

The Role of Arbitration in Economic Development and the Creation of Transnational Legal Principles

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My lecture today concerns two aspects of private commercial arbitration that have been the focus of much of my work and scholarship both as a practicing lawyer and as a law professor.

The first is private arbitration's unique potential to contribute to economic growth and development in nations without advanced legal systems – in other words, nations without fully-developed laws, an established legal profession, reliable courts, and other mature institutions involved in law making and the administration of justice.

The second is the unique potential of private arbitration for resolving disputes between parties from very different legal systems or legal traditions, and thereby for contributing to the development of new norms and practices for bridging transnational differences.

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The Role of Private Arbitration in Economic Development

My interest in the potential of arbitration to contribute to economic development grew out of law reform work in which I was involved in Indonesia about twenty years ago. My task was to work with government and business leaders on solutions to the lack of foreign direct investment and economic growth, at the time, that many believed was caused, in part, by underdeveloped laws and unreliable legal institutions. More recently, I have been involved in a similar project in Jerusalem, where the objective is to promote Israeli-Palestinian economic exchange and commercial dispute resolution. Both projects focused on private arbitration as a potential solution.

A dilemma that is common to all emerging economies, including Indonesia twenty years ago and Palestine today, is how to provide the legal institutions upon which economic development depends, without the developed economy upon which effective legal institutions depend.

Let me repeat this because I know it is a question with which business and political leaders in developing countries struggle every day: how do we provide the reliable public legal institutions – laws, regulations, courts, lawyers, enforcement mechanisms – upon which economic development and a thriving economy depend, without the developed economy and resulting resources upon which these institutions depend?¹

In certain important respects, the challenge faced by developing countries with respect to legal sector development is analogous to the challenge faced by the international community during the decade following World War II, when the international community desired cross-border trade and commerce but struggled with the challenge of devising transnational regulatory and judicial mechanisms that would facilitate

¹ This section of my lecture draws upon ideas and themes first published in Philip J. McConaughay, *The Scope of Autonomy in International Contracts and its Relation to Economic Regulation and Development*, 39 COLUM. J. TRANSNAT'L L. 595 (2000) [hereinafter *The Scope of Autonomy*].

commerce across national boundaries rather than just within national boundaries.

Although the analogy is not perfect, developing countries today also need to devise regulatory and judicial mechanisms that transcend traditional methods of economic exchange within local communities and that instead facilitate exchange with strangers from outside the countries -- strangers who often bring with them very different commercial customs and legal traditions.

Just like the international community during the post-World War II period, developing countries need to devise legal institutions (i) that are not dependent on existing public institutions (which often are either non-existent or unreliable), (ii) that are capable of operating independently of existing public institutions, and (iii) that, preferably, are allowed to operate with a promise that national governmental and judicial institutions will *not* interfere unduly with their independent operation and decisions.

Developing countries also confront another analogous challenge: creating legal institutions that do not require a significant public financial investment but that, nonetheless, are somehow capable of immediately providing certain important regulatory and adjudicatory functions that otherwise would require years to develop.

Finally, and again like the nations that were members of the international trading community during the post-World War II period, developing countries need to achieve all of this without unduly sacrificing their sovereign powers, interests, and responsibilities.

The international community solved these challenges by creating a multinational treaty regime for international commercial transactions that is based on the private law principle of autonomy of contract – party autonomy – and, specifically, two of the most important creations of autonomy of contract: first, agreements to submit disputes that might arise dur-

ing the course of a commercial relationship to binding private arbitration; second, contractual terms designating the law that will apply to such disputes.

The treaty that accomplishes this is known as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, or the 1958 New York Convention, for short.² Every nation that accedes to the treaty must make two fundamental promises:

The first promise is to honor written agreements to privately arbitrate matters that are capable of settlement by arbitration, which includes virtually all commercial and contractual matters. This promise means that, if one of the parties to a written arbitration agreement files a claim in a national court and the claim is within the scope of the written arbitration agreement, the court must decline to proceed with the claim and instead refer the parties to arbitration.

The second promise is that nations signing the New York Convention agree that their national courts will recognize and enforce awards made in arbitrations that are within the scope of the Convention, even if the award was made pursuant to some other nation's law, unless the award is infirm for one of a few very limited reasons.

It is these two promises, in my view, that have contributed so significantly to the dramatic growth of global commerce since the New York Convention first was promulgated.

² Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

146 of the world's 193 nation-states are parties to the New York Convention. These 146 nations include all of the world's major trading nations.³

This means that, even though the national courts of each of these nations enjoy the power under generally accepted principles of international law to adjudicate claims arising out of business transactions (i) that occur within the territory of the nation, or (ii) that have a substantial effect within the territory of the nation, or (iii) that include parties who are citizens of the nation,⁴ the national courts of that nation nonetheless will refrain from exercising that power if a claim is within the scope of a written agreement to privately arbitrate the claim.

This also means that, even though each of these nations enjoys the power under international law to apply its own law to disputes arising out of business transactions (i) that occur within the territory of the nation, or (ii) that have a substantial effect within the territory of the nation, or (iii) that include parties who are citizens of the nation,⁵ the national courts of that nation nonetheless will recognize and enforce an arbitration award within the terms of the New York Convention even if the award was made or determined under some other nation's law and even if the national court that is asked to enforce the award would have reached a different result.

In fact, it is private arbitration's relative independence of the legal institutions of any given nation, as guaranteed by the New York Convention, which accounts for arbitration's enormous contribution since 1958

³ The United Nations Commission on International Trade Law ("UNCITRAL") web site provides an updated list of all contracting states, *Status: 1958—Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html. (There have been two more contracting states since this speech.)

⁴ See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 401, 404 (1987).

⁵ See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 401–03 (1987).

to the dramatic growth and success of commerce that crosses national boundaries.

As a general rule, (i) the more reliably a nation's national courts honor written arbitration agreements and refuse to hear claims within the scope of an arbitration agreement, (ii) the more clearly defined and limited the possible occasions of judicial involvement in arbitration proceedings, and (iii) the more reliably a nation's national courts recognize and enforce arbitration awards without reviewing or "second guessing" the merits of the award, *the better the business climate and reputation of the nation as a preferred destination for foreign direct investment.*

There are four key aspects of domestic (i.e., national) arbitration laws, in my view, that contribute most significantly to creating a legal environment that is favorable for economic investment:

First, the law should allow the greatest contractual autonomy possible to private parties to determine the procedures and terms of their arbitrations and to designate the law that will govern their contract and the resolution of any disputes.⁶

Second, the law should define as precisely as possible, and in as limited a way as possible, the occasions on which judicial involvement in an arbitration proceeding may be appropriate.

Third, the law should explicitly designate the specific court or courts that will be competent to hear and decide motions pertaining to arbitration proceedings; this is especially important in nations in which the

⁶ In *The Scope of Autonomy*, *supra* note 1, I argue that economic development would be promoted in developing nations if these nations would extend private contractual autonomy not only to private law issues traditionally within the scope of private contractual autonomy, but also to matters governed by public regulatory law, which are traditionally have been outside the scope of private contractual prerogative. I argue that the opposite effect is likely if developed nations extend contractual autonomy to matters governed by public regulatory law: in this case, the extension would increase the risk of precisely the public harm the regulatory law is intended to prevent.

range of capacities among courts is uneven, and certain courts clearly are more reliable than others in terms of their capacity to act fairly and quickly.

Fourth, the law should specify that the grounds for “setting aside” an arbitral award in an arbitration occurring in that nation are identical to – or at least nearly identical to – the grounds specified in the New York Convention for refusing to recognize and enforce a *foreign* arbitral award.

A reasonable benchmark of a national law that comes close to achieving these characteristics is the Model Law on International Commercial Arbitration published by UNICTRAL, the United Nations Commission on International Trade Law.

Let me conclude this portion of my talk by repeating my thesis: private commercial arbitration is capable of providing commercial transactions with several important regulatory and adjudicatory services typically provided by public legal institutions, and because of this, private arbitration can help provide the legal environment essential to economic development and prosperity even during the period before the public legal institutions fully develop and mature.

However, in order for private arbitration to succeed in this role, it must be supported by a domestic legal regime that approximates the legal environment afforded transnational commerce by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which means that private commercial arbitration must be allowed to proceed largely independently of official regulatory and judicial interference.

The Role of Private Arbitration in the Creation of Transnational Legal Principles

The second aspect of arbitration about which I'd like to speak is the unique potential of international commercial arbitration for resolving disputes between parties from very different legal systems or traditions, and thereby for contributing to the development of new norms and practices that might bridge such differences. My interest in this topic arose from my work as a practicing lawyer representing mostly Japanese and Chinese companies involved in disputes with large American firms.⁷

As I suggested in my comparison of developing countries to the post-World War II international community of nations, there can be no question about international arbitration's extraordinary contribution to the promotion and growth of international commerce during the past 50 years.

Private arbitration offers a neutral forum for multinational parties free from the national interests of any single party to a cross-border transaction. There has been a proliferation of national laws hospitable to international arbitration that guarantee a wide choice of places the world over where international arbitrations can be conducted essentially free of interference or oversight by national courts. And, because of the New York Convention and the strong desire of most nations to appear supportive of international commerce, the awards made in international arbitrations have greater enforcement currency across national boundaries than ever before.

As a result, international commercial arbitration – and the New York Convention in particular – effectively provides a transnational system of justice that works as well as it does precisely because it is non-national

⁷ I first wrote about this topic in Philip J. McConaughay, *The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration*, 93 NW. U. L. REV. 453 (1999); and then developed the thesis more completely in Philip J. McConaughay, *Rethinking the Role of Law and Contracts in East-West Commercial Relationships*, 41 VA. J. INT'L L. 427 (2001); from which this portion of my lecture borrows liberally.

and treated with such deference by all of the world's major trading nations.

For the last few decades, nonetheless, there has been a growing feeling among many scholars and practitioners that arbitration would work even better at facilitating international commerce if only it were more predictable. As the late scholar of international arbitration, Martin Domke, declared, the "principal challenge" facing international commercial arbitration is achieving "predictability of result."⁸ And clearly, the uncertain rules of procedure, elastic rules of evidence, highly limited discovery, secrecy, and untrained non-lawyer arbitrators characteristic of many arbitral proceedings do contribute to outcomes that are not "legally predictable," especially in comparison to the outcomes one would expect if the same issues were tried in a federal court in the United States or a national court of most of the nations of Western Europe.

This growing concern about the unpredictability of international arbitration is understandable in light of the very high value placed by both the civil law and common law traditions on the rule of law, and the resulting expectation within these traditions that commercial activities, like social and political activities, will be ordered and conducted in conformance with prescribed legal rules and obligations, whether specified by statute, regulation, or contract.⁹

In fact, in commercial contexts within these traditions, it is the presence or absence of text in a written contract that typically defines all rights and obligations and provides the standard against which the propriety of the parties' ensuing conduct is judged. Commercial parties write out and sign their commercial contracts and then order their affairs and

⁸ MARTIN DOMKE, *COMMERCIAL ARBITRATION* 14 (1965).

⁹ See, e.g., Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 *COLUM. L. REV.* 1 (1997); JOHN H. BARTON, *LAW IN RADICALLY DIFFERENT CULTURES* 9 (1983); A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 184–98 (10th ed. 1965); LON L. FULLER, *THE MORALITY OF LAW* 43 (Yale Univ. Press rev. ed. 1964).

performance accordingly. Any deviation from the precise terms of the agreement risks breach, blame and liability. Contract law in both the common law and civil law tradition essentially is founded on the assumption that the whole of a commercial relationship is embodied in the contract the parties conclude at the outset of their relationship.¹⁰

The primacy of written contracts in these traditions – in the Western tradition – is reflected in a variety of well-established rules of contract law that promote both the ever-increasing particularity of written contracts and the preeminent role of written contracts in resolving commercial disputes. The parol evidence rule is a good example. This rule essentially forbids the consideration in a commercial dispute of any prior or contemporaneous writings or statements of the parties that explain or contradict their contract as written. Thus, the rule places commercial parties at risk of losing the benefit of any term not explicit in the contract.¹¹

The sanctity of written contracts also lies behind the doctrines of impossibility, frustration of performance, and force majeure. “Promises must be kept though the heavens fall,” is the essence of their commands.¹² A host of canons of construction within contract law have the same purpose and effect.

These rules and the values they express assume, as one would expect, that commercial disputes arise when one party or another to a transaction allegedly departs from some contractual or codified standard of conduct, and that the appropriate way to resolve such disputes is to compare the conduct or omission in question to the relevant contract term or code for purposes of determining breach, blame and liability. And the

¹⁰ See, e.g., Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law*, 72 NW. U. L. REV. 854, 888 (1978) (“[C]ontract law [is] founded on the assumption that all of a [commercial] relation[ship] is founded in some original assent to it.”).

¹¹ See, e.g., Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533 (1988).

¹² JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* 122 (4th ed. 1998).

procedures and rules that tend to make this comparison most accurately are those followed by the national courts of nations within the common law and civil law traditions, where strict rules of procedure, evidence, judicial impartiality, and transparency combine for the purpose and effect of yielding “legally correct” outcomes. Many believe this is especially true of the adversarial legal culture of the United States and the distinctive characteristics of that culture – party-dominated pre-trial discovery; party-selected expert witnesses; party-controlled direct and cross examination; and, a comparatively passive role for the trial judge, especially when contrasted with the inquisitorial civil law model.

These observations help explain why, in response to the challenge posed by Professor Domke of achieving greater “predictability of outcomes” in commercial arbitration, there has been a veritable chorus of scholars and practitioners urging the reform and standardization of arbitral rules and procedures to conform to the judicial rules and procedures common in highly-developed Western nations, and particularly the United States. Leading commentators urge (i) the replacement of arbitral privacy with greater transparency;¹³ (ii) the standardization of arbitral rules of procedure and evidence;¹⁴ (iii) greater discovery and more latitude in the examination of witnesses;¹⁵ (iv) the elimination of equitable decision-making in favor of strict adherence to law and legal rules;¹⁶ (v) the publication of reasoned arbitral awards;¹⁷ (vi) the creation of a system of stare decisis;¹⁸ and generally, (vii) the adoption of any similar “control mecha-

¹³ See, e.g., Richard M. Buxbaum, *Introduction*, 4 INT’L TAX & BUS. LAW. 205, 208 (1986).

¹⁴ See, e.g., Charles N. Brower, *Evidence before International Tribunals: The Need for Some Standard Rules*, 28 INT’L LAW. 47, 58 (1994).

¹⁵ See, e.g., Robert von Mehren, *The Future of Arbitration and Public Law*, 12 BROOK. J. INT’L L. 583, 626 (1986).

¹⁶ See, e.g., F.A. Mann, *England Rejects “Delocalized” Contracts and Arbitration*, 33 INT’L & COMP. L.Q. 193, 196–97 (1984).

¹⁷ See, e.g., Julian D.M. Lew, *The Case for the Publication of Arbitration Awards*, in *THE ART OF ARBITRATION* (Jan C. Schultz & Albert J. van den Berg eds., 1982).

¹⁸ See, e.g., Thomas E. Carbonneau, *Arbitral Adjudication: A Comparative Assessment of its Remedial and Substantive Status in Transnational Commerce*, 19 TEX. INT’L L.J. 33, 39 (1984).

nisms” necessary to ensure “properly legal” results.¹⁹ As Professor Rusty Park has explained, the desire of international commercial parties for a neutral arbitral forum does not mean they are “opting for the abandonment of legal rules” and procedures.²⁰

But what if the arbitration is between or with parties who do not share the Western commitment to the strict “legal” rules and procedures necessary to yield “properly legal” results? What if these parties do not share a notion of justice that views a “legally proper” outcome as the only “just” outcome? What if these non-Western parties “clearly understand the terms of the written agreement into which they have entered,” but “hold entirely different conceptions [from their Western counterparts] of the meaning and effect of the contract,” as Professor Arthur von Mehren once observed of contracting parties throughout much of Asia?²¹ Of what value then is the “Westernization” or “Americanization” of arbitral procedures in arbitrations charged with resolving disputes among or with these parties?

Law and contracts traditionally have not played the role in non-Western commercial relationships – those throughout most of Asia and Africa – that they have in Western commercial relationships. Many non-Western societies originated as public law regimes, with “law” representing little more than the regulatory commands of whoever ruled; there was no concept of law as a means of ordering private affairs, including private commercial affairs.²² As Professor John Haley has observed, “there was a tendency in these societies to avoid legalistic approaches in the ordering of personal and corporate relationships ... and a reticence to rely on law,

¹⁹ See, e.g., W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION 46 (1992).

²⁰ William W. Park, *Control Mechanisms in the Development of a Modern Lex Mercatoria*, in LEX MERCATORIA AND ARBITRATION 115 (Thomas E. Carbonneau ed., 1990).

²¹ Arthur T. von Mehren, *Some Reflections on Japanese Law*, 71 HARV. L. REV. 1486, 1494 (1958).

²² See, e.g., JOHN OWEN HALEY, AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX 198 (1991).

whether contract or code, as the primary instrument of social ordering.”²³ Personal relations prevailed over legal relations.

The primacy of relational considerations in the governance of non-Western commercial exchange resulted in a host of practices and expectations, still prevalent today, that are the opposite of those that developed in the Western legal tradition: (i) evolving situational and circumstantial considerations prevail over precise contractual prescriptions;²⁴ (ii) ongoing negotiations and compromise prevail over all-or-nothing adjudication;²⁵ (iii) group interests prevail over individual interests;²⁶ (iv) custom and usage prevail over written law.²⁷

The result is a non-Western conception of “contract” that often is fundamentally different from the Western conception. In the Western legal tradition, a contract memorializes the “conclusion” of a business deal and embodies strict rights and duties enforceable in court; in many non-Western traditions, a contract signifies the “beginning” of a functioning business relationship that requires the parties to be prepared to accommodate future contingencies as they occur. In these traditions, the notion of assigning fixed consequences to conduct or events long before they occur is counter-intuitive; contract terms professing such an exercise are not accorded determinative weight.²⁸

²³ *Id.*

²⁴ See, e.g., PITTMAN B. POTTER, *FOREIGN BUSINESS LAW IN CHINA* 2 (1995); Stanley B. Lubman, *Dispute Resolution in China after Deng Xiaoping*, 11 COLUM. J. ASIAN L. 229, 375–76 (1997).

²⁵ See, e.g., HALEY, *supra* note 22, at 3.

²⁶ See, e.g., Chin Kim & Craig Lawson, *The Law of the Subtle Mind: The Traditional Japanese Conception of Law*, 28 INT’L COMP. L.Q. 491, 498 (1979).

²⁷ See, e.g., Anthony Hulwese, *Law as One of the Foundations of State Power in Early Imperial China*, in FOUNDATIONS AND LIMITS OF STATE POWER IN CHINA 14 (Stuart R. Schram ed., 1987).

²⁸ See, e.g., Dan Fenno Henderson, Preston M. Torbert & Xie Huaishi, *Contract in the Far East—China and Japan*, in 7 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 4 (Arthur von Mehren ed., 1992); Takeyoshi Kawashima, *The Legal Consciousness of Contract in Japan*, 7 LAW IN JAPAN 1, 6 (Charles R. Stevens trans., 1974); von Mehren, *supra* note 21, at 1496.

The “friendly negotiations” and “confer in good faith” clauses typical of both Western and non-Western commercial contracts illustrate these fundamentally different conceptions.

The typical Western view of such clauses is that they impose no real obligation at all. At most, they represent either a mechanism for making unenforceable requests, or the initial step of a multi-step dispute resolution process that culminates ultimately in a compulsory adjudication intended to enforce precise contractual terms.²⁹

When viewed from relational perspectives outside of the Western legal tradition, these clauses, to use Western terms, represent executory obligations no less substantive than terms of price, payment and delivery. They embody and express the notion that a written contract is unfolding rather than static and subject to adjustment in favor of other values -- such as preserving the relationship, avoiding disputes, and reciprocating previous accommodations by the other party -- as contingencies arise during the course of contractual performance. Characterizing “friendly negotiations” and “confer in good faith” clauses as “merely procedural dispute resolution mechanisms” misapprehends their essential nature in most non-Western traditions, for no “dispute” exists if all of the parties understand the evolving nature of their contract and their substantive obligation to make reasonable adjustments to their performance or expectations in the face of changing circumstances.

This understanding of “friendly negotiations” and “confer in good faith” clauses, of course, does not mean that real disputes do not arise in relational commercial traditions outside of the Western legal tradition. The nonperformance of obligations, or performance outside of the relational values I mentioned, or refusals to adjust to reasonable demands for adjustment in the face of changed circumstances, or unreasonable demands for adjustment, all can give rise to disputes in these relationships

²⁹ DAN FENNO HENDERSON, 2 CONCILIATION AND JAPANESE LAW: TOKUGAWA AND MODERN 195 (1965).

no less serious and potentially destructive of the mutual enterprise than those that arise in the West as a result of a party diverging from a strict contractual term. But the process by which the dispute is resolved, and the values that inform the resolution, once again are often fundamentally different in non-Western traditions from those that we know in the Western legal tradition. Just as contracts are relational in most non-Western traditions, so too is commercial justice.³⁰

The objective of dispute resolution in many non-Western traditions typically is not the ascertainment of legal rights and the allocation of blame and entitlement, as it is in the West; the objective is a resolution, and hopefully a reconciliation, whatever the result. The merits of the dispute are not irrelevant, but “merits” outside of the Western legal tradition often have far more to do with relative status, actual circumstances, reciprocal adjustment, and maintaining the relationship, than with compliance or noncompliance with precise contractual terms that predate the dispute. Western and non-Western dispute resolution traditions may be alike insofar as both seek to achieve the “expectation interests” of the parties, but without an explanation of how fundamentally different the expectations of non-Western parties can be from those of Western parties, this comparison would convey a falsehood.

Commerce in non-Western traditions is as dependent as Western commerce on the “predictable” resolution of disputes; but “predictability” in many non-Western traditions derives not from “legal predictability,” as conceived in the common law and civil law traditions, it derives from the fact that there will be a resolution of the dispute, and in many cases, a resolution that allows the commercial relationship to continue.³¹

This version of commercial justice requires dispute resolution procedures and techniques different from those designed to yield the “legally

³⁰ *Id.* at 174.

³¹ See, e.g., Kim & Lawson, *supra* note 26, at 511; HALEY, *supra* note 22, at 23; Kung-Chuan Hsiao, *Compromise in Imperial China*, in PARERGA: OCCASIONAL PAPERS ON CHINA 6 (Univ. of Wash. Press 1979).

correct” outcomes favored by the Western legal tradition. Mediation and conciliation, for example, traditionally have been preferred strongly over arbitration or other compulsory adjudication.³² And even when arbitration is commenced, arbitrators in non-Western settings routinely make intermittent efforts to mediate the dispute, often engaging in *ex parte* communications with each party and then resuming as arbitrators, without objection from the parties, if a mediation effort fails – thus confounding Western notions of judicial ethics.³³ The complete privacy and secrecy of the arbitration is critically important to this effort, as is the complete discretion of arbitrators not to issue written opinions attributing blame and explaining their awards.

Why then, would we ever want to “Americanize,” “Westernize,” or “standardize” an international commercial dispute resolution process in ways that would foreclose each of the features so important to so many non-Western parties? Isn’t the genius of the New York Convention precisely the fact that it permits complete party autonomy and flexibility with respect to most questions of arbitral procedure and conduct?

The conventional answer to these questions is that substantive law worldwide seems to be converging or harmonizing around common law and civil law principles, so it should follow naturally for dispute resolution procedures and rules to converge around the Western legal tradition as well.

And it clearly is true that nations and societies throughout Asia, Africa, the Caribbean, and South America, whose relational practices and traditions are not part of the Western legal tradition, have, over the course of the last century, adopted civil and commercial codes based very much

³² See, e.g., HENDERSON, *supra* note 29, at 235; Lubman, *supra* note 24, at 295–96; Jerome Alan Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L. REV. 1201 (1966).

³³ See, e.g., POTTER, *supra* note 24, at 70; for the characteristic non-Western practice, see Lubman, *supra* note 24, at 337; for conventional Western objections, see J.D. Fine, *Continuum or Chasm: Can West Meet East?*, 6 J. INT’L ARB. 27, 30 (1989).

on common law and civil law counterparts. German civil code provisions are evident throughout the civil and commercial codes of China, Japan, Korea, and Taiwan; Dutch provisions can be found throughout the codes of Indonesia, Botswana, Sri Lanka, South Africa, and Zimbabwe; English common law principles are can be found throughout the codes of Ghana, Kenya, Jamaica, Malawi, Bahrain, and many other non-Western nations; and, of course, I could go on both expanding these lists and adding lists of non-Western nations whose civil and commercial codes essentially replicate the codes of Portugal, France and Belgium.

But it also is true that all of these nations, more accurately, should be described as having “mixed” legal systems, in which transplanted colonial or imperial codes exist alongside strong customary legal traditions and sometimes Islamic or other religious law as well.³⁴ In most non-Western societies, even today, I think it is fair to say that the penetration of common law and civil law principles is not deep. Commercial practices in these nations often remain deeply rooted in customary relational traditions. Practicing lawyers in these nations regularly observe, as Professor Dan Fenno Henderson once described, “[a] mix of [customary and transplanted]...legal institutions that is elusive to lawyers” who lack deep exposure to these societies.³⁵ As Professor William Shaw has noted with respect to China and Korea, “work is only now beginning on the study of how traditional legal systems met and often persisted under the ‘Westernizing’ reforms of [colonial or imperial influences].”³⁶

The inevitability of a worldwide convergence of law and commercial practices around the Western legal tradition also is questionable on other grounds. Much of the growth of international commerce today is exclusively non-Western. Consider the burgeoning economic exchange

³⁴ See, e.g., POTTER, *supra* note 24, at 3; Dan Fenno Henderson, *The Japanese Law in English: Some Thoughts on Scope and Method*, 16 VAND. J. TRANSNAT’L L. 601, 609–11 (1983).

³⁵ Henderson, *supra* note 34.

³⁶ William Shaw, *Traditional Korean Law and its Relation to China*, in *ESSAYS ON CHINA’S LEGAL TRADITION* 302, 318 (Jerome Cohen et al. eds., 1980).

between China and Africa, which has grown from \$10 million (U.S.) annually barely 20 years ago to well over \$100 billion annually today, with a remarkable growth rate of over 700 percent between 2001 and 2009 alone. Why should we presume the emergence of contract and dispute resolution rules reflecting Western values in the context of Africa-China trade that includes 53 African nations whose combinations of customary traditions and colonial codes still include relational commercial and dispute resolution practices remarkably similar to the relational practices that persist in China and the rest of Asia despite a similar “legal dualism” here?³⁷

The growth and effectiveness of worldwide non-Western diasporas also casts doubt on the convergence thesis. The world is seeing that mass migration, the internet and affordable flights are preserving diversity around the world no less than they are promoting harmonization. *The Economist* reported recently that more Chinese live outside of China than French live in France. There are 22 million ethnic Indians scattered across every continent. Smaller diasporas tie West Africa to Lebanon, and Brazil and Peru to Japan. The world has 40 percent more first generation migrants today than in 1990. If migrants were a nation, they would be the world’s fifth largest. Diaspora ties are a way of business and a growing and highly lucrative means of cross-border business collaboration. These “diasporan” nations that cross national boundaries operate largely according to relational principles, not according to the formalistic Western legal mechanisms that proved so helpful in fostering economic exchange between parties of different nationalities within the Western legal tradition.³⁸

Opinion surveys of non-Western parties confirm their preference for relational rather than legalistic commercial practices. Studies comparing the preferences of Chinese and Western subjects show a strong prefer-

³⁷ See Philip J. McConaughay, *Foreword*, in Won Kidane, *China-Africa Dispute Settlement: The Law, Culture and Economics of Arbitration* (2011).

³⁸ See generally *The Magic of Diasporas*, *THE ECONOMIST* (Nov. 19, 2011), <http://www.economist.com/node/21538742>.

ence among Chinese for mediation and assisted voluntary settlements over adversarial disputing; Western subjects prefer adversarial dispute resolution and “legally correct” results.

A study published last year by Hong Kong University Professor Shahla Ali refines these preferences further.³⁹ Her survey was of parties, lawyers and arbitrators involved in international arbitrations in the principal North American, European and Asian arbitral institutions. The results revealed that respondents from Asian institutions prefer assisted settlements and flexible, secret proceedings; respondents from Western institutions prefer predictable legal outcomes and clear, predictable rules of procedure. Respondents from Asian institutions were most concerned about lawyers who are too adversarial and a process that focuses more on past facts and legal rights than on future creative settlement options; respondents from Western institutions preferred adversarial lawyers and strictly legal outcomes.

Given that most of the growth in international arbitration is occurring in the Asian institutions at which Professor Ali conducted her survey, I believe it is fair to question the “inevitability” of the “Westernization” or “Americanization” of international commercial arbitration. It has been well over a decade since the total number of international arbitrations filed annually in Hong Kong and CIETAC alone surpassed the total number filed annually in all North American and European institutions combined.

These trends leave the following question: if cross-border commercial practices and international arbitration rules are not destined to converge around Western or American standards, what is their destiny? Or, to pose the question somewhat differently, can contracting and dispute resolution terms and mechanisms be devised that account for the significant differences between Western and non-Western traditions with re-

³⁹ SHAHLA F. ALI, *RESOLVING DISPUTE IN THE ASIA-PACIFIC REGION: INTERNATIONAL ARBITRATION AND MEDIATION IN EAST ASIA AND THE WEST* (2010).

spect to the role of contracts and the nature of dispute resolution in cross-border commercial relationships? This is a question that all lawyers involved in cross-cultural transactions and disputes should ask themselves and their clients.

I will conclude with a few thoughts about how I believe these questions might be answered.

In my view, the same three features of international commercial arbitration that have been responsible for the success of cross-border trade also are uniquely capable of supporting new paradigms of contracting and dispute resolution practices that might begin to bridge the major differences between Western and non-Western traditions. To reiterate, the first feature is the increasingly unfettered autonomy of parties to international transactions to designate whatever law or decisional rule they wish to apply to their dispute, to the exclusion of all otherwise applicable laws. The second is the virtually complete autonomy of these parties to agree to arbitrate their disputes according to dispute resolution procedures unconstrained by the peculiarities of national laws and practices. The third feature is the assurance that arbitral awards rendered pursuant to these party-determined laws and procedures will be readily recognized and enforced in virtually all of the world's trading nations.

Briefly, with respect to contracting practices, I foresee more frequent resort to terms that explicitly acknowledge duties of reasonable accommodation as unexpected contingencies arise. The existing concept of "good faith and fair dealing" in certain Western jurisdictions comes close to this. The Dutch understanding of "good faith" is a good example: it envisions that, "a rule binding upon the parties as a result of the contract does not apply to the extent that, in the given circumstances, this would be unacceptable according to the criteria of reasonableness and equity."⁴⁰

⁴⁰ See BURGERLIJK WETBOEK [BW] [CIVIL CODE] art. 6:248 (1992) (Neth.); for an English translation, see P.P.C. HAANAPPEL & EJAN MACKAAY, NIEUW NEDERLANDS BURGERLIJK WETBOEK art. 6:248, para. 2 (1990).

Utrecht University Law Professor Arthur Hartkamp explains that, under this rule, contract provisions do “not apply” to the extent they would be contrary to good faith.⁴¹

Other new terms might be modeled on the “adaptation and renegotiation” clauses typical of long-duration contracts in certain sectors of Western cross-border trade. Similar clauses also are found in some bilateral treaties between nations, where sunset provisions extinguish obligations after a certain limited period in favor of resumed negotiations. We might see adjustment obligations emerge in combination with a range of performance parameters instead of rigidly set terms, or in combination with new, more relaxed conceptions of contractual hardship or force majeure.

Choice of law provisions also might contribute to bridging West/non-West differences. Choices of “trade usage” or “lex mercatoria” or “general principles of law” might emerge as decisional standards in place of designations of a particular jurisdiction’s law. Empowering arbitrators to act “*ex aequo et bono*” or as “*amiable compositeurs*” might be used instead of, or in conjunction with, a specific applicable law. Both of these doctrines empower arbitrators to depart from the law if they believe it appropriate and to seek a resolution that enables potential adversaries to maintain a valuable commercial relationship.⁴²

Procedural adjustments might include explicit multi-tiered dispute resolution obligations, or an increased blurring of performance and dispute resolution terms in the form of “friendly negotiations” or “confer in good faith” clauses. Western notions of arbitrator impartiality might relax in favor of the same individuals serving as both arbitrator and mediator. Presentational changes might emerge that are less adversarial.

⁴¹ Arthur Hartkamp, *The Concept of Good Faith in the UNIDROIT Principles for International Commercial Contracts*, 3 TUL. J. INT’L & COMP. L. 65, 66 (1995).

⁴² See Louis B. Sohn, *Arbitration of International Disputes Ex Aequo et Bono*, in INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE 332–33 (Pieter Sanders ed., 1967); RENÉ DAVID, ARBITRATION IN INTERNATIONAL TRADE 335 (1985).

All in all, international arbitration might begin to function more as the great comparative law scholar, René David, once envisioned, “not to apply law, but as a remedy against its insufficiency.”⁴³

It bears remembering that none of these changes is really all that different from Western commercial traditions as practiced by the parties to business transactions rather than as litigated by lawyers. As Professor Karl Lewellyn wrote in 1931, “[T]he major importance of [a] legal contract is to provide a frame-work, ... a frame-work [that is] highly adjustable, ... which almost never indicates real working relations, but which affords a rough indication around which relations vary....”⁴⁴ Professor Stewart Macaulay’s work in the 1960’s highlighted the relational contracting practices of American businesses,⁴⁵ as did Professors Robert Ellickson’s and Lisa Bernstein’s work in the 1990’s.⁴⁶ The shift in focus may be to create enforceable obligations of reasonable adjustment in the future when none existed in the past, but the effect on actual commercial practices may not be all that different.

To sum up, the much heralded worldwide “Westernization” or “Americanization” of international commercial arbitration, in my view, is neither particularly likely nor particularly desirable. The principal challenge for West/non-West commerce, instead, is to somehow account in these relationships for contracting and dispute resolution traditions so different that law and contracts are determinative of performance and outcomes in one but subordinate to other values in the other.

Each of the mechanisms I have suggested as possible ways of achieving this accounting clearly increases risk in a commercial relation-

⁴³ RENÉ DAVID, *CONTEMPORARY PROBLEMS IN COMPARATIVE LAW* 33 (1962).

⁴⁴ Karl N. Lewellyn, *What Price Contract? – An Essay in Perspective*, 40 *YALE L.J.* 704, 736–37 (1931).

⁴⁵ Stewart Macaulay, *Non-Contractual relations in Business*, 28 *AM. SOC. REV.* 55 (1963).

⁴⁶ See ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 *J. LEGAL STUD.* 115 (1992).

ship to the extent that “risk” is defined, as it is in the West, as the likelihood of a party diverging from some precise, preordained contractual term or standard of conduct. But Western parties would do well, in my view, not to overlook the possibility that explicit promises to negotiate and adjust reasonably in West/non-West commercial relationships might be a far more effective way of managing risk than attempts to foreclose such obligations.

If the primary objective of drafting a contract in a cross-cultural commercial relationship is the success of the relationship, as it should be, and not simply the advantage of one party or the other in the event of the relationship’s failure, increasing rather than reducing the flexibility of contract terms and dispute resolution procedures actually might contribute to greater stability in West/non-West commercial ventures, contrary to conventional Western wisdom.