

Foreword

China has now become a major player in the world economy. China's interactions with globalisation have aroused great academic and practical interest. This book, which was first presented as a PhD thesis at Geneva University, is timely as it takes up this important topic and examines contemporary Chinese arbitration law and practice, in a historical background and in a dynamic modern context. What distinguishes this work from other books on international arbitration is its interdisciplinary perspective and comparative approach. It examines the development of arbitration in China in the context of the global harmonisation of arbitration law and practice, and takes into account China's specific legal, cultural, sociological, political and economic conditions.

After an overview of the Chinese legal framework and arbitration system, the book compares the law and practice of arbitration in China with generally accepted standards (which I call transnational standards) in terms of the arbitration agreement, the arbitral tribunal, recognition and enforcement of arbitral awards, the practice of arbitration institutions, as well as the combination of mediation with arbitration. Each topic is reviewed in depth with an analysis of the theory underpinning it and case law. The legal characteristics of arbitration in China, especially those that differ from transnational standards, are presented in a clear and convincing manner.

The theoretical analysis is greatly assisted by the author's first-hand experience of arbitration and her empirical studies. The empirical research was conducted while the author worked with me at the University of Geneva for a research project on arbitration in China, funded by the Swiss National Research Fund, during which we travelled together to Hong Kong and mainland China and conducted a series of interviews with arbitration specialists, including academics, arbitrators, arbitration commission officials, judges and legislators. This allowed us to see how arbitration operates in practice in China and brought to light certain differences compared to transnational standards, beyond the institutional reports and descriptions found in literature.

More importantly, the book goes well beyond the law to explain such differences. The author examines the cultural, philosophical and historical aspects of dispute resolution in Chinese society. The result of this analysis most helpfully highlights the reasons behind the characteristics of Chinese arbitration law and practice. In that sense, this work serves as a welcome contribution to our thinking about commercial dispute resolution and the relationship between law and society in general. Arguing largely from a universal perspective, the author is at the same time mindful of cultural differences. This places her study on a balanced ground and makes her arguments appealing to scholars of various disciplines.

The book not only benefits from the author's empirical studies, it also gains from her academic and practical experience in international commercial arbitration, in China and on a comparative basis. Her experience as counsel at the ICC Court of Arbitration contributed to her understanding of the workings of arbitration. During recent years she has also been exposed to a wide number of countries and different legal cultures, including China, United States, France, Switzerland, and Hong Kong, which provided her with a good basis to engage in comparative studies.

In sum, this book makes a remarkable contribution to the understanding of arbitration in China and transnational arbitration in general. Academics, scholars and students of international arbitration, comparative studies and globalisation may all find this book stimulating. It also provides useful guidance for practitioners involved or interested in arbitration in China.

Gabrielle Kaufmann-Kohler

Preface

In the context of globalisation, there is a strong movement towards harmonisation of the law and practice of modern arbitration. To what extent are Western and Chinese legal traditions still influential on their modern arbitration practice? Contrary to the Western legal tradition which is significantly based on private law such as *jus civile* in ancient Roman law and *lex mercatoria* in medieval Europe, the Chinese approach to dispute resolution is predicated, to a great extent, upon Confucian philosophy that emphasises harmony and conflict avoidance. Now that China's legal system has evolved, to what extent is this non-confrontational culture still influential on the law and practice of arbitration in contemporary China?

Furthermore, in the new era of globalisation, non-Western countries are playing an increasingly important role in international commercial and financial markets. An important question to ask in the study of transnational arbitration is how the new economic players will react to this movement of harmonisation. Will they follow and adapt to the movement? Or will they attempt to shape transnational arbitration, to suit their economic requirements and legal background? China, again, serves as a good example in this regard, as one of the main new economic players which increasingly interacts with global commerce. Is China showing signs of adaptation to the current trend of transnational arbitration? On the other hand, will Chinese legal culture influence the practice of arbitration in the rest of the world?

This book gives readers a unique insight into real arbitration practice in China, based on a combination of theoretical analysis and practical considerations. Where there is society, there is law. Where there is law, there is society (*ubi societas ibi jus, ubi jus ibi societas*). This book examines the development of arbitration in China in the context of the changing economic, social and legal structure of Chinese society.

First, to understand the interactions between global norms and local traditions, it is important to study arbitration in China in the context of globalisation and to compare Chinese practice with transnational standards. 'Transnational standards' refers to principles and practices that are widely accepted by national laws, an accumulation of national standards. Comparisons are made in terms of legislation and court practice, the practice at arbitration institutions and the role of arbitrators in facilitating settlement. These comparisons may shed light on the uniqueness of the Chinese arbitration system, and may also illustrate the role of China, as a new economic player, in the development of transnational arbitration.

Furthermore, given the wide gap between statutes and practice in China, empirical study is needed to confront paper law with real practice. Based on the legal analysis of the current arbitration regime in China, the book examines a number of judicial decisions and arbitral awards so as to understand the actual practice at the courts and arbitration institutions. This empirical approach is in part achieved by referring to a series of interviews conducted with Professor Kaufmann-Kohler during a research trip to China (which included Hong Kong, Beijing and Wuhan) between March and April 2007. This first-hand information reliably tells us how arbitration operates in China and what the problems in the current regime are.

Finally, this book addresses an important theoretical question on the interactions between globalisation of law and local culture and legal traditions. Through the lens of the transplantation of arbitration in China, the book demonstrates that tradition and culture do play a very significant role in accepting and reshaping a borrowed legal institution, despite the general trend that modernisation of law is inevitable. I argue that the development of transnational arbitration is a process of 'glocalisation', which reflects combined impacts of globalisation of law and local culture and traditions. It predicts its prospect as the coexistence of the historical and the contemporary, the coexistence of China and the West, all in harmony. Analysing the current legal system from a cultural and historical perspective will help readers to understand traditional influences on contemporary practice, to assess where the legal obstacles to modern arbitration arise, and to predict what future trends might be.

I hope that this book proves to be a useful and informative contribution to the study of transnational arbitration in China and elsewhere. It may be of interest for practitioners in arbitration, scholars of international commercial and comparative law, specialists in dispute resolution and students on arbitration/mediation courses. The interdisciplinary approach may arouse greater readership in the broader context of legal transplantation, law and society, and globalisation of law.

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