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The Culture of Arbitration

Tom Ginsburg*

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The relationship between “legal culture” and the practice of international arbitration has received increasing attention in recent years. Many see arbitration 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 traditions² or as competition among various players.³

This comment contests the view that the current state of convergence in arbitration is properly considered a cultural

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1. See generally INTERNATIONAL DISPUTE RESOLUTION: TOWARDS AN INTERNATIONAL ARBITRATION CULTURE (Albert Jan van den Berg, ed., 1998); Siegfried H. Elsing & 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); Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VAND. J. TRANSNAT’L L. 1313 (2003); 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).

2. See CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS (Stefan N. Frommel & Barry A.K. Rider eds., 1999) (considering the resolution of differences arising among parties coming from different legal cultures).

3. See generally 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 & Barry A.K. Rider, eds., 1999) (cultural conflict); Michael Kerr, *Concord and Conflict in International Arbitration*, 13 ARB. INT’L 121 (1997) (harmony and discord in international arbitration); YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE* 54 (1996) (competition).

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 already in the business. 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 U.S. legal culture as well as, more broadly, a civil law and common law culture.⁵ As Friedman put it, legal culture consists of the “attitudes, values and opinions held in society with regard to law, the legal system and its various parts.”⁶ These values might be expressed as a preference for arbitration over litigation, for oral procedures over written ones, or for punitive remedies, to mention only a few examples.⁷

4. David Nelken, *Toward a Sociology of Legal Adaptation*, in ADAPTING LEGAL CULTURES 7, 25 (D. 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.”); see also CSABA VARGA, COMPARATIVE LEGAL CULTURES 1-83 (1992) (discussing the roots of Western legal culture). See generally COMPARING LEGAL CULTURES (David Nelken ed., 1997).

5. See e.g., Anita Bernstein & Paul Fanning, “Weightier Than a Mountain”: Duty, Hierarchy, and the Consumer in Japan, 29 VAND. J. TRANSNAT’L L. 45 (1996) (discussing Japanese legal culture); Alain Lembreur, *Negotiation and Mediation in France: The Challenge of Skill-based Learning and Interdisciplinary Research in Legal Education*, 3 HARV. NEGOT. L. REV. 151 (1998) (discussing French legal culture); Christian Atais & Alain A. Levasseur, *American Culture and Traditional Scholarly Order*, 46 LA. L. REV. 1117 (1986) (discussing U.S. legal culture).

6. LAWRENCE M. FRIEDMAN, LAW AND SOCIETY: AN INTRODUCTION 76 (1977); see also LAWRENCE M. 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”). Cf. Roger Cotterell, *The Concept of Legal Culture*, in COMPARING LEGAL CULTURES, *supra* note 4, at 13-14 (critiquing the above viewpoint).

7. See Richard H. Kreindler, *Arbitration or Litigation? ADR Issues in Transnational Disputes*, 52 DISP. RES. J. 79 (1997) (examining the factors that come into play in the choice between arbitration and U.S. courts); see also Amanda Stallard, Note, *Joining The Culture Club: Examining Cultural Context When Implementing International Dispute Resolution*, 17 OHIO ST. J. DISP. RES. 463, 463 (2002) (observing that international disputes involve collision of “dispute resolution cultures”).

This idea of culture conceptualizes culture as a feature of the decision making environment of legal actors. It posits that prior cultural endowments create the preferences behind certain choices, either procedural or substantive.⁸ The preferences of legal actors are exogenously produced by the national culture or legal tradition and will shape behavior.⁹ This approach emphasizes the relative immutability and constraining effect of culture on legal choices.¹⁰ It also implies that culture will dictate outcomes even when it is costly, that is, when rational cost-benefit calculation would not produce the same result.¹¹

A second notion of culture contemplates culture as consisting of shared norms and expectations *produced* by legal actors. Actors engaged in repeated interaction over time produce culture.¹² Lawyers form an epistemic community, that is, a community of professionals with common training and expertise.¹³ This common training and expertise, combined with interactive practices, produces a common set of expectations.¹⁴ These expectations, in turn, shape behavior, though they are also subject to change as new norms arise.¹⁵ 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 a culture of arbitration, a transnational culture common to practitioners, arbitrators and

8. See Kriendler, *supra* note 7, at 79, 80.

9. See Stallard, *supra* note 7, at 463, 473-82.

10. *Id.* at 473.

11. See Frommel & Rider, *supra* note 2, at 1-18.

12. See Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 3 (1992) (acknowledging that the shared beliefs of knowledge-based experts can lead to similar patterns of behavior within different cultures).

13. One commentator has noted:

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 the conviction that human welfare will be enhanced as a consequence.

Id. at 3.

14. *Id.* at 3.

15. *Id.*

parties involved in arbitral practice.¹⁶ The culture of arbitration typically refers to the gradual convergence in norms, procedures and expectations of participants in the arbitral process.¹⁷

Professor Kaufmann-Kohler describes this phenomenon quite nicely.¹⁸ 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.¹⁹ She also notes convergence on the role of the tribunal in setting its rules and in deciding procedural matters.²⁰ 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.²¹ Even the dreaded Anglo-American discovery practice has been adopted in a limited form, tamed by the moderating influence of commercial arbitration.²²

Further convergence is found in the ability of the tribunal to determine its own jurisdiction, the so-called *kompetenz kompetenz*,²³ and provisions for severability of the arbitral clause, without which arbitration would be severely constrained.²⁴ Another example argued to reflect cultural convergence is the substantial agreement on the general principles of arbitration, such as party autonomy and the

16. DEZALAY & GARTH, *supra* note 3; *see generally* van den Berg, *supra* note 1; Horacio A. Grigera Naón, *Latin American Arbitration Culture and the ICC Arbitration System*, in Frommel & Rider, *supra* note 2, at 117; Leonel Pereznieta Castro, *Commercial Arbitration in Mexico*, 13 FLA. J. INT'L L. 29, 32 (2000) (discussing enforcing foreign awards even if not from New York Convention signatories); Brett Fulkerson, *A Comparison of Commercial Arbitration: the United States and Latin America*, 23 HOUS. J. INT'L L. 537, 566 (2001) (NAFTA harmonizing arbitration culture); Alan Scott Rau & Edward F. Sherman, *Tradition And Innovation In International Arbitration Procedure*, 30 TEXAS INT'L L. J. 89, 91-104 (1995).

17. van den Berg, *supra* note 1, at 31-34.

18. *See generally* Kaufmann-Kohler, *supra* note 1.

19. *Id.* at 1315. *See also* UNCITRAL MODEL LAW art. 1(2).

20. Kaufmann-Kohler, *supra* note 1, at 1321-22. *See also* 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").

21. *See* Andreas F. Lowenfeld, *International Arbitration as Omelette: What Goes into the Mix*, in Frommel & Rider, *supra* note 2, at 19, 24 (oral procedures); Serge Lazareff, *International Arbitration: Towards a Common Procedural Approach*, in Frommel & Rider, *supra* note 2, at 31, 35 (limited hearing).

22. *See* Lowenfeld, *supra* note 21, at 26 (observing that discovery in arbitration is a "genuine compromise"); Elsing & Townsend, *supra* note 1, at 61 (compromise over discovery); *see also* IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION (1999).

23. Arbitration Act, 1996, c. 30 (Eng.).

24. Lazareff, *supra* note 21, at 31.

need for procedural fairness.²⁵ Finally, the spread of the Model Law and the New York Convention have been major forces pushing toward uniformity.²⁶

It is worth noting that the emergent arbitration culture does not reflect the hegemony of the Anglo-American law firm, as some would have it.²⁷ On balance, the various shifts may have encouraged arbitration to become more like Anglo-American style litigation, but this shift is far from complete.²⁸ Indeed, there are signs that U.S. 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.²⁹ Professor Park's article 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.³⁰ Park really calls 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.³¹ In this sense, both Professor Kaufmann-Kohler and Professor Park address responses to globalization with Kaufmann-Kohler's approach being descriptive and Park's more normative.

25. Kaufmann-Kohler, *supra* note 1, at 1321-22; *see also* Borris, *supra* note 3, at 3 (noting that arbitration laws converge on principles of party autonomy).

26. *See* PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION IN MODEL LAW JURISDICTIONS (2000); IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION, ICCA CONGRESS NO. 9 (Albert Jan van den Berg ed., 1999).

27. *See* Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEGAL STUD. 383, 384 (2003) (arguing that 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) (observing that U.S. expertise is hegemonic). *But see* DEZALAY & GARTH, *supra* note 3, at 60-61 (noting that results of contest over arbitration not clear and will be provisional).

28. DEZALAY & GARTH, *supra* note 3, at 60-61.

29. Commercial Arbitration Rules and Mediation Procedures, R-12(b), American Arbitration Assoc. (2003). For the traditional distinction between U.S. 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) (discussing the benefits of party-appointed arbitrators in international commercial arbitration); Richard M. Mosk, *The Role of Party-Appointed Arbitrators in International Arbitration: The Experience of the Iran-U.S. Claims Tribunal*, 1 TRANS. LAW 253 (1988) (describing the role of party-appointed arbitrators of the Iran-U.S. claims tribunal).

30. William W. Park, *The Specificity of International Arbitration: The Case for F.A.A. Reform*, 36 VAND. J. TRANSNAT'L L. 1241 (2003).

31. *Id.* at 1269-73.

II. WHOSE CULTURE?

Arbitral practices have 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 shared expectations among those who are 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.³² 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 appealed.³³ Indeed, much of what we do know about arbitration comes from these possibly aberrant cases.³⁴ Although certain sources for arbitral decisions exist, such as *Mealey's Arbitration Reporter* and the ICC redacted awards, they are but the tip of the iceberg of all the cases produced.³⁵ Furthermore, the ICC awards are an explicitly biased sample as the ICC seeks to publish particularly interesting or unusual awards.³⁶

In this context, the work of various scholar-practitioners (such as Professors Kaufmann-Kohler and Park) serves as an important source of information on arbitration in practice. They 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.³⁷ Like the grand civil-law tradition, it is scholarly commentary that

32. *Id.* at 1269-76; Kaufmann-Kohler, *supra* note 1, at 1220.

33. 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) (observing that empirical studies are few but growing in number).

34. See Park, *supra* note 30, at 1246-47 (discussing *Alghanim v. Toys 'R' Us*, 126 F.3d 15 (2d Cir. 1997)).

35. See *e.g.*, ICC ARBITRAL AWARDS 1971-85 (Sigvard Jarvin & Yves Derains eds., 1990); ICC ARBITRAL AWARDS 1986-90 (Sigvard Jarvin et al. eds., 1994); ICC ARBITRAL AWARDS 1991-95 (Jean-Jacques Arnaldez et al. eds., 1997) (offering extracts of arbitral awards in the form of a collection). Arbitrations involving states have produced more volume.

36. W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 338 n.62, 639 n.39 (3d ed. 2000).

37. See, *e.g.*, *id.*; CHARLES N. BROWER & JASON D. BRUESCHKE, THE IRAN-UNITED STATES CLAIMS TRIBUNAL (1998) (discussing the establishment and contribution to international arbitration resulting from the Iran-U.S. claims tribunal); GEORGE H. ALDRICH, THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL (1996) (summarizing and analyzing the tribunal's jurisprudence); JULIAN D.M. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION (1987).

produces the law and technique of arbitration.³⁸ The role of scholars is enhanced because the other potential sources of lawmaking, namely legislators and judges,³⁹ are called on only when the relatively autonomous system of commercial arbitration turns to national legal systems for support or enforcement.⁴⁰ Nor can arbitral *practice* directly contribute to the norm-creation function because of the need for confidentiality.⁴¹ 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 evolution of arbitration into the preferred mode of international dispute resolution.⁴² Their story is one of competition among "the grand old men" and the large Anglo-American law firm over the rules of the game.⁴³ Arbitration has moved from a small number of "grand old men" (who in many cases shared a culture in our first sense, that of being from a common legal tradition) to a broad-based practice of major law firms operating in a global market.⁴⁴ Each group seeks and deploys "symbolic capital" in these struggles.⁴⁵ This contested process has produced the current (unstable) state of affairs that others call the culture of arbitration.⁴⁶

I agree with the outlines of Dezalay and Garth's basic story, but I 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."⁴⁷

38. See JOHN MERRYMAN, *THE CIVIL LAW TRADITION* (2d ed. 1985); see also Fabrizio Marella, *Choice of Law in Third Millennium Arbitrations: The Relevance of the UNIDROIT Principles of International Commercial Contracts*, 36 VAND. J. TRANSNAT'L L. 1137, 1142 (2003) (UNIDROIT principles produced by "cultural mediation of legal scholars").

39. See generally R.C. VAN CAENEGEM, *JUDGES, LEGISLATORS AND PROFESSORS* (1987) (offering a comparative analysis of the production of law in common law and civil-law countries).

40. See MERRYMAN, *supra* note 38.

41. See Alexis C. Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 AM. U. INT'L L. REV. 969 (2001) (considering the arguments for and against the duty of confidentiality in international commercial arbitration).

42. DEZALAY & GARTH, *supra* note 3, at 16.

43. *Id.* at 16, 18.

44. *Id.* at 18.

45. *Id.* at 18-29.

46. *Id.*

47. *Id.* at 18.

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.

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.⁴⁸ Ogus focuses on the concept of network benefits.⁴⁹ Networks in economics are systems in which users are linked, and network goods are those for which a user's benefit increases as the number of network users increases.⁵⁰ The paradigm network good is the telephone, which is useless unless others also own telephones. As more people own them, the more useful they become. The Windows operating system is another prominent example—having established itself as the standard, one incurs costs in the form of lost network benefits in order to switch to a new system.

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.”⁵¹ 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 with outsiders. When legal cultures compete, lawyers become benefit as more people members of their particular network or legal culture; this explains some of the intense competition to educate and train lawyers from around the world or to export rules from a home jurisdiction.⁵²

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 the spread and continuous updating of arbitration rules to capture some of the “market” for arbitral business as well as 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

48. Anthony Ogus, *The Economic Basis of Legal Culture: Networks and Monopolization*, 22 OXFORD J. LEG. STUD. 419 (2002).

49. *Id.*

50. *Id.* at 422. See also Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479, 481 (1998) (exploring the application of network economic theory in the field of law).

51. Ogus, *supra* note 48, at 420.

52. Garth, *supra* note 27, at 395.

Association and UNCITRAL, to name only a few.⁵³ The rules of various arbitral institutions, which reflect substantial convergence on many important questions, are another example.⁵⁴ 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.⁵⁵ But when one factors in the network benefits to be obtained by conforming one's own law to that of other jurisdictions, the rapid production of new laws makes more sense. Having domestic lawyers with a working familiarity of the Model Law, for example, not only helps those lawyers compete for business overseas, but it 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 that making arbitration easier abroad makes it easier at home as well.

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.⁵⁶ Each jurisdiction might ideally desire to exercise strong review of awards for conformity with local law, but, if they do so, other jurisdictions will not enforce awards in favor of their nationals. All economies are better off with recognition of foreign arbitral awards. These benefits increase as more economies observe the Convention since lawmakers

53. See generally Sandra M. Rocks & B. Shea Owens, *Survey of International Commercial Law Developments*, 56 BUS. LAW. 1867 (2001) (discussing the establishment of legal mechanisms aimed at facilitating international commercial arbitration).

54. See e.g., Richard Mosk & 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).

55. Cf. 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 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 6 n.55 (1993) (arguing that new statutes are a signal to international arbitration community).

56. See generally H. Stephen Harris, Jr. & Jack P. Smith III, *Statutory Enforcement of International Arbitration Awards in the United States*, 15 INT'L L. PRACTICUM 54 (2002) (analyzing the principal provisions of the New York Convention and their application by U.S. courts).

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 against 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.⁵⁷ 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.⁵⁸ 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 gains in efficiency or uniformity or harmonization, we might expect more divergence. Here competition to establish the network standard could 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.⁵⁹ In this view, culture can be an anti-competitive product.⁶⁰ Those inside the relatively closed world of international arbitration can use claims of an "arbitration culture" to highlight their own expertise.⁶¹ Those who are "outside the culture" are less desirable participants.⁶²

We can now see why 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. The larger and more diverse the network, the more pronounced the need for common expectations.⁶³ At the same time, claims of culture help to keep outsiders on the outside.⁶⁴ We ought to be cautious about embracing this latter characteristic of arbitration culture.

57. Andreas F. Lowenfeld, *International Arbitration as Omelette: What Goes into the Mix*, in Frommel & Rider, *supra* note 2, at 19.

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

59. Ogus, *supra* note 48, at 427.

60. *Id.* at 426-29.

61. *Id.*

62. *Id.*

63. van den Berg, *supra* note 1, at 23-54.

64. Ogus, *supra* note 49, at 427.

In short, the main *mechanisms* of convergence are likely to be economic rather than cultural. At the same time, economic factors may in part explain why it is so common to describe the results of convergence as a cultural phenomenon. Pressures for more rules lead to competition to establish new network standards. The network standards provide a template for action, and everyone benefits by following it. 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 are unstable as a result.⁶⁵ 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.

IV. CONCLUSION

This comment has highlighted the economic role in creating the international arbitration culture. As institutions evolve under competitive pressures, expectations converge and create 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. Alternatively, it can be monopolistic, trying to keep new entrants out with cultural claims. As the culture of arbitration evolves, it will be interesting, though difficult, to try to determine which outcome occurs.

65. DEZALAY & GARTH, *supra* note 3, at 18-27.

* * *