Arbitration in China: A Legal and Cultural Analysis BY KUN **FAN** [Oxford and Portland: Hart Publishing, 2013. li + 313 pp. Hardcover: £65.00]

I am pleased to review this very interesting, well-researched and well-written book on arbitration in China. The author properly delivers on the second part of the title of the book: "A Legal and Cultural Analysis".

The first part of the book (I would say Chapters 1 to 5) is focused on the more properly legal aspects of arbitration in China. What the author does well is to accurately describe what she calls the "transnational standards" in arbitration and then accurately describe the ways in which Chinese practices are different from those transnational standards. She does this very well and very concisely. The first part of her book is therefore an excellent, concise and useful description of Chinese arbitration law in contrast to Western practices.

On those transnational standards, the author occasionally, rightly points out that different Western or developed jurisdictions interpret the standards differently—the transnational standards are often not as standardised as imagined. In my view however, "transnational" may be a bit of a misnomer as the standards are transnational mainly in those jurisdictions, which are very favourable to arbitration—that is, mainly developed countries. When countries as big as China (and Indonesia) do not follow those standards, are they truly transnational? But this is a minor point—nomenclature is not that important—what is important is that China is under pressure from investors

to respect these standards, and an accurate evaluation of their implementation in China is what is important.

For each topic in the first part the author first discusses the transnational standards, explaining what I would call the best practices in international arbitration in the developed world. These standards are often codified in the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS 3 [*New York Convention*] and The United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006* (Vienna: United Nations, 2008), online: United Nations Commission on International Trade Law <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf>, and the author explains their interpretations in these jurisdictions favourable to arbitration. Then, for each topic, the author discusses the law and practice in China and most of the time, she has to show how short from best practices Chinese statutes and their implementation are. There is a lot to be hopeful for—the author does show the evolution of Chinese law and practices toward best practices, but she also very clearly and competently shows the large gaps in many instances between the law and practices most favourable to arbitration and Chinese law and practices.

For example, whereas, according to transnational standards, an arbitration agreement usually only needs to be in writing in order to be valid, Chinese law sets out additional requirements (at pp 38 ff). For example it requires that the arbitration agreement clearly designate an arbitral institution to manage the arbitration, failing which, the arbitration clause is held to be invalid (at pp 40-42). In addition to making ad hoc arbitration impossible, this requirement encourages a strict interpretation of the arbitration clause. Therefore rather than noting that the parties had an intention to arbitrate and then seeking to interpret a defective clause in order to give it an effect, Chinese courts, as soon as there is uncertainty or ambiguity as to which institution has been designated, simply declare the clause to be invalid (at p 38). This is in sharp contrast with transnational standards. Interpretative opinions issued by higher courts have somewhat improved the situation but there is still a large gap between Chinese and standard practices. This is only one example of how the author documents well both the best international practices on the topic as well as the Chinese practices.

Another example is *compétence-compétence* (at pp 54-60). The author summarises very well the position in first-world jurisdictions showing that there are some legitimate differences in how the principle is applied even in developed countries, that there is no clear requirement under the *New York Convention* for a court to limit the examination of the issue of jurisdiction to a *prima facie* exercise until the arbitral tribunal has decided whether it has jurisdiction. She also reminds us that it was not until 1996 that England modified its law to be more consistent with the principle of *compétence-compétence*. This puts the Chinese position in perspective. As we know China does not follow the principle of *compétence-compétence* and leaves the issue to be decided either by the arbitral institution or by the courts, the latter having a prevailing jurisdiction if a party brings the case to the courts.

The most interesting chapter in the first part of the book is the one on enforcement of awards in China (Chapter 4). A lot has been written on the difficulty of enforcing awards in China. No one denies that there are difficulties but we are often left

with, on the one hand, anecdotal evidence of non-enforcement by frustrated foreigners, and on the other hand, what seems to be overly rosy accounts of enforcement drafted by Chinese arbitral institutions and some Chinese writers. The truth must lie somewhere in between, but we are now very thankful to the author for documenting the situation in detail. After looking at different studies and conducting her own research (including field research), the author concludes, "[i]t is neither as hopeless as some foreign investors and reporters are wont to suggest, nor as trouble-free as official and semi-official sources allege" (at pp 92, 93). The author details her findings with statistics from both official and unofficial sources indicating differences in enforcement in large cities compared to smaller cities. She then undertakes some case analysis where she looks at some actual instances where the courts were asked to enforce arbitral awards. The short case summaries she provides would be useful to the reader who does not have access to those cases.

In the second part of the book (Chapter 6 and following) she looks at aspects of arbitration that are more typically Chinese—this is the more cultural part of the book. In Chapter 6 for example she shows the practice of combining arbitration and mediation in China. The author explains the Confucian influence on the practice of mediation as well as its historical development and its practice today by the courts in China. She thus explains why culturally "arb-med" works well in China and is not perceived as problematic.

The last two chapters of the book are particularly focused on culture. Chapter 8 is entitled "Traditional Legal Culture and Its Influence on Contemporary Arbitration Practice". It provides the reader unfamiliar with Chinese culture and history a very good short overview of the influence of the Confucian and Legalist traditions on Chinese social ordering and law. It also explains the influence of these traditions on litigation and arbitration.

Chapter 9 is entitled "The Modernisation of Law and Cultural Influences on Arbitration Practice". It discusses the development of the Chinese legal system and of arbitration since 1840, a period marked by many western influences (including Soviet influences).

Although the last two chapters are useful and important, I personally wonder whether they should not have been placed chronologically at the beginning of the book before the analysis of the most recent developments relating to arbitration in China, as a way of explaining them.

The book as a whole provides many insights into the law and culture of arbitration in China. What is particularly impressive is the detailed knowledge the author has not only of the law in China but also of the practices of arbitral tribunals, arbitral institutions and the courts. It is not always easy to document court decisions as well as the practices of arbitral institutions, and it can be particularly difficult in a developing country where such information is sometimes not easily accessible. To have done such a good job in such a large country with so many different arbitral institutions and courts is extremely impressive. Anyone interested in arbitration in China will have to read this book.

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