Joshua Karton
The Culture of International Arbitration and the Evolution of Contract Law (Oxford University Press, 2013), ISBN 978-0199658008, 296 pages

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Introduction

Joshua Karton's *The Culture of International Arbitration and the Evolution of Contract Law* offers a key to the one of the world's most elusive and lucrative areas of legal practice; international commercial arbitration. International commercial arbitration is a private and confidential dispute resolution method for contract disputes between international parties whose national jurisdictions are signatories to the 1958 New York *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.[1] Although myriad international arbitration practitioner treatises and scholarly articles already exist on the theory and practice of international commercial arbitration, Joshua Karton's treatise, *The Culture of International Arbitration and the Evolution of Contract Law*, is one of the first comprehensive interdisciplinary works of research in this field since Dezalay and Garth's pioneering 1996 study of international arbitrators, *Dealing in Virtue*.[2] However both Karton's treatise and that by Dezalay and Garth do *not* purport to elucidate upon trends and developments in the related realm of investment treaty-based forms of international arbitration.

In *The Culture of International Arbitration and the Evolution of Contract Law*, Karton undertakes a careful socio-legal study of the way in which international arbitrators approach their task of hearing, interpreting and determining private international commercial contract disputes. Karton does this in order to devise a theory for the evolution of a distinct cultural trend in contract law interpretation, which he argues is discernibly emerging in international commercial arbitration. What makes this theory important and provocative is that it suggests that a distinct cultural trend in contract law is emerging and evolving *through* arbitrator awards, which is divergent from the contract law jurisprudence of national judiciaries. In the absence of a doctrine of *stare decisis* under precedent in international commercial arbitration arbitral awards, Karton argues cogently that an observable trend is nevertheless discernible in an identifiable cultural approach to decision-making being adopted by international arbitrators presiding over arbitral disputes.

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1 Opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959).

2 Yves Dezalay and Bryant G Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press, 1996).

If Karton's argument is valid, it has significant implications for the entire field of international commercial arbitration, particularly for commercial party users who try to control the process through the selection and nomination of preferred arbitrators, as well as for lawyers who represent international parties in contract disputes.

As international commercial arbitration is a highly private and confidential method of dispute resolution, where the public cannot watch proceedings and arbitral awards are unpublished (or redacted and edited by international arbitral institutions when published), if distinct cultural decision-making trends are emerging and continuing to evolve in this field, they affect international commercial arbitration's reputation for predictability and certainty. This is because Karton's theory effectively challenges the utility of the international arbitration community's ongoing preoccupation with the selection and appointment of a small pool of international arbitrators based on a perceived, but perhaps imagined, desire for a 'safe pair of hands' in the perpetual pursuit of predictability and certainty of an arbitral dispute's final award and outcome.[3]

Readership and Impact

Karton's treatise is a monograph which he originally completed as a doctoral thesis at the University of Cambridge in 2010. The treatise has utility for ongoing further academic research in international arbitration while being a practical aid for international arbitrators, external legal counsel and in-house counsel presently working in the field. The readership that will perhaps find this treatise the most illuminating and therefore useful includes research academics, students, and legal practitioners who are presently *outside* the field of international arbitration but who wish better to understand its inner sanctum in order to access it. Karton's treatise thus offers important insights for scholars in academic disciplines beyond international arbitration such as: legal history, legal ethics, sociology, economics and business.

With regard to the disciplines of history and sociology as examples, the treatise's utility lies in its engagement of concepts of social norms and sociological research theory to understand the way in which international arbitration emerged and developed as a dispute resolution method in merchant history. Although Karton's discussion of international arbitration's history is not comprehensive, as Hale[4] rightly acknowledges, apart from the few scholarly arbitration history works by scholars such as Roebuck,[5] there is presently no comprehensive historical account of international arbitration.

The economics and business research value of Karton's treatise lies in its use of the empirical research method of Grounded Theory to analyse critically those few published international arbitral awards which have been published, to show how commercial market factors directly impact upon the selection, nomination and appointment of international arbitrators. The main commercial factor is the market competition that occurs between

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3 Joshua Karton, *The Culture of International Arbitration and the Evolution of Contract Law* (Oxford University Press, 2013) 60.

4 Thomas Hale, *The Rule of Law in the Global Economy: Explaining Institutional Diversity in Commercial Dispute Resolution* (PhD thesis, Department of Politics, Princeton University, 2012) 10.

5 Derek Roebuck, 'Sources for the History of Arbitration' (1998) 14 *Arbitration International* 237.

arbitrators, who effectively compete for appointments by cultivating symbolic capital through generating reputations of 'virtue' (referring back to Dezalay and Garth's seminal study). Such reputations are fostered and promulgated by writing text books, presenting conference papers, publishing articles or gaining lectureship positions on law faculties while frequenting the international arbitration social circuit. The unique contribution that Karton's analysis makes on this point, however, is that these commercial factors are an integral part of international arbitration's culture which directly impacts upon and thereby influences the way in which arbitrators think, manage the arbitral process and decide awards.

The argument that *non-legal* cultural factors influence arbitrator behaviour also has implications for the convention of party autonomy in international arbitration, regarding the level of certainty and predictability that commercial parties seek to achieve through choice of law clauses in commercial contracts. This same argument has implications for the convention of party autonomy pertaining to the certainty and predictability parties try to achieve through arbitrator selection, nomination and appointment. Despite purported preferences for international arbitration over all other international dispute resolution methods,[6] Karton points out that international commercial arbitration can still be 'a gamble'.[7] Although not couched in terms of 'legal ethics,' Karton's treatise here potentially offers the first source for legal ethics research in international arbitration that emanates from arbitral jurisprudence itself — rather than from the adversarial procedural paradigm of legal professional conduct. Howarth has rightly identified that legal professional discourse has room for evolution, as much of it is still rooted in the paradigm of lawyers as litigation adversaries in courts.[8] Howarth has explained that a more up-to-date paradigm for what most lawyers really do today can be sustained by comparing the lawyer function with that of engineers who create solutions to problems. This potentially changes the entire scope of legal ethics, if the work of lawyers is compared to the work of engineers.[9] Howarth's view arguably supports an argument for a lacuna in legal ethics scholarship in international arbitration which is predominantly engaged in critiques of the behaviour and regulation of legal counsel and arbitrator conduct in different settings in the arbitral process.[10]

Karton's treatise begins to address this gap by focusing on the way in which cultural norms affect how international arbitrators think and deliberate. In other words, *The Culture*

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6 In a 2013 survey, 52 per cent of corporate in-house counsel are reported to have said they preferred international arbitration over other methods of dispute resolution: Pricewaterhouse Coopers, 'Corporate Choices in International Arbitration: Industry Perspectives' (2013) 6 <http://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf.>

7 Karton, above n 3, 8.

8 David Howarth, *Law As Engineering: Thinking About What Lawyers Do* (Elgar, 2013) 21.

9 Ibid 97.

10 See, eg, Catherine Rogers, 'The Ethics of Advocacy' in Doak Bishop and Edward G Kehoe (eds), *The Art of Advocacy in International Arbitration* (Juris, 2nd ed, 2010); Catherine Rogers, 'The Ethics of International Arbitrators', in Lawrence W Newman and Richard D Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (Juris, 2nd ed, 2008); Catherine Rogers, 'Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct' (2005) 41 *Stanford International Law Review* 53; Catherine Rogers, 'Fit and Function in Legal Ethics: Developing a Code of Attorney Conduct for International Arbitration' (2002) 23 *Michigan International Law Journal* 341.

of International Arbitration and the Evolution of Contract Law is effectively a clear statement on the legal ethics of international arbitrators, bearing in mind their function is a largely commercial activity of devising solutions for the problems of international commercial contract disputes. This treatise does this by highlighting how cross-cultural influences impact on international arbitrators whose normative allegiance to the convention of party-autonomy in international commercial arbitration motivates them to let the disputing parties decide what external factors ought to be introduced into and used in an arbitration to interpret the contract in dispute.[11] This is because while aspects of objective common law interpretation do occur in international commercial arbitration, the cultural predominance of arbitrator deference to party autonomy tends to allow the parties subjectively to develop and control what facts and evidence of the dispute are brought before an arbitral tribunal, thus indicating the potential dominance of a civil law-oriented international commercial arbitration culture because 'subjective interpretation follows as a near-inevitable consequence'.[12]

Karton's treatise also responds to a significant critical analysis gap in private international *commercial* arbitration scholarship. As Roberts has identified, although much research literature exists and persists in the paradigm of public investment treaty arbitration, far more attention needs to be paid to private international commercial arbitration.[13] The majority of past, present and future academic research scholarship, both within and outside international arbitration, is heavily preoccupied with public investor-state treaty-based forms of international arbitration, which gives rise to the need for more analysis of the private sphere.[14] Private international commercial arbitration apparently accounts for around 95 per cent of the entire international arbitration market,[15] and could be said therefore to have a far greater direct and indirect public policy impact than public investment treaty-based forms of arbitration in the facilitation of international trade in the global economy.[16]

This need for more critical scholarship about private international commercial arbitration also arises because the broader private international law paradigm in which it sits is predominantly focused on the settlement of disputes, rather than the creation of law.[17] *The Culture of International Arbitration and the Evolution of Contract Law* directly addresses this very question about the creation of law in the realm of private international dispute settlement. In so doing, the treatise lays the foundation for examining the duty of international arbitrators to adhere to and apply the law that was chosen by the parties through the insertion of choice of law clauses into the contract that is the subject of the arbitral dispute. Karton's treatise also complements the emerging body of scholarship

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11 Karton, above n 3, 233.

12 Ibid 234.

13 Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping The Investment Treaty System' (2013) 107 *American Society of International Law* 45, 87.

14 Ibid.

15 Pricewaterhouse Coopers 'International Arbitration: Corporation Attitudes and Practices' (2008) 3 <http://www.pwc.co.uk/en_UK/uk/assets/pdf/pwc-international-arbitration-2008.pdf>.

16 Karton, above n 3, 8, 99–114.

17 Roberts above n 13, 62.

which is highlighting the confluence and impact of public international law paradigms on the private international law sphere.[18]

Theory and Research Method

The March 2013 publication of this insightful treatise put an immediate end to claims within the international arbitration academy, originally made shortly before its release, that international arbitration scholarship has failed to undertake interdisciplinary research via socio-legal and other methods, and/or engage with developments in international legal and non-legal scholarship.[19] In fact this treatise does just this by undertaking a well-executed hermeneutic analysis of salient aspects of international private law instruments such as the *UNIDROIT Principles* and the *United Nations Commission on International Trade Law on International Commercial Arbitration* in conjunction with probing discussion of relevant arbitral institution rules and published arbitral awards, national statutes and common law.

The main theory of this treatise is that the culture of international commercial arbitration is such that arbitrators will interpret commercial contracts in a way that is different from the jurisprudence of contract law interpretation and application by national court judges, regardless of the choice of applicable substantive private national law. Karton constructs this theory by undertaking a combined doctrinal and socio-legal empirical analysis of the culture of international commercial arbitration and international arbitrators. In a select case study, he examines the few available published arbitral awards and conducts a range of qualitative anonymous interviews. Karton concludes that international arbitrators trend toward adopting *a civil law approach* in the management of arbitral procedure and the interpretation of contracts, irrespective of whether their education and training background is from a civil or common law tradition. Without intending to suggest this contributes to the troublesome spectre of bias allegations that plague public investment treaty arbitration, Karton explains how market-based forces and the operation of the convention of party autonomy in international commercial arbitration see international arbitrators *deferring* to party needs and preferences in a way that national judges do not.

Karton's analysis contributes to a theory of arbitral decision-making that explains the emergence of new substantive and procedural laws in international commercial arbitration which are important for legal practitioners. It: 'provides a basis on which to predict what those new rules will be and how transnational legal instruments will change over time'.[20]

Karton uses Glaser and Strauss' 'Grounded Theory' research method to discern the emergence of a culture in international commercial arbitration by examining arbitral laws, published arbitral awards, empirical research surveys and anonymous interviews with international arbitrators. Rather than imposing a research theory upon a field of study and

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18 Alex Mills, 'The Confluence of Public and Private International Law' (Cambridge University Press, 2009); Alex Mills, 'Antimonies of Public and Private At The Foundations of International Investment Law and Arbitration' (2011) 14 *Journal of International Economic Law* 469.

19 See, eg, Stavros Brekoulakis, 'International Arbitration Scholarship and the Concept of Arbitration Law' (2013) 36 *Fordham International Law Journal* 745.

20 Karton, above n 3, 240.

interpreting the data through the theory, the Grounded Theory approach involves developing a theory 'from the ground' by allowing it to emerge from the data itself.[21] This method allows Karton to develop his theory of a culture of international commercial arbitration and contract law evolution which he does in two main sections.

The first section (three chapters) lays the foundation for a cultural theory of international arbitral decision-making, the norms arising from the institutional structure of international commercial arbitration and the importance of culture, social norms and values in the competitive marketplace of this field. The second section (four chapters) explores the research method more definitively by exploring the emergence of a cultural trend in international arbitrator decision-making in the context of two case studies; the first being the interpretation and determination of disputes which involved the remedy of 'Suspension of Performance'. The second explores how international arbitrators interpret contracts in their approaches to the exclusion of extrinsic evidence. Both case studies are jurisdictionally comparative, juxtaposing common law and civil law judicial approaches of various nations with the outcomes of published arbitral awards in international commercial arbitration.

The findings of the first case study are difficult to summarise into a neat form of quasi ratio. Acknowledging that there is no uniform convergence of approach to the principles for the remedy of Suspension of Performance at private international law or within the myriad rules of international commercial arbitration, Karton finds that arbitrators are motivated by service business norms and remedies that are intuitive, proportional and economically efficient,[22] especially where the governing law contains a duty of good faith.[23] The second case study is more definitive, finding that arbitrators adopt a civil law approach to the inclusion of extrinsic evidence for contract interpretation.[24] This is arguably owing to market competition factors operating in arbitrator selection, nomination and appointment, which influence arbitrators to defer to party wishes through party autonomy as a social norm.[25]

Criticisms

Some of the potential criticisms of this treatise were anticipated by Karton and addressed within it. However, criticisms are valid and potentially limit the utility of the treatise as an aide to practice. The main criticism is owed in large part to the obstacles the scholarly study of international commercial arbitration faces, due to its highly private and confidential nature. International arbitrator awards are largely unpublished and, when they are released, this usually only occurs after arbitral institutions have selectively edited so that all arbitrator

21 Ibid 28.
22 Ibid 193.
23 Ibid 194.
24 Ibid 233–4.
25 Ibid 84–94.

and party identities are removed and censored, along with any facts that would allow parties to be inadvertently identified by outsiders to the dispute.[26]

It follows that an inevitable Catch-22 criticism is that the low number of published awards means those awards which are reviewed and relied on in this treatise are insufficient in number to devise a testable theory about a genuinely discernible cultural trend among all arbitrators. Karton's response to such criticism is that this is a theory yet to be proved or disproved, which will no doubt occur as more arbitral institutions around the world begin autonomously to publish redacted arbitral awards. The theory is a rudder for the ongoing monitoring of the evolution of any cultural trend in international commercial arbitration.[27] However this potential criticism is important and cannot be entirely dismissed as the utility of such cultural trends are necessarily limited in practical value by virtue of the small number of awards available for scrutiny. Others might argue that any discernible cultural trend is limited to the demographics of the arbitrators who were anonymously interviewed for this research, or that it might be attributed partly to the culture of the arbitral institutions that have a hand in selective publication, editing and award redaction.

Karton's view is that the published writings of arbitrators and their awards still reflect the values of international arbitrators as an identifiable group of the same international players, and thereby their awards manifest *their* culture. Karton does concede there are limitations in his study and it is necessarily qualitative rather than quantitative. Even if not statistically useful, the treatise's use of arbitral award data and the use of Grounded Theory for its analysis produces results which are theoretically useful for the purpose of more accurately predicting the behaviour and thinking of other arbitrators, placed under the same commercial market incentives that impact a dispute's outcome and final award.[28]

Another potential criticism is that a theory about international commercial arbitration cannot be discerned at all, because arbitral award outcomes largely depend upon the relationship between the arbitrators and the legal counsel appearing in arbitral proceedings.[29] However the treatise's theory about how arbitrators think and determine contract disputes supports the suggestion that when preparing for a hearing, legal counsel should be ready for an arbitral tribunal potentially adopting a civil law approach.[30]

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26 See Joshua Karton, 'Conflict of Interests: Seeking a Way Forward on Publication of International Arbitral Awards' (2012) 28 *Arbitration International* 447.

27 For example, the redacted publication of all arbitral awards is now mandated under the 2010 international arbitration rules of the Milan Chamber of Arbitration and the 2013 rules of the Singapore International Arbitration Centre. The International Chamber of Commerce ('ICC') in Paris has published arbitral awards for many years, but engages its own method for the selection arbitral awards that are edited and revised before publication. In fact, one of the services the ICC is renowned for offering user parties, is reviewing awards penned by arbitrators and sending them back to arbitrators to revise and rewrite, (for the purpose of ensuring the award's enforceability in the jurisdiction where the claimant will seek its enforcement).

28 Karton above n 3, 37.

29 See, eg, Christopher Seppälä, 'Recommended Strategy For Getting The Right International Arbitral Tribunal: A Practitioner's View' (2009) 6(1) *Transnational Dispute Management* 1, 2.

30 Karton above n 3, 234.

Conclusion

The empirical approach of Karton's treatise ensures its multiple utility as an international arbitration academic teaching course text, a guidebook for newcomer practitioners and a comprehensive source for researchers within and outside international arbitration. Although traditionally positivist doctrinal articles and texts are being produced with a much narrower focus on the state of international arbitration legislative machinery in jurisdictions such as Australia,[31] *The Culture of International Arbitration and the Evolution of Contract Law* has a much broader scope in that it provides a robustly independent transnational critical assessment of the state of international commercial arbitration jurisprudence from a practical insider/outsider perspective. The treatise's other utility derives from its aims to achieve a balanced socio-legal reflexive perspective, owing to the private and confidential nature of international commercial arbitration as a field that cannot be studied and discussed without recognition of the way its emerging jurisprudence is substantially affected by the psychological heuristics of international arbitrators.[32]

The Culture of International Arbitration and the Evolution of Contract Law is anticipated to become a leading scholarly work for the field of international commercial arbitration because it manages to deconstruct an extremely complex and elusive topic to make it accessible, discernible and highly engaging for both those who are already within the field, and importantly for those presently outside of it. It is the very culture of international commercial arbitration itself, and the private and confidential nature by which it operates, which make the field highly exclusive and elusive. In uncovering a cultural trend in international arbitrator decision-making by theorising about the evolution of a distinct contract law approach, Karton's treatise offers a key for all newcomers standing on the outside of a locked door to international arbitration, who now wish to enter.

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[31] See, eg, Albert Monichino, Luke Nottage and Diana Hu, 'International Arbitration in Australia: Selected Case Notes and Trends' (2012) 19 *Australian International Law Journal* 181; Richard Garnett and Luke R Nottage, 'What Law (If Any) Applies to International Commercial Arbitration in Australia?' (2012) 35 *University of New South Wales Law Journal* 953; Luke Nottage and Richard Garnett (eds), *International Arbitration in Australia* (Federation Press 2010).

[32] See, eg, research on the role of psychology in international arbitration: Sophie Nappert and Dieter Flader, 'Psychological Factors in the Arbitral Process' in Bishop and Kehoe, above n 10, ch 5; Lucy Akehurst, 'The Relevance of Psychology to International Arbitration: the Assessment of Credibility' (Paper presented at 'The Roles of Psychology in International Arbitration Conference', Brunel Law School, 23 May 2013).