.

In considering the reasons for non-enforcement in China, it is important to note the difference between a court refusing to enforce an award on legal grounds and a court being unable to enforce an award for practical reasons, such as the insolvency of the respondent, location and size of the award, or willingness of parties to settle outside of court. This article focuses on the legal reasons for denial in the Chinese court system.

The next section will review the legal framework of Chinese arbitration law relevant to enforcement which provides the necessary contextual background for understanding why procedural harmonization should not be characterized as a convergence in shared expectations.

IV. OVERVIEW OF LEGAL FRAMEWORK CHINESE ARBITRATION

Upon receipt of an application for recognition and enforcement of a foreign-related arbitral award, the People’s Court will review the award in accordance with applicable civil procedure law, arbitral law, notices issued by the People’s Republic of China Supreme People’s Court, and international treaties. If there are no grounds for refusal, the court must recognize the effect of the award and enforce it in accordance with the execution provisions of the 1991 Civil Procedure Law. At the outset, it is

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36 As noted in Section C, supra, it is difficult to find reliable statistics on enforcement rates due to the private nature of arbitration. In the United States, the large amount of unenforced judgments has spawned an entire industry specialising in recovering awards. See, e.g., PI Consulting Group, Judgment Recovery, obtainable from <www.thepiconsultinggroup.com> (August 25, 2005).

37 See Unfortunate Few, supra note 29, at 75. These awards fail because of errors in following the arbitration agreement regarding what disputes are at issue, as well as how the panel is formed and conducts itself. These issues in turn arise from arbitrator mishandling of the case or poor drafting of the arbitration clause itself. See Arbitration in China, supra note 31, at 298.

38 The term “foreign-related award” denotes both international and “foreign element” awards.

39 The Law of the People’s Republic of China on Civil Procedure was adopted at the 4th Session of the Standing Committee of the Seventh National People’s Congress, promulgated by Order No. 44 of the President of the People’s Republic of China on April 9, 1991 and became into effect on the same day [hereinafter 1991 Civil Procedure Law]. Note that, prior to 1982, there was no legal provision for enforcing CIETAC and CMAC awards. This situation changed with the enactment of The Law of the People’s Republic of China on Civil Procedure (‘1982 Civil Procedure Law’), adopted by the Standing Committee of the National People’s Congress of the People’s Republic of China, and promulgated by Order No. 8 of the
important to note two key points. First, the CIETAC rules of arbitration do not provide for an appellate process. Second, should a Chinese court refuse to recognize or enforce a CIETAC award, the applicant still has a valid arbitration award and enforcement could be attempted in another location. The problem is that most Chinese parties do not have assets abroad that could be attached to satisfy an award.\(^{40}\) The following discussion reviews the Chinese law that is applicable to the enforcement of arbitral awards. Because Chinese arbitral practices are generally less well-known, a comparison with the U.S. practice will be made in sections 1 and 2.

1. Civil Procedure Laws

Chinese civil procedure laws have undergone significant transformations in the past twenty-five years and currently reflect general international legal trends; however, the application of civil procedure law is overly broad and foreign investors are somewhat disadvantaged. The 1991 Civil Procedure Law introduced new provisions relating to the enforcement of awards with a "foreign element." In a manner that echoes Article V(1) of the New York Convention, Article 260(1) provides that Chinese courts "may not order the enforcement of an award and must set aside the award if the party against whom enforcement is sought provides evidence establishing one of the following grounds":

a) the parties have not incorporated clauses providing for arbitration in the contract or have not subsequently reached a written agreement for arbitration;

b) the person against whom the application is made is not duly notified of the appointment of an arbitrator or the arbitration proceedings, or the said person was unable to present his case for which he is not responsible;

c) the composition of the arbitral tribunal or the procedure for arbitration is not in conformity with the rules of arbitration;

d) the matters decided exceed the scope of the arbitration agreement or the limits of authority of the arbitration institutions.\(^{41}\)

President of the People's Republic of China on March 18, 1982 and became effective as of October 1, 1982. Specifically, Article 195 of the 1982 Civil Procedure Law provided for the enforcement of CIETAC and CMAC awards in China:

When one of the parties concerned fails to comply with a ruling made by a foreign affairs arbitration organization of the People's Republic of China, the other party may request that the ruling be executed in accordance with the provisions of this article by the courts at the place where the arbitration organization is located or where the property is located.

\(^{40}\) Harer, supra note 22, at 418.

\(^{41}\) Qiu, supra note 26, at 610-11.
Furthermore, under Article 260(2), the Chinese court has the discretion to refuse the recognition and enforcement of the award when its execution is determined to be against the social and public interest of China.42

a. Public Policy

At first glance, Article 260(2) seems analogous to the public policy exception outlined in Article V(2) of the New York Convention; however, in practice, the grounds set forth in Article 260 of the 1991 Civil Procedure Law are interpreted more broadly by Chinese courts, causing some dissatisfaction, especially among foreign parties. For instance, the phrase ‘public policy’ does not exist in Chinese law. Instead, Chinese law applies the concept of ‘public and social interest’ based on its domestic standard, which effectively means the basic legal and moral rule in China.43 In a recent case, an award in favor of a touring heavy metal band was refused enforcement by the Supreme Court of China on the grounds that the band’s performance was ‘contrary to the national feelings of the Chinese people and violated public and social interests.’44

Furthermore, according to publicly available information, ‘international public interest’ has not yet been exercised by the People’s Court as a ground for denying enforcement of an international arbitral award.45 For instance, in the well-known case Dongfeng Garments Factory of Kaifeng City and Taichu International Trade (HK) Company LTD. v. Henan Garments Import & Export (Group) Company,46 public interest was viewed by the Chinese court through a parochial lens. Upon obtaining a CIETAC award in April 1992, the winning plaintiff, a Hong Kong company, had to bring an action to enforce the award in a local Chinese court; however, enforcement was refused solely on the following basis: ‘according to current State policies and regulations, enforcement ...would seriously harm the economic influence of the State and public interest of the society, and adversely affect the foreign trade order of this State.’47 The defendant, Henan Garments

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42 1991 CIVIL PROCEDURE LAW, supra note 36, Art. 260(2).
43 Qiu, supra note 26, at 611.
45 According to William Teltley, ‘international public policy/international public order is a principle whereby courts in both civil law and common law jurisdictions may refuse to apply a foreign law which they find repugnant to basic principles or ideas of morality, justice and decency and/or lofty concepts of civilization of the forum’. See William Teltley, New Development in Private International Law: Tolofson v. Jensen and Gagnon v. Lucas, 44 AM. J. COMP. L. 647, 656 n.75 (1996).
46 This case was not reported, but was discussed in CHENG, MOSER & WANG, supra note 30, at 131.
Import & Export Company, was the major economic force in the municipality where the court sat. The underlying justification for non-enforcement was that compelling the defendant to pay substantial damages would be detrimental to the social and public interest of the municipality. The decision was overturned by the Supreme People’s Court; however, not on the basis of ‘international public interest.’ The Supreme People’s Court held that the local court erred in refusing enforcement on the ground that state economic interests would be seriously harmed. In other words, the local court should not have seen the enforcement of the arbitral award as violating the public interest in China.\textsuperscript{48} The court’s broad interpretation of the public policy provision allows significant leeway to refuse enforcement of CIETAC awards. Thus, the practical application of Article 260 does not follow standardized norms in international arbitration law. Foreign investors continue to fear the lack of guidance on how Chinese courts are to interpret violations of ‘social public interests’ under Article 260 of the 1991 Procedure Law.

\textit{b. Limitation Periods}

One procedural matter that is worth brief attention is the limitation periods for the recognition and enforcement of arbitral awards. While the U.S. allows for a limitation period of three years, Chinese courts only allow six months where both parties are legal persons or other organizations. This period begins to run from the last day of the periods indicated in the award for voluntary performance.\textsuperscript{49} Given the difficulties of translating necessary documentation into Chinese and preparing foreign lawyers that are unfamiliar with Chinese law and the judicial system, a longer limitation period would be more reasonable.\textsuperscript{50} In this regard, Chinese civil procedure law warrants some amendments because foreign parties seeking enforcement are significantly disadvantaged.

2. \textit{Chinese Arbitration Law}

The Nation’s People’s Congress of China enacted China’s first arbitration law, which became effective in 1995 (‘Arbitration Law’).\textsuperscript{51} Read

\textsuperscript{48} This approach is inconsistent with the intended scope of the public policy exception in the New York Convention which, as illuminated by its drafting history and later interpretive case law, was intended to be very narrow. See Brooke Snyder, \textit{Denial of Enforcement of Chinese Arbitral Awards on Public Policy Grounds: The View from Hong Kong}, 42 VA. J. INT’L. 339, 348 (2001).

\textsuperscript{49} CHENG, MOSER, \& WANG, supra note 30, at 125.

\textsuperscript{50} Qiu, \textit{supra} note 26, at 634.

\textsuperscript{51} The Law of the People’s Republic of China on Arbitration was adopted at the Ninth Session of the Standing Committee of the Eighth National People’s Congress of the People’s Republic of China, promulgated on August 31, 1994, and became effective as of September 1995 [hereinafter ARBITRATION LAW]. The law contains
together with the 1991 Civil Procedure Law, it is clear that ‘foreign element’ and international awards are less regulated than domestic awards and may still be considered valid in law despite the existence of a serious mistake or violation in substantive content. According to Articles 69 and 70 of the Arbitration Act, the People’s Court must set aside ‘foreign element’ and international arbitration awards if one of the four circumstances set out in Article 260 of the Civil Procedure Law is involved. Comparatively, domestic awards can be set aside under a number of circumstances, described in Article 58 of the Arbitration Law and Article 217 of the Civil Procedure Law (as incorporated in Article 63 of the Arbitration Law). For instance, Article 217 of the Civil Procedure Law provides the following grounds for setting aside a domestic award:

a) The litigants neither stipulated arbitration provisions in their contract nor reached a written agreement of arbitration afterwards.

b) The matter being adjudicated falls neither within the limits of the agreement of arbitration nor the limits of the arbitration organ’s authority.

c) The formation of the arbitration tribunal or the arbitrating procedure violates the legal procedure.

d) The crucial evidence is found to be insufficient.

e) The application of the law is found to be erroneous.

f) The arbitrator is found to have taken bribes, committed malpractice out of personal considerations, and misused the law in rendering a decision in the course of arbitration.52

When a ‘foreign element’ and international award contains a serious mistake or violation of law in its substantive content, it is still considered enforceable under Chinese law. The following circumstances would provide the basis to set aside a domestic award, although not a ‘foreign element’ and international arbitral award:

a) The evidence upon which the original foreign-related award was based was forged.

b) The opposing party has concealed the evidence enough to affect the justice of the award.

c) The arbitrators have engaged in corruption, accepted bribes, committed malpractice for personal benefit, or distorted the text of the law in the arbitration of the case.

eight chapters, with detailed provisions regarding ‘the scope of arbitration, the arbitration organ, the arbitration agreement, arbitration procedure, the arbitral award, arbitration supervision, and foreign-related arbitrations’. The Arbitration Law has become a fundamental tool in regulating all arbitration acts in China. See Qiu, supra note 26, at 611 n. 23.

52 1991 CIVIL PROCEDURE LAW, supra note 36, Art. 217.
d) The main evidence for ascertaining the facts in the original foreign-related award is insufficient.
e) There is definite error in the application of law in the original foreign-related award.\(^{53}\)

In this respect, the 1991 Civil Procedure Law and Arbitration Law have adopted separate legislation for the enforcement of ‘foreign element’ and international arbitral awards in China.

By comparison, U.S. courts also treat domestic awards differently from non-domestic awards by according greater leniency to foreign or international awards rendered in the United States. Section 10 of the Federal Arbitration Act (‘FAA’\(^{54}\)) contains the statutory grounds for the judicial supervision of awards: arbitrator misconduct, excess of arbitral authority, evident partiality, and fraud.\(^{55}\) By virtue of domestic case law on labor arbitrations, arbitral awards can be denied on the bases of three additional implied grounds: arbitrary and capricious or irrational award,\(^{56}\) manifest disregard of the law,\(^{57}\) or violation of public policy.\(^{58}\) Due to their particularly domestic nature and tolerance for merit scrutiny, these grounds would run afoul of the spirit of the New York Convention if they were applied in the context of foreign or international awards; however, U.S.

\(^{53}\) This list is compiled from a reading of Article 217 of the 1991 CIVIL PROCEDURE LAW, supra note 36 with Articles 58 and 63 of the ARBITRATION LAW, supra note 75. See Qiu, supra note 26, at 614.


\(^{55}\) Section 10 of the Chinese ARBITRATION LAW, supra note 75, sets out the following grounds for vacating an arbitral award:

Where the award was procured by corruption, fraud, or undue means.
Where there was evident partiality or corruption in the arbitrators, or either of them.
Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehaviour by which the rights of any party have been prejudiced.
Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

\(^{56}\) See, e.g., Eljer Mfg v. Kowin, 14 F.3d 1250 (7th Cir. 1994); Brown v. Rauscher, 994 F.2d 775 (11th Cir. 1993); Ainsworth v. Skurnick, 960 F.2d. 939 (11th cir. 1992).


\(^{58}\) See, e.g., Rodriguez, 882 F.Supp; Exxon Shipping v. Exxon Seamen’s Union, 11 F.3d 1189 (3rd Cir. 1993); Brown, supra note 68. See also ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 265 (1981).
domestic law is not often used to frustrate the enforcement of non-domestic awards rendered in the U.S.\(^{59}\) Thus, just as Chinese law provides more extensive grounds for non-enforcement of domestic awards, so do U.S. courts.

To summarize, both in law and in practice, China and the U.S. adopt different approaches towards the enforcement of domestic arbitral awards versus non-domestic awards. Generally speaking, domestic awards are reviewed more closely by courts of both countries. While both countries have adopted the reciprocity reservation of the New York Convention, they construe the provisions differently. Compared to China, the U.S. allows for a much broader application of the New York Convention: it is not only applicable to awards rendered outside of the U.S. but also to non-domestic awards rendered within the U.S.\(^{60}\)

3. Judicial Interpretations Issued by China's Supreme People's Court

The Supreme People's Court issues official notices in order to ensure the strict implementation of the Arbitration Law, 1991 Civil Procedure Law, and relevant international conventions to which China has acceded. Of relevance to recognition and enforcement refusals is the 1995 Notice, which establishes an internal control mechanism whereby enforcement actions involving foreign-related awards are effectively monitored.\(^{61}\) According to paragraph two of the 1995 Notice, any People's Court seeking to refuse enforcement of an international or foreign-related award must first obtain approval from the superior People's Court in the same jurisdiction.\(^{62}\) If the superior court decides to uphold the decision of the lower court, that decision must be reported to the Supreme People's Court prior to finalizing the decision to refuse enforcement. Thus, from the perspective of foreign parties, the 1995 Notice is an important supplement to the Arbitration Law and the 1991 Civil Procedure Law. While the foregoing discussion reveals that enforcement problems in China are largely due to the inappropriate civil procedure and arbitration law, these notices give reason to be optimistic.

4. International Treaties

With respect to the recognition and enforcement of international arbitral awards, the most important treaty to which China has acceded is the New York Convention.\(^{63}\) While Article I(1) of the New York Convention permits
awards not considered domestic awards to be treated as convention awards, China foreclosed this possibility at the time of its ratification of the New York Convention by adopting the ‘reciprocity’ and commercial reservations. Therefore, CIETAC and CMAC awards are not eligible for enforcement inside China pursuant to the New York Convention. China will only apply the New York Convention to ‘arbitral awards made in the territory of other Contracting States’ and to ‘disputes arising out of defined legal relations which are considered to be commercial relations of a contractual or non-contractual nature under Chinese law’. Thus, Chinese courts will only apply the New York Convention to arbitral awards made within the territory of another Contracting State.

This position concerning the recognition and enforcement of New York Convention awards is governed by the Supreme People’s Court Notice on the Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Notice states that awards should be recognized and enforced in accordance with the procedures stipulated in Civil Procedure Law if the circumstances specified under Article V(1)(2) of the New York Convention are not present. The Notice requires Higher and Intermediate People’s Courts to ‘immediately organize economic and civil trial personnel, enforcement personnel, and other relevant personnel to earnestly study the New York Convention as well as to duly and conscientiously implement it’. According to Li Hu, some judges still have little understanding of how the New York Convention should be implemented and the uniform judicial interpretation of this provisions accepted by courts worldwide.

Investment Disputes between States and Nationals of Other States (ICSID Convention) and is therefore subject to the arbitration procedures of the International Centre for the Settlement of Investment Disputes (ICSID) which is available for the settlement of disputes between the Chinese government and foreign investors.

64 CHENG, MOSER, & WANG, supra note 30, at 125.
66 See CONVENTION IMPLEMENTATION NOTICE. See also Fa (Jing) Fa [1987] No. 5, Supreme Court Gazette, June 20, 1987.
67 CONVENTION IMPLEMENTATION NOTICE, supra note 62.
68 See Hu, supra note 62.
69 See Qiu, supra note 26, at 625.
70 See Hu, supra note 62.
V. PROCEDURAL CONVERGENCE IS NOT A CULTURAL PHENOMENON

There are three prominent reasons why procedural harmonization should not be characterized as a cultural phenomenon. Firstly, due to the private nature of arbitration, it is difficult to determine whether convergence is actually ‘culture,’ in the sense of shared expectations among participants in the process. Comprehensive empirical data on arbitration proceedings cannot be compiled because the only cases known to the public are those that are reported or appealed by the parties themselves. Much of what is known about international commercial arbitration comes from these select aberrant cases. Although certain sources for arbitral decisions are reliable, such as Mealey’s Arbitration Reporter and the International Chamber of Commerce (‘ICC’) redacted awards, they are but a small sample of all cases heard. Additionally, the ICC International Court of Arbitration awards provide a biased sample because they seek to publish the particularly unusual or interesting awards. Even if reliable data were available, the prevalence of an International Arbitration Culture would be difficult to determine with certainty because culture is, by its nature, characterized by ethnic, human, and social factors.

Secondly, a definition of International Arbitration Culture that includes shared expectations is problematic because, unlike litigious or conciliatory cultures, the practice of arbitration itself is not a tradition with established roots in any particular part of the world nor is it embedded in the social fabric of any particular country or region. Rather, arbitration is a system that lacks any underlying ideology and, in most countries, it exists alongside litigation and conciliation (negotiation/mediation) practices. While Western legal systems are traditionally characterized by litigious culture, East Asia is known for its emphasis on conciliation. In China, a strong emphasis on conciliation was evident even under the Maoist communist regime as a means of solving the so-called ‘contradiction within the people.’ Professor Yasuhei Taniguchi of Kyoto University — one of few participants at the ICCA conference who protested against the concept of an International Arbitration Culture — asserts that the practice of arbitration occupies a place closer to litigation, and not conciliation practices, because

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71 The new lex mercatoria which is said to have arisen from arbitral jurisprudence has been debated with some precision; however, this article will only focus on convergence in arbitral proceedings.
73 Yasuhei Taniguchi, Is There a Growing International Arbitration Culture?: An Observation from Asia, in ICCA CONGRESS, supra note 3.
74 Cremades, supra note 3.
75 Similarly in Japan, under the feudal regime of the Tokugawa period, there was a strong communal system to promote amicable settlement of disputes and to suppress litigation, which was condemned as a moral wrongdoing to the society and to the other party. See Taniguchi, supra note 69.
binding decision-making predominates and a consensual element is only normally found at the time of signing a contract. While expectations can change, Taniguchi contends that, at the moment of signing a contract with an arbitration clause, no actual dispute exists or is seriously anticipated.\textsuperscript{76} Arbitration is further similar to litigation in that they both involve more or less adversarial and confrontational proceedings. Finally, Taniguchi argues that arbitration and litigation are widely considered to be similar because arbitrators must apply the rules of substantive law in resolving a dispute, rather than their sense of justice or \textit{ex aequo et bono}, unless the parties expressly so agree. Taniguchi goes as far as to say that 'arbitration [has] become another litigation only with a different name.'\textsuperscript{77}

The reflex to arbitrate is contingent on the differences in litigious and conciliatory cultures and divergent commercial practices. Taniguchi maintains that, despite an arbitration clause, a Japanese businessman is likely to continue negotiations to find an agreeable solution whereas an American businesswoman, advised by her lawyer, would be more inclined to quickly start arbitration.\textsuperscript{78} One has to be careful that Taniguchi's overarching generalizations are not reinforcing stereotypes; however, it is fair to assume that a party's nationality, legal background, and conception of justice affect their manner of interaction in a dispute resolution forum.\textsuperscript{79} In sum, it is worth questioning whether a so-called 'arbitration culture' can assert \textit{a raison d'\^{e}tre} distinct from that of litigation culture and whether this notion of 'arbitration culture', as a twin sister of litigation culture, could take root in a region such as Asia where conciliatory culture is said to prevail.

Thirdly, the notion of an International Arbitration Culture that encompasses shared expectations ignores any rule of law problems that may be linked to specific values and practices of domestic culture. Rule of law problems help explain why the enforcement apparatus is the weakest prong of the Chinese court system and signals the lack of certainty and predictability that are necessary for the development of shared expectations. Although the rule of law is a contested concept, at a minimum, it entails 'the regular and impartial administration of public rules', a definition proposed by John Rawls. This involves the reduction of individualized discretion, leading to greater predictability. Because the tension between law and discretion is present in every legal system, the rule of law question becomes one of degree and implementation. Questions have been raised as to the competency of Chinese courts when it comes to finding grounds for denial of enforcement. Further, the ability of the court to uphold an award can be an additional hurdle. At the end of the next section, it will become evident

\textsuperscript{76} Id. at 32.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
that rule of law problems with regard to judicial competence and the lack of authority of Chinese courts cannot support the notion of an International Arbitration Culture. In the author’s view, it is this third reason why procedural harmonization should not be characterized as a convergence in shared expectations that carries the greatest weight. The next section is devoted to the rule of law problems that are related to China’s enforcement mechanism.

VI. ENFORCEMENT PROBLEMS AND THE LACK OF RULE OF LAW IN CHINA

1. Judicial Competence and Professionalism

Inconsistencies in judicial competency in China ensure large discrepancies between legal decisions, which means that parties to an arbitral proceeding cannot develop a sense of shared expectations. Proper implementation of the Arbitration Law depends on the correct understanding and proper management of cases by judicial personnel. Questions have been raised, however, as to the competency of China’s judiciary to implement the Arbitration Law effectively because, in practice, the Intermediate People’s Court has occasionally erroneously set aside or denied enforcement of foreign-related awards. Anecdotal evidence reveals several cases in which the judges of the enforcement department were not familiar with the rules regarding enforcement. They were unsure which chamber should decide whether to recognize the award, what documents were required, and which documents needed to be translated, notarized, and consularized. In other cases, the courts applied incorrect standards. Peerenboom knows of two cases in which the courts held that the arbitration clause was not valid under Chinese law, when foreign governing law should have applied to the question of validity of the arbitration agreement. In another case, the court ordered the seizure of goods that were already attached by another court. Yet another court ignored the limited liability of the Chinese party, ordering the Chinese party to have its wholly-owned subsidiary sell its shares to a third listed company. With such variance in the application of procedural law, there is no foundation upon which a sense of shared expectations in arbitration procedural law can develop.

Enforcement problems may be attributable to a lack of professionalism and incentive. Judges consider the enforcement department as the worst assignment because the work is not considered intellectually challenging. Furthermore, an increase in crime rates has prompted the judicial system to gear its resources towards controlling crime. The judges with better training are steered towards the criminal department while judges with the least legal

80 Tao, supra note 23, at 146.
81 Id.
82 Enforcement, supra note 29, at 298.
83 Id.
84 Cases B4, B7, 27, 26 of Enforcement. Id. at n. 175-77.
training end up in enforcement. In this regard, ‘the prestige of the execution chamber is lower than that of the adjudicatory chambers — young and capable cadres go to the adjudicatory chambers, while the execution chambers is the refuge of the tired, the mediocre, and the uneducated.' In some cases, however, what may seem like laziness or impotence on the part of enforcement judges may in fact be compliance with regulatory constraints concerning informal enforcement quotas.

Additionally, judges may be reluctant to aggressively pursue enforcement because they fear for their personal security. There are a number of reported incidents of judges and court personnel being physically abused or threatened by the respondent’s workers, shareholders, or creditors because of the court’s attempt to enforce an award.

2. Lack of Authority of the Courts and Local Protectionism

Local protectionism in China is often said to be responsible for judicial independence problems. Even if there were a consistently high degree of judicial competence in the enforcement department, there are significant extra-judicial hurdles which undermine any notion of an International Arbitration Culture. Cooperation outside of the judiciary is unreliable, due to informal codes and customs based on personal connections and relationships, which is particularly problematic to law enforcement. Chinese courts are much weaker institutionally in important ways from their counterparts in Western countries. Traditionally, ‘organizations outside the court bureaucracy had no more than a kind of moral obligation to cooperate with a court.' In fact, even within the court’s sphere of influence, parties frequently ignore the court’s orders. Donald Clarke has gone as far as suggesting that the ability of external entities to resist court orders ‘stems from the fact that the court is essentially just another bureaucracy, with no more power to tell [litigants] what to do than the Post Office.’

The problem of informal codes and customs based on nepotism, which exist to a certain degree in many societies, is exacerbated by the enactment of 1991 Civil Procedure Law, which vests exclusive jurisdiction over applications for enforcement of CIETAC and CMAC awards in the people’s courts, “located either at the place where the party against whom enforcement is sought has its legal domicile or at the place where the

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85 Id. at 297-98.
86 Donald C. Clarke, Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments, 10 COLUM. J. ASIAN L. 1, 3 (1996).
87 Enforcement, supra note 29.
89 Clarke, supra note 110, at 56.
90 Heye, supra note 84, at 294.
91 Clarke, supra note 110, at 56.
property is located. Thus, Beijing courts no longer enjoy automatic jurisdiction over foreign-related enforcement actions, as they did prior to 1991, unless the involved property is located in Beijing or the respondent resides there. It is generally perceived that this decentralization not only exacerbated the inexperience of judges, but increased the scope of local protectionism.

Further, the lower level People's Courts are presently subject to the considerable influence of local governments, particularly in the areas of financing and personnel. In practice, freezing bank accounts often requires the approval of the court with jurisdiction over the bank in question. In some places, the bank will insist on an order from the local court before consenting to the transferring of funds. This phenomenon is particularly evident when enforcement of the arbitral award could result in economic ruin of a community. Therefore, even if courts overcome certain incompetence issues, [court] orders are only pieces of paper that are dependent for execution on the often-elusive cooperation of local officials. Thus, it is not surprising that, in the face of laws that favor local protectionism, courts have difficulty exerting authority over banks and other administrative agencies.

Another product of local protectionism is rampant hostility between courts, which perpetuates the lack of authority of the courts. If an outside court seeks to execute an award in another area, the local court will often refuse to cooperate and may even obstruct execution by engaging in 'secret communications with the [local] party, warning it to shift its funds and property.' While the Supreme People's Court has repeatedly acknowledged the problem of local protectionism, it is difficult to correct without some fundamental restructuring of the judicial system. Because local courts remain dependent on municipal funding and local government officials control the appointment of judges and operating expenses,

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92 Qiu, supra note 26, at 610.
93 Tao, supra note 23, at 160.
94 Id. at 146
96 Clarke, supra note 110, at 73.
97 Tao, supra note 23, at 147.
99 Clarke, supra note 110, at 46.
100 For instance, at the National Conference on Politics and Law held in December 1992, Supreme People's Court President Mr. Ren Jianxin asserted that the phenomenon of local protectionism was detrimental to the fundamental interests of China and represented a significant challenge to the development of China's socialist legal system. See CHENG, MOSER, & WANG, supra note 30, at 127. However, Justice Ren's statement obviously does not carry the weight of legislative force.
including the salaries of the judges, 'it is in the self-interest of a judge to protect local litigants by [...] issuing rulings favorable to local litigants or refusing unfavorable rulings rendered by other courts against local litigants.' Thus, as long as the court personnel have a direct stake in the outcome of the case, local protectionism and hostility between courts will be difficult to curtail.

In sum, although China is making great efforts to improve the quality of its judiciary, there are clearly a number of problems that must be overcome with respect to judicial competency and extra-legal factors such as guanxi (personal relationships or connections). The ICCA’s notions of an International Arbitration Culture do not account for a possible lack of rule of law problems in countries with transitional legal systems. While the Chinese legal framework, especially with regard to procedural laws, has adopted norms that suggest China is participating in the harmonization of procedural arbitration law, rule of law problems prevent the development of shared norms or expectations. Thus, if a country that hosts a significantly large number of arbitration applications suffers rule of law problems, the notion of an International Arbitration Culture, as the ICCA discussed, is fundamentally challenged, at least in the case of China.

VII. COMPETITION TO CAPTURE NETWORK BENEFITS

The author would like to propose that convergence in procedural arbitration law is better understood as the result of competition to capture network benefits in the rapidly expanding field of international commercial arbitration. From an economic perspective, networks are 'systems in which users are linked,' and the resulting network effects are markets in which the value that users place on a good increases as the number of network users increases. The value of participation in a network increases exponentially with the size of the network. A helpful example is the Microsoft Windows operating system — as an established standard, users incur costs in the form of lost network benefits when switching to a new system. Another prominent example is the telephone, which is useless unless others own telephones and is increasingly useful as more people own them. Through the lens of a network benefits analysis, convergence in international commercial arbitration can similarly be viewed as a

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101 Margaret Y. K. Woo, Law and Discretion in the Contemporary Chinese Courts, 8 PAC. RIM L. & POL’Y J. 581, 591 (1999); Clarke, supra note 110, at 49; Heye, supra note 84, at 541.
102 For further details, see Kaufmann-Kohler’s discussion supra note 3.
104 Lemley & McGowan. id. at 484.
105 Ginsburg, supra note 2, at 1342.
combination of concepts and procedures that ‘constitute a network which, because of the commonality of usage, reduces the cost of interactive behaviour.’ Standardized rules become a kind of template for legal interactions, and members of the same legal community find working with outsiders more difficult or less efficient.

The rapid spread of arbitration and the scramble to modernize national arbitration laws is described by Tom Ginsburg as a phenomenon of network benefits. The expansion of arbitration at the international level creates a business for arbitration at all levels. When legal cultures compete, there is heightened demand for new rules and a rush to define the network. Lawyers benefit in the continuous updating and creation of arbitration rules to capture the ‘market’ for arbitral business, thereby establishing the standard for future interactions. The appearance of draft rules, contract terms, and principles from organizations such as the International Bar Association, UNIDROIT, and UNCITRAL are a few examples. The rules of arbitral institutions, which reflect substantial convergence on important issues, are another example. With the spread of a harmonized arbitration system, parties will view arbitration as an attractive dispute resolution option. The modernization of national arbitration laws equally signals the interest in establishing and joining networks. The network benefits obtained by a country that conforms its domestic laws to that of other jurisdictions or rapidly produces new laws such that domestic lawyers are familiarized with the UNCITRAL Model Law, will not only help lawyers compete for business abroad, but will also make domestic lawyers more sophisticated when it comes to negotiating arbitration clauses with foreign investors. The spread of regulatory structures that are conducive to arbitration may benefit all states, particularly the Model Law jurisdictions, in that ‘making arbitration easier abroad makes it easier at home as well.’

Thus, as arbitration expands, the value of controlling the network standard increases and pressure for more rules leads to competition to establish new network standards. Similarly, the larger and more diverse the network, the greater the need for common expectations and claims of an arbitral culture help keep outsiders excluded from the network. Thus, economic factors not only explain the mechanisms of convergence, but also the desire to characterize the results of convergence as a cultural phenomenon. In effect, culture becomes a shorthand manner of referring to the set of network standards which provide a template for action and benefit everyone who follows them.

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106 Ogus, supra note 99, at 420.
107 Ginsburg, supra note 2, at 1342.
108 Id.
109 Id.
110 Id. at 1343.
111 Id. at 1345.
VIII. RECONCILING AN UNRELIABLE ENFORCEMENT MECHANISM IN CHINA WITH THE NOTION OF NETWORK BENEFITS

Difficulties in enforcing arbitral awards in China undermine the notion of procedural convergence in arbitration practices as being a cultural phenomenon but do not undermine an economic explanation of arbitral convergence. While traces of procedural convergence are evident in the Chinese approach, the production of arbitration culture clearly does not extend to the enforcement of awards in the People's Court. If it were culture driving the legal reforms in Chinese arbitration law, the actual application of the law, manifested in the enforcement of arbitral awards, would reflect this interest. Thus, the ICCA discussion of an International Arbitration Culture seems to apply best to societies with advanced legal systems. The state of arbitral enforcement in China, however, does not undermine an economic explanation of arbitral convergence. Under conditions of market competition, China has recognized that there are efficiency advantages to modernizing its national laws. Provisions such as Article 260 of the 1991 Civil Procedure Law, which mirror Article V of the New York Convention, are initiatives that respond to procedural convergence in international commercial arbitration. With a prima facie modern-looking legal system, China provides an environment better conducive to attracting and sustaining foreign investors. Further, if China joins the 'international arbitration network', lawyers and investors benefit from reduced costs of interactive behavior. By updating its arbitration rules, China is also in a better position to capture a larger portion of the arbitral business market.

While it would be overly broad to claim that the efficiency advantages of arbitration are the main explanation for procedural convergence within the field of international commercial arbitration, the networks benefits approach holds more weight in a country such as China, which grapples with the tension of a legal culture diametrically opposed to the West and a strong desire to maximize the benefits of cross-national interaction in the globalized economy. China's attempts to join the 'international arbitration network' have likely heightened since its accession to the World Trade Organization on December 11, 2001. If an International Arbitration Culture were to exist, the author believes that it would have to be free from domestic complications, meaning local legal culture and rule of law problems.

IX. RULE OF LAW AND ENFORCEABLE PROPERTY RIGHTS

There is a seeming paradox in China's economic growth and the apparent absence of a consistent rule of law. Neo-classical economists and advocates of rule of law alike have argued that sustainable economic

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112 A closer look recognises, however, provisions such as Art. 246 of the Chinese Civil Procedure Law, in which Chinese courts have been granted exclusive jurisdiction for all litigation involving FIEs.

113 See also Taniguchi, supra note 69.
development requires the rule of law and, in particular, clear and enforceable property rights.\(^1\) China, however, seems to have had tremendous economic growth without either of the above. How has China managed to attract significant foreign investment and high growth rates despite rule of law problems and seemingly unenforceable property rights? There are several hypotheses that may explain this apparent anomaly. Firstly, there may be fewer rule of law problems in China than originally thought. Randall Peerenboom supports this hypothesis with the empirical evidence derived from his sample size of seventy-two foreign and CIETAC arbitral award enforcement cases. Peerenboom finds that, in several of the seventy-two cases, the reasons for non-enforcement were either legitimate under Chinese law or the New York Convention or due to the respondent's lack of assets.\(^1\) Peerenboom asserts that 17-29% of non-enforcement cases are, however, due to protectionism, judicial incompetence, and corruption. In effect, this hypothesis demystifies the grim predictions in the media that portray the enforcement of arbitral awards in China as nearly impossible.\(^1\)

A second possibility is that investors may not be rational when making investment decisions. Rational investors will invest when the expected gains exceed the expected losses. The expected gains and losses are a function of the size of the gain or loss and the probability of realizing them.\(^1\) Because the monetary amounts of CIETAC awards in question are mostly small, perhaps the benefits of a return on investment outweigh the risk of any losses.\(^1\) Dazzled by the promise of a market of 1.3 billion captive consumers, foreign investors may be willing to discount or ignore the risks. Alternatively, perhaps investors are simply not acting rationally because they lack sufficient information to make a rational choice. Even basic information such as the profitability of foreign invested companies, is difficult to come by in China, and the information that is available may be conflicting.\(^1\)

Thirdly, notwithstanding the empirical studies, perhaps the rule of law and enforceability of property rights are not as important to foreign investment and economic growth as initially perceived. It is a fundamental principle of economic development that 'countries with stable government, predictable methods of changing laws, secure property rights and a strong

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114 Indeed, a number of World Bank multiple-country empirical studies have shown that rule of law and enforceable property rights are positively correlated with growth. See, e.g., WORLD BANK REPORT 1999/2000 23 (2000). See also KATHARINA PISTOR & PHILIP WELLONS, THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT 1960-1995 (1998); DOUGLAS CECIL NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990).

115 Enforcement, supra note 29, at 310.

116 Rushford, supra note 29.

117 Enforcement, supra note 29, at 311.

118 Qiu, supra note 26, at 608 n. 5.

119 Enforcement, supra note 29, at 311.
judiciary’ enjoy greater investment and growth than countries lacking such institutional support. There may, however, be substitutes or alternatives in China that provide certainty and predictability needed by investors. China’s phenomenal growth rate in the absence of strong rule of law has often been attributed to cultural factors — a distinct form of ‘Chinese capitalism,’ a guanxi-based rule of relationships, clientelism, and corporatism. The rule of law and clear property rights may not be important in China if parties are relying on trust, loss of face, and the threat of reputational damage to ensure that contracts are performed. Further, due to the increasing number of investors that are striving to secure agreement to arbitration for their commercial disputes in either Singapore or Hong Kong, perhaps the rule of relationships is an adequate substitute for the rule of law.

The main problem with this third hypothesis is that there is no way to quantify what the levels of foreign investment and growth rates would have been if China’s legal system did protect property rights and measured up to investor’s rule of law standards. Further, there is some evidence that the lack of rule of law in China will become an impediment to its foreign investment and growth in the future, particularly when rapid rates of economic growth become difficult to sustain. Economists at the World Bank have argued that China’s growth rate has resulted from productivity improvements, primarily due to reallocation of labor from low to high productivity sectors such as manufacturing and services. Long-term growth,

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120 See 1997 World Bank Report; Tao, supra note 23 at i.

121 Characteristics of Chinese capitalism include a tendency to resolve disputes through informal mechanisms rather than the courts, a preference for family business, a common sinic cultural heritage, adherence to Confucian values and an emphasis on relationships. See, e.g., GORDON REDDING, THE SPIRIT OF CHINESE CAPITALISM (1990).

122 Formal rational law may not be as crucial to capitalism if one looks at Singapore, Taiwan, South Korea, and Hong Kong where rule of law may not be required for economic development and informal alternatives to legal regulation may be more efficient than competitive markets based on law. See Carol A.G. Jones, Capitalism, Globalization and rule of Law: An Alternative Trajectory of Legal Change in China, 3 SOC. AND LEGAL STUD. 195 (1994).

123 Clientelism refers to ‘reliance on personal and social relationship networks (guanxi)’ as an alternative way of describing the rule of relationships. See, e.g., DAVID WANK, COMMODIFYING COMMUNISM: BUSINESS, TRUST AND POLITICS IN A CHINESE CITY (1999).

124 Corporatism may be understood as a way of viewing state-society relations and civil society. See Jonathan Unger & Anita Chan, China, Corporatism, and the East Asian Model, 33 AUST. J. CHINESE AFFAIRS 29 (1995). Although there are differences in the various theories, a detailed discussion exceeds the scope of this article.

125 Enforcement, supra note 29, at 314.

126 Tao, supra note 23, at xv. Pursuant to the Arbitration (Amendment) Ordinance 2000, passed by the legislative council of Hong Kong on January 5, 2000 and became effective on February 1, 2000, the courts of Hong Kong will enforce awards rendered by the arbitral authorities in China.
however, requires an increase in productivity within individual sectors. According to World Bank studies, only one-fourth of China’s growth resulted from improvements in individual sectors. Thus, China’s rapid growth rate may be increasingly difficult to sustain. As investors become more familiar with the Chinese market, they may be gaining a better sense of how the rule of law impacts the bottom line. In sum, China has not yet proven itself as an exception to the general rule that rule of law and enforceable property rights are crucial to sustained economic development. In any event, China appears to be committed to legal reform and, as the country becomes further enmeshed in the global marketplace, the pressure to bring its legal system into compliance with international standards will heighten.

X. CONCLUSION

Although China faces significant obstacles to overcome within a short period of time, parties that engage in arbitration certainly expect to have awards enforced. Debating the development of International Arbitration Culture is superfluous if this fundamental aspect is questionable. Because CIETAC has the most institutional arbitral applications in the world, one may easily doubt whether International Arbitration Culture, as discussed by the ICCA, can in fact be international. In China, national influences remain paramount. While rule of law problems are partly to blame, arbitration bears the stigma of strong domestic philosophies, such as guanxi. In this regard, although China may be slowly harmonizing its procedural arbitration law, it is misleading to include in the definition of International Arbitration Culture the notion of shared expectations among participants. Even with the presence of an adequate legal infrastructure, differences in legal and commercial cultures cause variance in participants’ expectations.

Despite the enforcement problem in China, there is significant foreign investment. Why are foreign parties still investing in China? Is it a risk assessment analysis in which foreign parties simply conclude that the benefits of investing in China outweigh the risk of losses — i.e., arbitral awards may not be enforced? Or, are foreign parties simply learning to adapt to the China business practices by agreeing to arbitrate outside of mainland China? If the latter is the case, the notion of an emergent International Arbitration Culture is further eroded.

Because international arbitration is aimed at fulfilling general needs stemming from trade, direct investment, and economic cooperation at the international level, a better approach to procedural convergence in international arbitration law is to understand the phenomenon in terms of network benefits. After all, if arbitration is to be truly effective, it must be harmonized, not only in terms of legal principles, but in terms of a growing acceptance of arbitration, what Taniguchi would term ‘arbitration culture,’

in each participating country. In the author’s view, it is premature to assert that there exists an International Arbitration Culture when China, a country that hosts a significant number of institutional arbitration applications, is plagued with deficiencies in the legal system that hinder the most fundamental aspect of arbitration, namely enforcement.