

**“GLOCALIZATION” OF INTERNATIONAL ARBITRATION—  
RETHINKING TRADITION: MODERNITY AND EAST-WEST BINARIES  
THROUGH EXAMPLES OF CHINA AND JAPAN**

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*In the main streams of comparative law, general legal theory and the study of globalization, there is a general lack of consideration of non-Western legal experience. Such general omission is deeply rooted in the static binaries such as “tradition-modernity” and “East-West,” which make up ‘legal Orientalist’ discourses. This article fills the gap by studying the case China and Japan and analyzing the role of their tradition on the contemporary development of international arbitration. Through the specific example of international commercial arbitration, it illustrates that even in specialism where “national identity” seems relatively weak, and thus the effects of globalization is particularly strong, local culture remains to play a significant role.*

*Rejecting the cultural homogenization thesis, this article puts forward the theory of “glocalization of arbitration,” which describes the entanglement process between “global standards” and “local norms” in international arbitration. The concept of glocalization is used to analyze the ways in which social actors construct meanings, identities, and institutional forms within the sociological context of*

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*globalization conceived in multidimensional terms. On the one hand, global norms are localized with adaptations to accord more closely with local cultures—“localized globalism;” on the other hand, through interactions with different cultures, local practices may produce shared norms and expectations, which will in turn shape behaviors and eventually form a common culture—“globalized localism.” It challenges the conventional world view of tradition-modernity, West and non-West, and proposes a different way to look at modernity or in fact a “postmodern” framework, which can be characterized as an age of “glocalization.”*

*After the Introduction, Part II maps the conceptual framework of culture and defines the two notions of legal culture. Part III takes a microscopic approach to illustrate localized globalism by looking at the local cultures in China and Japan and analyzing the cultural influence on their respective contemporary arbitration regimes. Part IV attempts to foresee whether the cross-national interactions in the arbitration community will lead to a convergence of the participants’ own national legal cultures and eventually lead to the emergence of a common international arbitration culture crossing national and geographical boundaries—the “diffusion of cultures” and “globalized localism.” Part V concludes with a few observations on the limits of this study and possible areas for future research.*

“It bids us remember benefits rather than injuries, and benefits received rather than benefits conferred; to be patient when we are wronged; to settle a dispute by negotiation and not by force; to prefer arbitration to litigation — for an arbitrator goes by the equity of a case, a judge by the strict law, and arbitration was invented with the express purpose of securing full power for equity.”

**Aristotle, Rhetoric<sup>1</sup>**

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<sup>1</sup> ARISTOTLE, *Rhetoric* bk. I:13 (W. Rhys Roberts trans., Dover Publications 2004) (c. 350 B.C.E.).

“Lead them by political maneuvers, restrain them with punishments: the people will become cunning and shameless. Lead them by virtue, restrain them with ritual: they will develop a sense of shame and a sense of participation.”

## The Analects of Confucius<sup>2</sup>

### I. Introduction

We live in the world of globalization,<sup>3</sup> which allows us to cross space and time, to be informed of what happens around the world within seconds, to engage with people in other parts of the world as if they were just next door, and to travel regularly for business or leisure at an affordable cost. The old geographical boundaries that distinguish sharply between “local,” “national,” “regional,” and “global” no longer work in a complex, networked world where these boundaries overlap and interpenetrate each other. At the same time, norms, principles, standards, laws, and legal institutions are circulated among national systems and spread from the national to the global level, and vice versa. This process is often described as “globalization of law” or “legal globalization.”<sup>4</sup> Against

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<sup>2</sup> CONFUCIUS, *The Analects of Confucius* 6 (Simon Leys trans., W.W. Norton & Company 1997) (c. 500 B.C.E.).

<sup>3</sup> Scholars hold divergent views as to the definition of globalization, as well as its scale, causation, chronology, impact, etc. Some core qualities of globalization can be identified, such as the creation of new social networks and activities and the multiplication of existing ones; the expansion and the stretching of social relations, activities and interdependencies; the intensification and acceleration of social exchanges and activities; and change of the subjective plane of human consciousness. For a discussion, see DAVID HELD & ANTHONY MCGREW, *GLOBALIZATION/ANTI-GLOBALIZATION* (2d ed. 2007); DAVID HELD & ANTHONY MCGREW, *GLOBALIZATION THEORY* (2007); JAMES H. MITTELMAN, *THE GLOBALIZATION SYNDROME* (2000); SASKIA SASSEN, *A SOCIOLOGY OF GLOBALIZATION* (2007); *THE INTERNATIONALIZATION OF THE PRACTICE OF LAW* (Jens Drolshammer & Michael Pfeifer eds., Kluwer Law International 2001); *THEORISING THE GLOBAL LEGAL ORDER* (Andrew Halpin & Volker Roeben eds., 2009); Alexandra Crampton, *Addressing Questions of Culture and Power in the Globalization of ADR*, 27 *HAMLIN J. PUB. L. & POL'Y* 229 (2006).

<sup>4</sup> See, e.g., DAVID HELD & ANTHONY MCGREW, *GLOBALIZATION/ANTI-GLOBALIZATION* (2d ed. 2007); DAVID HELD & ANTHONY MCGREW, *GLOBALIZATION THEORY* (2007); WOLF HEYDEBRAND, *From Globalisation of*

the background of social change in globalization, law loses its autonomy becoming “porous” and open-ended.<sup>5</sup>

To be sure, within the legal sphere, different specialties will be affected by globalization in different ways, depending on whether they are already transnational in character and whether they deal with specifically global issues.<sup>6</sup> In other words, the key issue is “the cultural embeddedness of the area of law”<sup>7</sup> or what I will call “the degree of national identity.” In certain areas of law, where national identity or cultural embeddedness is particularly strong, legal transplantation from one country to another may be extremely difficult. Accordingly, the effects of globalization may be less obvious. For instance, family law touches on deep questions of religion and culture, so family law transfers are less likely to take place. In other areas of law of a transnational nature or which deal with overtly global issues, legal transplantation may be readily available and a worldwide convergence of the law and practice may be already emerging. Commercial law is one such area of law. Businessmen respond to relatively universal profit incentives embedded in markets, and commercial transactions do not touch on the core issues of personal behavior.<sup>8</sup> Therefore, commercial law is generally more amenable to transfer across borders than family law. Similarly, the common interests of merchants have driven the

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*Law to Law under Globalisation*, in ADAPTING LEGAL CULTURES (David Nelken & Johannes Feest, eds., 2001); THE INTERNATIONALIZATION OF THE PRACTICE OF LAW (Jens Drolshammer & Michael Pfeifer eds., Kluwer Law Int'l 2001); MARC GALANTER, *The Modernization of Law*, in MODERNIZATION: THE DYNAMICS OF GROWTH 153 (Myron Weiner ed., 1966); JOHN GILLESPIE, *Developing a Framework for Understanding the Localisation of Global Scripts in East Asia*, in THEORISING THE GLOBAL LEGAL ORDER 209 (Andrew Halpin & Wolker Roeben eds., 2009); PATRICK GLENN, *Cosmopolitan Legal Orders*, in THEORISING THE GLOBAL LEGAL ORDER 25 (Andrew Halpin & Wolker Roeben eds., 2009); WILLIAM TWINING, *Implications of 'Globalisation' for Law as a Discipline*, in THEORISING THE GLOBAL LEGAL ORDER 39 (Andrew Halpin & Wolker Roeben eds., 2009); WILLIAM TWINING, *GLOBALISATION AND LEGAL THEORY* (2000).

<sup>5</sup> WILLIAM E. SCHEUERMAN, *Globalisation and the Fate of Law*, in RECRAFTING THE RULE OF LAW 243 (David Dyzenhaus ed., 1999);

<sup>6</sup> TWINING, *Implications of 'Globalisation' for Law as a Discipline*, *supra* note 4, at 39.

<sup>7</sup> TOM GINSBURG, *Lawrence M. Friedman's Comparative Law*, in LAW, SOCIETY, AND HISTORY: ESSAYS ON THEMES IN THE LEGAL SOCIOLOGY AND LEGAL HISTORY OF LAWRENCE M. FRIEDMAN (Robert W. Gordon ed., 2010).

<sup>8</sup> *See Id.* (Using banking law as an example).

convergence of the national arbitration system and the substantial harmonization of the law and practice in international arbitration.

In line with globalization of law, there is a strong movement towards the harmonization of the law and practice of international commercial arbitration worldwide. The United Nations, in particular its Commission on International Trade Law (UNCITRAL), has made an essential contribution to the process of legal harmonization.<sup>9</sup> The instruments for the international unification of domestic laws include the following:

- **International conventions:** the New York Convention,<sup>10</sup> adopted in 1958 and now recognized by 149 States and non-state territories.<sup>11</sup> The New York Convention is “the most successful multilateral instrument in the field of international trade law.”<sup>12</sup> Nations signing the Convention must take two fundamental promises: first, to honor an agreement in writing under which the parties agree to privately arbitrate disputes, concerning a subject matter capable of settlement by arbitration;<sup>13</sup> and second, to recognize and enforce awards made in arbitrations that are within the scope of the Convention, unless the award is tainted by one of the exhaustive grounds listed in Article V of the Convention.<sup>14</sup> It is these promises that provide an “additional measure of commercial security for parties entering into cross-border transactions.”<sup>15</sup>

- **Model laws:** the UNCITRAL Model Law on International Commercial Arbitration of 1985 with Amendments as

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<sup>9</sup> See GEROLD HERRMANN, *UNCITRAL's Basic Contribution to the International Arbitration Culture*, in ICCA CONGRESS SERIES NO. 8 49-52 (Albert Jan van den Berg ed., Kluwer Law Int'l 1996).

<sup>10</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, 330 U.N.T.S. 38 (1958) [hereinafter New York Convention], [http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII\\_1\\_e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf).

<sup>11</sup> For a complete list of signatures of the New York Convention, see *New York Convention Status*, UNCITRAL, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (last visited Feb. 10, 2016).

<sup>12</sup> PIETER SANDERS, *Foreword by Pieter Sanders as Honorary General Editor*, in ICCA'S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION: A HANDBOOK FOR JUDGES (Int'l Counc. for Com. Arb. 2011) [hereinafter ICCA Guide].

<sup>13</sup> New York Convention, *supra* note 10, art. 2.

<sup>14</sup> New York Convention, *supra* note 10, art. 5.

<sup>15</sup> SANDERS, *supra* note 12, at xi.

Adopted in 2006 (Model Law).<sup>16</sup> Although the Model Law does not take the form of a treaty, legislators who have decided to review their arbitration legislation have all “given due consideration” to the Model Law, as recommended by the United Nations General Assembly.<sup>17</sup> It “forms the basis for States without an arbitration law to adopt one ready-made or to substitute it for one that is out of date.”<sup>18</sup> Other jurisdictions “have enacted new legislation, which ... is based essentially upon the Model Law.”<sup>19</sup> There are now sixty-eight States and non-state territories that have adopted or adapted the Model Law.<sup>20</sup>

- **Contractual technique:** one common example is where a standard dispute resolution clause referring to the use of internationally recognized rules for the conduct of dispute resolution proceedings could be included in a contract. The UNCITRAL Arbitration Rules (as amended in 2010)<sup>21</sup> is an example of such internationally recognized uniform rules.

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<sup>16</sup> The Model Law was adopted by the UNCITRAL on June 21, 1985, at the end of the 18th Session of the Commission. It was amended by UNCITRAL on July 7, 2006, at the 39th Session of the Commission. UNCITRAL MODEL LAW ON INTERNATIONAL COM. ARB., U.N. Sales No. E.08.V.4 (U.N. COMMISSION ON INT’L TRADE L. 2006) [hereinafter UNCITRAL Model Law].

<sup>17</sup> The General Assembly, in its resolution 40/72 of December 11, 1985, recommended “that all States *give due consideration* (emphasis added) to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice.” Subsequently, the General Assembly, in its resolution 61/33 of December 4, 2006, recommended “that all States give favorable consideration to the enactment of the revised arts of the UNCITRAL Model Law on International Commercial Arbitration, or the revised UNCITRAL Model Law on International Commercial Arbitration, when they enact or revise their laws ...” See EMMANUEL GAILLARD & JOHN SAVAGE, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 109 (John Savage & Emmanuel Gaillard eds., Kluwer L. Int’l 1999).

<sup>18</sup> ICCA Guide, *supra* note 12, at xi.

<sup>19</sup> *Id.*

<sup>20</sup> For a list of jurisdictions whose legislation is based on the Model Law, see *Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006*, UNCITRAL, [www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html) (last visited Feb. 26, 2016).

<sup>21</sup> Effective on 15 August 2010, see UNCITRAL ARBITRATION RULES (AS REVISED IN 2010) (U.N. COMMISSION ON INT’L TRADE L.), <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> (last visited Feb. 10, 2016).

The above instruments have been the major forces pushing towards the unification of arbitration law and arbitration rules. As a result, international consensus has been reached with respect to a number of procedural issues. There are many examples of points of convergence, as argued by Kaufmann-Kohler, such as separability of the arbitration agreement,<sup>22</sup> the principle of competence-competence,<sup>23</sup> limited remedies against the award, and party autonomy.<sup>24</sup> In this context, modern arbitration is developing towards an ever-increasing global harmonization.<sup>25</sup> This trend has been referred to as the development of “transnational arbitration,”<sup>26</sup> or sometimes labeled as an “arbitral legal order.”<sup>27</sup>

### *Americanization of International Commercial Arbitration?*

Many scholars believe that Western influence, and in particular American influence, remains dominant in the development of international arbitration. This phenomenon is often described as “Americanization of international commercial arbitration.”<sup>28</sup> In

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<sup>22</sup>The principle that the validity of the arbitration agreement is independent from the validity of the main contract. This is also referred to as “severability” or “autonomy” of the arbitration agreement. See GAILLARD & SAVAGE, *supra* note 17, at 198-217; MARTIN HUNTER et al., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 117-21 (2009); PIERRE MAYER, *The Limits of Severability of the Arbitration Clause*, in ICCA Congress Series no. 9 261-67 (ALBERT JAN VEN DEN BERG ed., 1999).

<sup>23</sup> The principle that an arbitral tribunal has the power to rule on its own jurisdiction. This principle enables the arbitral tribunal to continue with the proceedings even where the existence or validity of the arbitration agreement is challenged. See SAVAGE & GAILLARD, *supra* note 17, at 73.

<sup>24</sup> Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedures*, 36 VAND. J. TRANSNAT’L L. 1313 (2003).

<sup>25</sup> For discussions about the points of convergence, see *Id.*

<sup>26</sup> See generally, KAUFMANN-KOHLER, *supra* note 24, at 1313-1333; Marc Blessinglessing, *Globalization (and Harmonization?) of Arbitration*, 9 J. INT’L ARB. 79 (1992); Fali Nariman, *East Meets West: Tradition, Globalization and the Future of Arbitration*, 20 ARB. INT’L 123 (2004).

<sup>27</sup> For a discussion on the evolution and usage of the expression “arbitral legal order”, see EMMANUEL GAILLARD, ASPECTS PHILOSOPHIQUES DU DROIT DE L’ARBITRAGE INTERNATIONAL 60-66 (2008).

<sup>28</sup> See, e.g., WILLIAM PARK, AMERICANIZATION OF INTERNATIONAL ARBITRATION AND VICE VERSA ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES: STUDIES IN LAW AND PRACTICE (2006); Roger Alford, *The American Influence on International Arbitration*, 19 OHIO. ST. J. ON DISP. RESOL. 69 (2003); Eric Bergsten, *The Americanization of International Arbitration*, 18 PACE. INT’L. L.

*Dealing in Virtue*, the authors describe the increasing influence of “Anglo-American law firms” in international arbitration and the “offensive brought by the American lobby . . . , to rationalize the practice of arbitration such that it could become offshore-U.S.-style-litigation.”<sup>29</sup> The rise of the “American law firm model” is leading to “a more aggressive and confrontational style of litigation, displacing the earlier Continental model of the pipe-smoking professor/arbitrator with his ‘oracle of the law’ mode of producing courtroom legitimacy.”<sup>30</sup> As Karamanian explains, “‘Americanization’ suggests international arbitration is akin to dispute resolution in the United States. For some non-Americans, the observation has normative consequences; it means unbridled and ungentlemanly conduct or a strategy of ‘total warfare.’”<sup>31</sup>

The claims of Americanization of international arbitration are in line with the general assumption of the Westernization of law. In the context of legal globalization, Watson proposes that fixed preferences about global scripts compete in a “marketplace” of ideas. From an economic perspective of this competition, he estimates that global scripts generally prevail over local opposition because they are promoted and resourced by legal elites. Watson sees few points of interaction between the global and local, making legal globalization relatively easy. Watson uses his many examples of legal transplants to show the ease and inevitability of legal transfers.<sup>32</sup> Following this

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REV. 289 (2006); Elena Helmer, *International Commercial Arbitration: Americanized, “Civilized,” or Harmonized?*, 19 OHIO ST. J. ON DISP. RESOL. 35 (2003-2004); Susan Karamanian, *Overstating the “Americanization” of International Arbitration: Lessons from ICSID*, 19 OHIO ST. J. ON DISP. RESOL. 5 (2003-2004); PEDRO MARTINEZ-FRAGA, *THE AMERICAN INFLUENCE ON INTERNATIONAL COMMERCIAL ARBITRATION: DOCTRINAL DEVELOPMENTS AND DISCOVERY METHODS* (2009); George von Mehren & Alana Jochum, *Is International Arbitration Becoming Too American?*, 2 GLOB. BUS. L. REV. 47 (2011); Lucy Reed & Jonathan Sutcliffe, *The ‘Americanization’ of International Arbitration?*, 16 MEALEY’S INT’L. ARB. REP. 36 (2001); Nicholas Ulmer, *A Comment on “The ‘Americanization’ of International Arbitration?”*, 16 MEALEY’S INT’L. ARB. REP. 24.

<sup>29</sup> YVES DEZALAY & BRYANT GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 51-57 (1996).

<sup>30</sup> AMR A. SHALAKANY, *Arbitration and the Third World. A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT’L L. J., 419, 435 (2000).

<sup>31</sup> Karamanian, *supra* note 28, at 5, 6.

<sup>32</sup> Alan Watson, *Comparative Law and Legal Change*, 37 CAMBRIDGE L.J., 313 (1978).



line of arguments, globalization has become a “Western discursive orthodoxy,”<sup>33</sup> which equals globalization as global Westernization. It is often assumed that as a result of the competition in the marketplace of ideas, Western traditions, ideas, and modern laws will dominate in the process of globalization. They see globalization as a marvelous contribution of Western civilization to the world.

However, the impact of the Western modern law was critically questioned by some recent historical and anthropological studies.<sup>34</sup> This article challenges the general assumption of Westernization of law and the claims of the Americanization of international arbitration in particular. Through the specific example of international commercial arbitration, it illustrates that even in specialism where national identity seems relatively weak, and thus the effects of globalization is particularly strong, local culture remains to play a significant role.

Furthermore, in the main streams of comparative law, legal theory, and the study of globalization, there is a generally little consideration of non-Western legal experience, even though some excellent and highly relevant work on the East Asia region has been done.<sup>35</sup> Such general omission is deeply rooted in static binaries such as “tradition-modernity” and “East-West,” which make up “Legal Orientalist”<sup>36</sup> discourses. As Ruskola points out, “Orientalism refers

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<sup>33</sup> Erik Swyngedouw, *Globalisation or 'glocalisation'? Networks, territories and rescaling*, 17 CAMBRIDGE REV. OF INT'L AFF., 6 (2004).

<sup>34</sup> See, e.g., STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER 5-9 (2007) (examining the acquisition of Indian property through contracts, treaties, and other means); NICHOLAS BLOMLEY, *Law, Property, and the Geography of Violence: The Frontier, the Survey, and the Gribid.*, 93 ANNALS OF THE ASS'N OF AM. GEOG. 121 (2003) (arguing “that violence plays an integral role in the legitimation, foundation, and operation of a regime of private property.”); TEEMU RUSKOLA, LEGAL ORIENTALISM: CHINA, THE UNITED STATES, AND MODERN LAW (2013); ADAM SELIGMAN & ROBERT WELLER, RETHINKING PLURALISM: RITUAL, EXPERIENCE, AND AMBIGUITY 10 (2012) (suggesting boundaries should not be absolutized, but acknowledged in a sense of genuine pluralism); ROBERT WELLER, ADAM SELIGMAN, MICHAEL PUETT & BENNETT SIMON, RITUAL AND ITS CONSEQUENCES: AN ESSAY ON THE LIMITS OF SINCERITY 11 (2008) (criticizing “the particularisms of Western Europe and of the United States”).

<sup>35</sup> See ANDREW HARDING, *Comparative Law and Legal Transplantation in South East Asia: Making Sense of the 'Nomic Din'*, in ADAPTING LEGAL CULTURES 199 (DAVID NELKEN & JOHANNES FEEST eds., 2001).

<sup>36</sup> RUSKOLA, *supra* note 34.

to the way Europe has historically defined itself against ‘Oriental Others’. Legal Orientalism, in turn, refers to the way the West defines what is and is not law in terms of the system used by the ‘Oriental Others’ who are perceived not to have law.”<sup>37</sup> According to this view, the East is often framed as lawless by virtue of its differences from the West. Such perception is based upon a misunderstanding of world history, which draws essentially on European history, a misunderstanding of earlier societies, and a misunderstanding of our current situation.<sup>38</sup>

Globalization has stimulated a revival of old debates between universalism and cultural relativism. As Twining points out, “how can one seriously claim to be a universalist, if one is ethnocentrically unaware of the ideas and values of other belief systems and traditions?”<sup>39</sup> Dipping a Western spoon into the river of Oriental history can only give us some one-sided pieces. This article attempts to understand the legal traditions in China and Japan by taking into consideration elements of both cultures such as the value placed on harmony and specific features of interpersonal relationships. Based on this understanding, this article will then analyze the influence of tradition on the contemporary development of international arbitration. The examples of China and Japan may shed light on the interactions between globalization of law and divergence of local cultures. This article challenges the conventional world view of tradition-modernity, West and non-West, and proposes a different way to look at modernity: a ‘postmodern’ framework that can be characterized as an age of ‘glocalization.’

### **Glocalization**

Rejecting the cultural homogenization thesis, this article puts forward the theory of “glocalization of arbitration,” which describes the entanglement process between “global standards” and “local norms” in international arbitration. The term “glocalization” appeared for the very first time in the nineties in a sociological review carried out by Japanese scholars who used the Japanese word

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<sup>37</sup> *Id.* at 40.

<sup>38</sup> For critiques of the static binaries of “tradition-modern” and “West-NonWest”, see HARDING, *supra* note 35, at 199; RUSKOLA, *supra* note 34; SELLER & WELLER, *supra* note 34.

<sup>39</sup> TWINING, *Implications of 'Globalisation' for Law as a Discipline*, *supra* note 4, at 39.

*dochakuka*. The Japanese business community often used the term to refer to marketing issues, as in the popular slogan “think globally, act locally.”<sup>40</sup> It was later brought to the attention of the sociological community by Roland Robertson, who defined it as “the simultaneity—the co-presence—of both universalizing and particularizing tendencies” and “the tempering effects of local conditions on global pressures.”<sup>41</sup> Arguing that cultural globalization always takes place in local contexts, Robertson speaks of “glocalization” to capture the essence of the complex interaction of the global and local characterized by cultural borrowing.<sup>42</sup>

The glocalization theory can address some of the perceived problems of globalization. Critics have argued that globalization has caused conflicts between an emerging worldwide system of values and regional autonomy, resulting in the destruction of local cultures.<sup>43</sup> The glocalization theory proposes to mediate the conflicts between the global and the local, and contends that “rather than being totally obliterated by the Western consumerist forces of sameness, local difference and particularity still play an important role in creating unique cultural constellations.”<sup>44</sup>

The forces of globalization and those of localization are “two sizes of the same process in which the global is brought in conjunction with the local, and the local is modified to accommodate the global.”<sup>45</sup> This article argues that the development of arbitration is a hybrid blended and creolized process of glocalization. On the one hand, global processes are incorporated into the local setting—“localized globalism” or “micro-globalization.” On the other hand,

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<sup>40</sup> B. KUMARAVADIVELU, CULTURAL GLOBALIZATION AND LANGUAGE EDUCATION 45 (2007).

<sup>41</sup> ROLAND ROBERTSON, *Glocalization: Time-space and Homogeneity-Heterogeneity*, in Global Modernities (MICHAEL FEATHERSTONE ET AL eds., 1995); ROLAND ROBERTSON, GLOBALIZATION: SOCIAL THEORY AND GLOBAL CULTURE (1992).

<sup>42</sup> ROLAND ROBERTSON, *Glocalization: Time-space and Homogeneity-Heterogeneity*, in Global Modernities (MICHAEL FEATHERSTONE ET AL eds., 1995); ROLAND ROBERTSON, GLOBALIZATION: SOCIAL THEORY AND GLOBAL CULTURE (1992). For further discussion on the theory of glocalization, see also SWYNGEDOUW, *supra* note 33, at 45-48.

<sup>43</sup> CHARLES LERCHE, *THE CONFLICTS OF GLOBALIZATION* 3(1) IJPS (1998).

<sup>44</sup> MANFRED STAGER, GLOBALIZATION: A VERY SHORT INTRODUCTION 75-76 (2009).

<sup>45</sup> KUMARAVADIVELU, *supra* note 40, at 45.

local ideals, practices, and institutions are also projected onto global scenes—“globalized localism” or “macro-localization.”<sup>46</sup> Rejecting the hegemony of the globalization thesis, this article argues that the alleged process of Westernization should be re-cast as a process of “glocalization.”

Part II maps the conceptual framework of culture and defines the two notions of legal culture. Part III takes a microscopic approach to illustrate localized globalism by looking at the local cultures in China and Japan, and analyzes the cultural influence on their respective contemporary arbitration regimes. Part IV attempts to foresee whether the cross-national interactions in the arbitration community will lead to a convergence of the participants’ own national legal cultures, and eventually lead to the emergence of a common international arbitration culture that crosses national and geographical boundaries—the “diffusion of cultures” and “globalized localism.” Part V concludes with a few observations on the limits of this study and possible areas for future research.

## II. Mapping the Conceptual Framework Of Culture

Even though procedural rules are becoming more standardized and less country-specific, expectations of process differ based on the cultural background of the parties or arbitrators. To use an analogy, the two impressionists Camille Pissarro and Paul Cézanne often painted and drew side-by-side, yet each was keen to demonstrate his own personality. From their paintings on the same subject, we can clearly observe two paths, and two very different ways of thinking about painting.<sup>47</sup> This is comparable with arbitrators. When exercising the broad procedural powers, two different arbitrators, influenced by their own cultural background, may paint

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<sup>46</sup> See BOAVENTURA DE SOUSA SANTOS, TOWARDS A NEW COMMON SENSE: LAW, SCIENCES AND POLITICS IN THE PARADIGMATIC TRANSITION 65 (1995).

<sup>47</sup> *A Series of Colored Patches*, Museum of Modern Art, [http://www.moma.org/explore/conservation/cezannepissarro/colored\\_patches.htm](http://www.moma.org/explore/conservation/cezannepissarro/colored_patches.htm) 1 (last visited Feb. 26, 2016). New York’s Museum of Modern Art held an exhibition of two such works by Cézanne and Pissarro from June 26, 2005 to September 12, 2005 titled “Pioneering Modern Painting: Cézanne and Pissarro 1865–1885.” This exhibition offered an unprecedented opportunity to examine the parallel creative paths of these two artists, both through their common choices of subject matter and through their intense engagement in exploring new pictorial processes.

the arbitration proceedings differently, similar to Pissarro and Cézanne.

For instance, American arbitrators generally do not have the same approach to discovery as French arbitrators, and Italian arbitrators who have extensive arbitration experience are likely to adopt a different approach to the proceedings than Italian arbitrators who are mainly trained as a municipal court judges. The parties and their lawyers, similarly, always expect what they are familiar with to be the norm. For instance, Anglo-American parties and their lawyers will most likely expect a highly adversarial approach, whereas Asian parties and their lawyers will expect an inquisitorial and conciliatory approach. Kaplan thinks the cultural attributes of counsel are often more crucial than that of the client and notes that “one could take the same dispute and have it tried with two different sets of lawyers and end up with two completely different arbitrations with perhaps two differing results.”<sup>48</sup> This influence of the cultural attributes of arbitrators, counsels or lawyers is often implicit and sometimes unconscious. However, one cannot overlook culture and its role in shaping institutional design and its influence on the process and even on the outcome of the arbitration.

What is culture anyway? Culture has many different meanings. For anthropologists and other behavioral scientists, culture is the full range of learned human behavior patterns. The term was first used in this way by the pioneering English Anthropologist Edward B. Tylor, who wrote: “Culture or Civilization, taken in its wide ethnographic sense, is that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man (sic) as a member of society”.<sup>49</sup> In the 20th century, “culture” emerged as a central concept in anthropology, encompassing the range of human phenomena that cannot be directly attributed to genetic inheritance. In sociology, culture is considered as the ways of thinking, ways of acting, and material objects that together shape a people's way of life. For instance, the German sociologist Georg Simmel defines culture as “the cultivation of

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<sup>48</sup> Neil Kaplan, *Arbitration in Asia--Developments and Crises (Part 2)*, 19 J. Int'l Arb.3 (2002), at 255.

<sup>49</sup> EDWARD TYLOR, *THE SCIENCE OF CULTURE, PRIMITIVE CULTURE: RESEARCHES INTO THE DEVELOPMENT OF MYTHOLOGY, PHILOSOPHY, RELIGION, ART, AND CUSTOM*, at 1 (LONDON, CAMBRIDGE LIBRARY COLLECTION, 1871).

individuals through the agency of external forms which have been objectified in the course of history.”<sup>50</sup>

Williams claimed that “culture is one of the two or three most complicated words in the English language.”<sup>51</sup> This paper does not intend to trace out the full range of the different meanings of culture used in the academic discourse. We can, however, attempt to conceptualize the term from the following fundamental aspects:

A. *The Concept of Culture in Two Fundamental Aspects*

In one meaning, culture is “a theoretically defined category or aspect of social life that must be abstracted out from the complex reality of human existence.”<sup>52</sup> In this usage, culture is contrasted with some other equally abstract category of social life, such as economics, politics, or history. Culture in this sense, as an abstract theoretical category, only takes a singular meaning.<sup>53</sup>

In its other meaning, culture refers to “a concrete and bounded world of beliefs and practices. Culture in this sense is commonly assumed to belong to or to be isomorphic with a ‘society’ or with some clearly identifiable subsocietal group.”<sup>54</sup> In this sense, the contrast is not between culture and other non-cultural categories of social life, but between one culture and another—between Chinese, American, and French cultures.<sup>55</sup>

Culture as a theoretical category is conceptualized in numerous ways. The dominant concept in American anthropology since the 1960s considers culture as a system of symbols and meanings.<sup>56</sup> This conceptualization is to “disentangle the semiotic influences on action from the other sorts of influences—demographic, geographical, biological, technological, economic, and so on . . . .”<sup>57</sup>

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<sup>50</sup> GEORG SIMMEL, ON INDIVIDUALITY AND SOCIAL FORMS xix (1971).

<sup>51</sup> RAYMOND WILLIAMS, KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY 87 (1983).

<sup>52</sup> WILLIAM SEWELL, LOGICS OF HISTORY: SOCIAL THEORY AND SOCIAL TRANSFORMATION 156 (2005).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *See, e.g.*, CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 85-125, 193-233 (1973) (describing the term “cultural system”); DAVID SCHNEIDER, AMERICAN KINSHIP: A CULTURAL ACCOUNT (1968).

<sup>57</sup> SEWELL, *supra* note 52, at 160.

Over the last two decades, there has been a return to the concept of culture as practice,<sup>58</sup> suggesting Bourdieu’s key term “practice”<sup>59</sup> as an appropriate label by which to understand culture. Scholars in this camp insist that culture is a space of practical activity, subject to struggle, contradiction and constant change. I tend to think that the two schools of thought are not necessarily at odds with each other. Indeed, system and practice are not contradictory but complementary concepts. As Sewell suggested, “to engage in cultural practice means to utilize existing cultural symbols to accomplish some end. . . . Hence practice implies system. But it is equally true that the system has no existence apart from the succession of practice that instantiate, reproduce, or—most interestingly—transform it. Hence system implies practice.”<sup>60</sup>

### B. *The Two Notions of Legal Culture*

Friedman is credited with introducing the concept in the legal context to make explicit “the unofficial, and what otherwise would have been thought of as non-legal, behaviors as nonetheless important for shaping what is more conventionally understood as legal.”<sup>61</sup> He identified three central components of the legal system: (a) the social and legal forces that, in some way, press and make “the law”; (b) “the law” itself—structures and rules; and (c) the impact of law on behavior in the outside world.<sup>62</sup> According to Friedman, “where ‘the law’ comes from and what it accomplishes—the first and third terms—are essential to the social study of law.”<sup>63</sup>

Friedman should be credited to introduce the concept of “legal culture.” He defined legal culture as “those parts of general culture –

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<sup>58</sup> See e.g., JAMES CLIFFORD & GEORGE MARCUS, *WRITING CULTURE: THE POETICS AND POLITICS OF ETHNOGRAPHY* (1986); Sherry Ortner, *Theory in Anthropology since the Sixties*, 26 *COMPARATIVE STUDIES IN SOCIETY AND HISTORY* 126 (1984).

<sup>59</sup> PIERRE BOURDIEU, *ESQUISSE D'UNE THÉORIE DE LA PRATIQUE* [Outline of a Theory of Practice] (1972).

<sup>60</sup> SEWELL, *supra* note 52, at 164.

<sup>61</sup> Susan Silbey, *Legal Culture and Cultures of Legality*, in *HANDBOOK OF CULTURAL SOCIOLOGY* 471 (John Hall et al. eds., 2010).

<sup>62</sup> LAWRENCE FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* 2 (New York, Russell Sage Foundation, 1975).

<sup>63</sup> *Id.*, 15.

customs, opinions, ways of doing and thinking – that bend social forces toward or away from the law and in particular ways.”<sup>64</sup> To advance a social scientific study of “law in action,” Friedman used the concept of legal culture as a means of emphasizing the fact that law was best understood as a product of social forces, and itself a conduit of those same forces.<sup>65</sup> Since the introduction of the concept, debates have arisen among scholars. Cotterrell is one of the most sustained critiques of the concept. He questioned the role of using the concept of legal culture in explanatory inquiry, and warned us against assuming that the various units of legal culture make up a unity.<sup>66</sup> He insisted that “[e]verything about law’s institutions and conceptual character needs to be understood in relation to the social conditions which have given rise to it. In this sense law is indeed an expression of culture.”<sup>67</sup>

These debates point to the complexities of legal culture and the controversies plaguing the concept of culture generally. Despite the fact that culture is a “vague and fuzzy concept,”<sup>68</sup> and is often “not the sole or even necessarily the prime determinant of behavior,”<sup>69</sup> many scholars find the concept useful as a means of understanding aspects of legal action that are “not confined to official legal texts, roles, performances or offices.”<sup>70</sup> Culture is considered “a powerful, inescapable force shaping all aspects of human conduct, including adjudication.”<sup>71</sup> For the purpose of analysis in this article,

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<sup>64</sup> *Id.*, 15.

<sup>65</sup> *Id.*, 16..

<sup>66</sup> Roger Cotterrell, *The Concept of Legal Culture*, in *COMPARING LEGAL CULTURES* (David Nelken ed., 1997); *see also*, ROGER COTTERRELL, *LAW, CULTURE AND SOCIETY: LEGAL IDEAS IN THE MIRROR OF SOCIAL THEORY* 82 (2006) (reflecting on problems in using culture as an explanatory concept in theoretical analyses of law); Roger Cotterrell, *Culture, Comparison, Community, Culture*, 2 *Int'l Journal of Law in Context* 1 (2006) (arguing that legal studies today must have a comparative dimension, and that they should contribute to an understanding of law in relation to culture, or as a cultural phenomenon).

<sup>67</sup> ROGER COTTERRELL, *The Sociology of Law: An Introduction* 26 (2nd ed. 1992).

<sup>68</sup> GLEN FISHER, *INTERNATIONAL NEGOTIATION: A CROSS-CULTURAL PERSPECTIVE* 7 (1982).

<sup>69</sup> Joshua Karton, *International Arbitration Culture and Global Governance*, in *INTERNATIONAL ARBITRATION AND GLOBAL GOVERNANCE: CONTENTING THEORIES AND EVIDENCE* 84 (Walter Mattli & Thomas Dietz eds., 2014).

<sup>70</sup> Silbey, *supra* note 61, at 471.

<sup>71</sup> Karton, *supra* note 69, at 11.



I will adopt the two notions of legal culture proposed by Tom Ginsburg.<sup>72</sup>

The first notion of legal culture relates to those aspects of national or regional culture that “find expression in the legal system.”<sup>73</sup> It “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.”<sup>74</sup> In this sense, we often relate legal culture to geographical or ethnical boundaries (e.g., “Chinese legal culture” or “American legal culture”),<sup>75</sup> to express the values held in society with regard to the legal system.

The second notion of legal culture consists of “shared norms and expectations *produced* by legal actors.”<sup>76</sup> Legal culture in this sense is produced by “actors engaged in repeated interaction over time,”<sup>77</sup> which often cross spatial boundaries. In this regard, lawyers and arbitrators form an epistemic community—a community of professionals with common training and expertise in the field of international arbitration. As Ginsburg noted, “this common training and expertise, combined with interactive practices, may gradually produce a common set of expectations. These expectations, in turn, shape behavior, though they are also subject to change as new norms arise.”<sup>78</sup> In this second sense of culture, this paper attempts to foresee whether the cross-national interactions in the arbitration community will converge the participants’ own national legal cultures, and eventually lead to the formation of an “international arbitration culture.”

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<sup>72</sup> Tom Ginsburg, *The Culture of Arbitration*, 36 VAND. J. TRANSNAT’L L. 1336 (2003).

<sup>73</sup> *Id.*

<sup>74</sup> DAVID NELKEN, *Towards a Sociology of Legal Adaptation*, in *Adapting Legal Cultures* 25 (DAVID NELKEN & JOHANNES FEEST eds., 2001).

<sup>75</sup> One should bear in mind that there are often diverse cultures within a nation.

<sup>76</sup> Ginsburg, *supra* note 72, at 1337.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

### III. Divergence Of Cultures And Localized Globalism: A Country Study

In this section, we will examine the notion of culture in the first sense. I will take a microscopic approach to map the extent of conflicts and interactions between “indigenous” culture and “transplanted” law through examples of China and Japan. Being the second and the third largest economies in the world respectively, the two countries will play an important role in the development of arbitration in other parts of world. Both China and Japan are classified as part of the “Far Eastern Legal Family.”<sup>79</sup> One of the salient features of this group is the reliance on extra-judicial methods of settling disputes. In their view, positive law imported from foreign countries has not fully taken root in this group.<sup>80</sup> Deeply influenced by the Confucian philosophy in pursuit of harmony, people resort to informal procedures of dispute settlement instead of recourse to the courts.<sup>81</sup> With that cultural tradition, the dispute resolution mechanism in the two countries is viewed as a conciliatory mode, contrasted to the adversary mode in the US. The contemporary arbitration regimes of both jurisdictions based on the Western model are at a relatively early stage of development. Authorities in both jurisdictions have also undertaken significant reforms to improve their arbitration legal framework in recent years. At the same time, the two countries possess important divergences in their cultural, legal tradition, legal transplant, and contemporary political, social and economic status. The experience of China and Japan provide case studies of how Western principles are adopted and adjusted with their traditional dispute processing. The analysis in this section will focus on the specific aspect of local preference for settlement as compared to external (arbitral) decision. This may further shed light on the interactions between the forces of legal globalization and the forces of cultural diversity at a local level.

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<sup>79</sup> See, e.g., RENÉ DAVID & JOHN E. C. BRIERLEY, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (Free Press 2nd ed. 1978); RENÉ DAVID, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL COMPARÉ* [Elementary Treatise on Comparative Civil law] (1950); HIROSHI ODA, *JAPANESE LAW* (3<sup>rd</sup> ed. 2011); 1 KONRAD ZWEIGERT & HEIN KÖTZ, *Introduction to Comparative Law* 431-34 (Tony Weir trans., 2nd ed. 1987).

<sup>80</sup> ODA, *supra* note 79, at 5.

<sup>81</sup> ZWEIGERT & KÖTZ, *supra* note 79, at 362–65.

To be sure, even within a country, there are diverse legal cultures. For instance, the Islamic North West of China has a long tradition of dispute resolution that is very different culturally from the Han Chinese experience. The cultural dimensions may also vary by the age, gender, educational background, occupation, etc. As Iino expressed it, “each individual is by no means identical even within a culture or speech community; each individual is multicultural in this regard with an aggregate of multilayered comembership. No two people share the same set of semantic categories of social identity.”<sup>82</sup> We should avoid allowing the cultural dimensions to become a stereotype. In conducting the following country studies of China and Japan, I am neither suggesting that cultures are agreed upon by all of a society’s members, nor that culture is logical, coherent, uniform or static.

#### A. *Localization of Globalism in China*

##### 1. Contemporary Features of Arbitration in China

One of the main features of contemporary Chinese arbitration is frequent use of the combination of mediation with arbitration.<sup>83</sup> Due to the divergent conceptions on the role of arbitrators in different cultures, the appropriateness of arbitrators to facilitate settlement is one of the most heatedly debated issues in international arbitration.<sup>84</sup> The opponents consider that the roles of a mediator and an arbitrator are not compatible and cannot be assumed by the same person. Mediation is a non-adjudicatory process, “in which a third-party neutral, the mediator, assists disputing parties in reaching a mutually agreeable resolution.”<sup>85</sup> Mediators are not decision-makers, and they

<sup>82</sup> MASAKAZU IINO, *A Trap of Generalization: A Case of Encountering a New Culture*, 9 Working Papers in Educational Linguistics 21, 38 (1993).

<sup>83</sup> For a discussion, see KUN FAN, *ARBITRATION IN CHINA: A LEGAL AND CULTURAL ANALYSIS* 155-69 (2013); Gabrielle Kaufmann-Kohler & Kun Fan, *Integrating Mediation into Arbitration: Why It Works In China?*, 25 J. INT’L ARB. 479 (2008).

<sup>84</sup> For a discussion, see Gabrielle Kaufmann-Kohler, *When Arbitrators Facilitate Settlement: Towards a Transnational Standard*, 25 ARB. INT’L 1897 (2009); Emilia Onyema, *The Use of Med-Arb in International Commercial Dispute Resolution*, 12 AM. REV. INT’L ARB. 411, 415 (2001).

<sup>85</sup> Kimberlee K. Kovach, *Mediation*, in *THE HANDBOOK OF DISPUTE RESOLUTION* 304 (Michael L. Moffitt & Robert C. Bordone eds., 2005).

aim to facilitate information exchange, promote understanding among the parties, and encourage the exploration of creative solutions. Neither party is required to accept any proposal of the mediator.<sup>86</sup> On the other hand, arbitration is an adjudicatory process “by which a private third-party neutral, the arbitrator, renders a binding determination of an issue in dispute.”<sup>87</sup> The line between the two processes can be clearly drawn and cannot be combined.

In the Chinese practice, however, the boundary between the two processes is somehow blurred. According to a series of interviews with Chinese practitioners conducted by Professor Gabrielle Kaufmann-Kohler and the author during a research trip in March and April 2007,<sup>88</sup> the Chinese arbitrators systematically ask the parties if they want to try mediation. If the parties agree, then he will act as a mediator; if mediation fails, he will then shift his hat back as an arbitrator and render a binding decision. This finding is confirmed by a subsequent online survey conducted by the author in November 2011 and April 2012.<sup>89</sup> 88.9% of the respondents

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<sup>86</sup> See ROBERT BUSH & JOSEPH FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (2005); JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* (1984); CHRISTOPHER MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* (3rd ed. 2003).

<sup>87</sup> Sarah Cole & Kristen Blankley, *Arbitration*, in *THE HANDBOOK OF DISPUTE RESOLUTION* 318 (Michael L. Moffitt & Robert C. Bordone eds., 2005); JEAN-BAPTISTE-RENÉ ROBINET, *DICTIONNAIRE UNIVERSEL DES SCIENCES MORALES, ECONOMIQUES, POLITIQUES ET DIPLOMATIQUES* 627 (1777).

<sup>88</sup> The author conducted the research trip while working at the Geneva University Law School on a research project about international arbitration in China. Professor Gabrielle Kaufmann-Kohler directed the research project, and the Swiss National Science Foundation funded it. The arbitrators interviewed were among the most frequently appointed at the CIETAC, Beijing Arbitration Commission (BAC) and Wuhan Arbitration Commission (WAC), who have extensive experience in international arbitration in China. For the findings of this research trip, see Kaufmann-Kohler & Fan, *supra* note 83, at 479-92.

<sup>89</sup> Between November 2011 and April 2012, the questionnaires were distributed to more than 100 Chinese arbitrators sitting on the panel of the CIETAC and the BAC with the kind assistance of the CIETAC and the BAC and by the author's direct distribution to arbitrators by email. A total of thirty-eight responses were received. After filtering out two incomplete responses, the analysis was based on thirty-six complete responses. Statistically, 36 responses do not represent a very large sample. It should be emphasized that the target of our survey was limited to 'active' arbitrators, who have actual arbitration experience. Counsel without the experience of acting as arbitrators were excluded from the survey. Those who are on the panel list but have never acted as arbitrators were also excluded. To put

considered that it is appropriate for arbitrators to facilitate settlement. In practice, a majority of the arbitrators have attempted mediation during arbitration proceedings. 50% of the respondents have proposed mediation to the parties in over 90% of the cases where they act as arbitrators. The survey also shows that the Chinese arbitrators consider the combination of mediation and arbitration as being reflective of traditional culture.<sup>90</sup> When arbitrators propose the use of mediation, the survey and the interview both show a wide range of variation in the percentage of positive responses from both parties. Generally, the percentage is higher when both parties are Chinese than when a foreign party is involved. When both parties are Chinese, the mean response is 54.65%, and the median is 59.50%. When a foreign party is involved, the mean response is 37.50%, and the median is 19.50%.<sup>91</sup>

Why do Chinese arbitrators have a tendency to propose mediation in arbitration proceedings? Why is the combination of mediation and arbitration acceptable by the Chinese parties? How is the imported concept of arbitration localized in the Chinese setting? We will attempt to search for some explanations from the Chinese legal tradition.

## 2. Tradition and Cultural Influence on Contemporary Arbitration

### 1) Local Tradition

The non-adversarial method of dispute resolution is considered to be one of the five themes of legal values underlying

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this number into perspective, despite the large number of arbitrators on the panel lists of arbitrators from numerous arbitration institutions, only a small portion are frequently nominated by the parties or appointed by the arbitration institutions. The reason is obvious: the arbitration is as good as the arbitrators. Parties, advised by their lawyers, generally have their own list of active arbitrators who they trust to have extensive experience and a good reputation. The same concern applies when arbitration institutions are called upon to appoint arbitrators on the parties' behalf. The research findings were published in Kun Fan, *An Empirical Study on Arbitrators Facilitating Settlement in China*, 15 CARDOZO J. CONFLICT RESOL. 777 (2014).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*; see also Kaufmann-Kohler & Fan, *supra* note 83, at 479-92

both ancient and contemporary Chinese law and legal institutions.<sup>92</sup> This tradition has a deeply embedded philosophical basis in China. Various schools of thoughts, including Confucianism, Legalism and Taoism, considered the pursuit of harmony paramount to maintaining social stability. “Such a value system was gradually formed and sustained by the agricultural ecology of traditional Chinese society which was characterized by a high population density with relatively low social mobility.”<sup>93</sup> With such a value system, the Chinese generally preferred negotiation between two sides and mediation with the assistance of a third party to reach a settlement. They relatively disliked direct confrontation with each other and being judged by third parties, as it symbolized disruption of harmony. This culture has greatly influenced the development of dispute resolution throughout China’s history.

With such a tradition, the concept of Western arbitration—private law such as the *jus civile* in ancient Rome and the *lex mercatoria* in medieval Europe cannot find root in Chinese soil.<sup>94</sup>

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<sup>92</sup> RANDLE EDWARDS ET AL., HUMAN RIGHTS IN CONTEMPORARY CHINA 45-47 (1986).

<sup>93</sup> Kwang-Kuo Huang, *Guanxi and Mientze: Conflict Resolution in Chinese Society*, 7 INTERCULTURAL COMM. STUD. 17, 22 (1997).

<sup>94</sup> On the roots of Western arbitration, see THOMAS CLAY, L’ARBITRE [THE ARBITRATOR] 1-10 (2001); ANGELOS C. FOUSTOUCOS, L’ARBITRAGE-INTERNE ET INTERNATIONAL EN DROIT PRIVÉ HÉLLÉNIQUE [DOMESTIC AND INTERNATIONAL ARBITRATION IN GREEK PRIVATE LAW] 3 (1978); OTTO ARNDT GLOSSNER, ARBITRATION - A GLANCE INTO HISTORY (1978); DOUGLAS MACDOWELL, THE LAW IN CLASSICAL ATHENS (1978); FRANCOIS DE MENTHON, LE RÔLE DE L’ARBITRAGE DANS L’ÉVOLUTION JUDICIAIRE [THE Role of Arbitration in Judicial Evolution] (1926); DERECK ROEBUCK, ANCIENT GREEK ARBITRATION (2001); DERECK ROEBUCK, EARLY ENGLISH ARBITRATION (2008); DERECK ROEBUCK, DISPUTES AND DIFFERENCES: COMPARISONS IN LAW, LANGUAGE AND HISTORY (2010); DERECK ROEBUCK, THE CHARITABLE ARBITRATOR: HOW TO MEDIATE AND ARBITRATE IN LOUIS XIV’S FRANCE (2002); DERECK ROEBUCK & BRUNO DE LOYNES DE FUMICHON, ROMAN ARBITRATION (2004); Jean-Jacques Clère, *L’Arbitrage Révolutionnaire (Revolutionary Arbitration)*, 1 REVUE DE L’ARBITRAGE [ARB. REV.] 3 (1981); Serge Dauchy, *Le Recours Contre les Sentences Arbitrales en Perspective Historique [Historical Perspective on Remedies Against Arbitral Judgments]* 4 REVUE DE L’ARBITRAGE [ARB. REV.] 763 (1999); René David, *Arbitrage du XIXe et arbitrage du XXe siècle [Arbitration in the 19<sup>th</sup> and 20<sup>th</sup> Centuries]*, in MÉLANGES OFFERTS À RENÉ SAVATIER [SELECTION DEDICATED TO RENÉ SAVATIER] (1965); René David, *Arbitrage et droit Comparé [Arbitration and Comparative Law]*, 11 REVUE INTERNATIONALE DE DROIT COMPARÉ [INT’L REV. COMP. L.] 5 (1959); Jean Hilaire, *L’arbitrage dans la période moderne (XVIe-XVIIIe siècle) [Arbitration in the Modern Period (16<sup>th</sup>-18<sup>th</sup>*

Even when the term “arbitration” was used in China, it was, in fact, a method of internal resolution within the social institutions, rather than a semi-formal institution to resolve disputes by a binding decision made by a neutral third party.

It is important to bear in mind that due to the influence of Confucian cultural tradition, the Chinese conceptualization of an “individual” is very different from that of Western people. As a cultural product of Christianity, the self-contained individualism of Western civilization encourages an individual to define the boundary between one and other by the immediate surface surrounding one’s physical body.<sup>95</sup> The Chinese vision of “self,” on the other hand, is a kind of interdependent self, which is defined by one’s social role and relationship.<sup>96</sup> An individual’s “social self” is embedded in a stable social network; the boundary of which may include other social members.<sup>97</sup> In the process of socialization, the Chinese emphasize

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*Centuries*], 2 REVUE DE L’ARBITRAGE [ARB. REV.] 187 (2000); CHARLES JARROSSON, LA NOTION D’ARBITRAGE [THE CONCEPT OF ARBITRATION] 1-25 (1987); Yves Jeanclos, *La Pratique de l’Arbitrage du XIIe au XVe Siècle: Éléments d’Analyse* [Arbitration Practices of the 12th and 15th Centuries: Analytical Elements], 3 REVUE DE L’ARBITRAGE [ARB. REV.] 417 (1999); Sophie Lafont, *L’arbitrage en Mésopotamie* [Arbitration in Mesopotamia], 4 REVUE DE L’ARBITRAGE [ARB. REV.] 557 (2000); Fabrizio Marrella, *L’arbitrage à Venise (XIIIe-XVIe siècles)* [Arbitration in Venice (12<sup>th</sup>-16<sup>th</sup> Centuries)], 2 REVUE DE L’ARBITRAGE [ARB. REV.] 263 (2000); Michael Mustill, *Arbitration: History and Background*, 6 J. INT’L ARB. 43 (1989); Derek Roebuck, *Best to Reconcile: Mediation and Arbitration in the Ancient Greek World*, 66 ARB. 275 (2000); Jean Jean-François Poudret, *Deux Aspects de l’Arbitrage dans les Pays Romands au Moyen Âge* [Two Aspects of Arbitration in Middle Ages French-Speaking Regions], 1 REVUE DE L’ARBITRAGE [ARB. REV.] 3 (1999); William K. Slate, *The Impact of Culture on International Commercial Arbitration*, in NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND (2005); Julie Velissaropoulos-Karakostas, *L’arbitrage dans la Grèce antique* [Arbitration in Ancient Greece], 1 REVUE DE L’ARBITRAGE [ARB. REV.] 9 (2000).

<sup>95</sup> See generally Edward Sampson, *The Debate on Individualism: Indigenous Psychologies of the Individual and Their Role in Personal and Societal Functioning*, 43 AM. PSYCHOL. 15 (1988); Edward Sampson, *The Decentralization of Identity: Toward a Revised Concept of Personal and Social Order*, 40 AM. PSYCHOL. 1203 (1985).

<sup>96</sup> See generally Hazel R. Markus & Shinobu Kitayama, *Cultural and the Self: Implications for Cognition, Emotion and Motivation*, 98 PSYCHOL. REV. 224 (1991).

<sup>97</sup> Huang, *supra* note 93, at 20.

the importance of taking appropriate action at one's position embedded in one's social network.<sup>98</sup>

In line with such conceptualization, the basic unit in traditional Chinese society was not the individual but the individual's social group.<sup>99</sup> The existing social institutions—the family, clan, village, and guild—played a significant role in dispute resolution in traditional Chinese society and frequently outweighed the role of the formal courts of law.<sup>100</sup> A family dispute would probably be settled within the family by the family head. A dispute within the clan would be resolved by the clan leaders. Village disputes would be resolved by kinsmen, friends, neighbors, the gentry, other respected village personalities, and even by the government-appointed headmen. Disputes within the guilds would be handled by the guild officers. Local groups actively encouraged, and in the case of clans and guilds, required the parties to exhaust their remedies within the group before looking to the magistrate for relief.

Upon a closer examination of the practice of resolving disputes within the social groups based on the rules within the families, clans, villages, and guilds, which guided the conduct of their members and relevant anthropological studies,<sup>101</sup> we can see that the

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<sup>98</sup> Markus & Kitayama, *supra* note 96.

<sup>99</sup> See, e.g., HSIEN CHIN HU, *THE COMMON DESCENT GROUP IN CHINA AND ITS FUNCTIONS* (1948); Jerome Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L. REV. 1201, 1207 (1966); Hui-Chen Wang Liu, *An Analysis of Chinese Clan Rules: Confucian Theories in Action*, in *CONFUCIANISM IN ACTION* 63 (D.S. Divison & A.F. Wright eds., 1959); Stanley Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CAL. L. REV. 1284, 1294 (1967).

<sup>100</sup> See, e.g., Cohen, *supra* note 99; Lubman, *supra* note 99, at 1294-95.

<sup>101</sup> See, e.g., MAURICE FREEDMAN, *LINEAGE ORGANIZATION IN SOUTHEASTERN CHINA* (1958); KUNG-CHUAN HSIAO, *COMPROMISE IN IMPERIAL CHINA* (1979); HUI-CHEN WANG LIU, *THE TRADITIONAL CHINESE CLAN RULES* (1959); BURTON PASTERNAK, *KINSHIP AND COMMUNITY IN TWO CHINESE VILLAGES* (1972); QU TONGZU (瞿同祖), *ZHONGGUO FALÜ YU ZHONGGUO SHEHUI* (中国法律与中国社会) [Chinese Law and Chinese Society] (1981); Hu, *supra* note 99; Liu, *supra* note 99; Geoffrey MacCormack, *Assistance in Conflict Resolution: Imperial China*, in *ASSITANCE IN CONFLICT RESOLUTION* 116 (1996); L. Cohen Myron, *Lineage Organization in North China*, 49 J. OF ASIAN STUD. 509 (1990); Jack Potter, *Land and Lineage in Traditional China*, in *FAMILY AND KINSHIP IN CHINESE SOCIETY* 121 (Maurice Freedman ed. 1970); Harriet T. Zurndorfer, *Learning, Lineages, and Locality in Late Imperial China. A Comparative Study of Education in Huichow (Anhui) and Foochow (Fukien) 1600-1800 Part 1*, 35 J. OF THE ECON. AND SOC. HIST. OF THE ORIENT 109 (1992); Harriet T. Zurndorfer,



notions of mediation and arbitration were not clearly distinguished in China. In fact, the function of the dispute resolver in traditional Chinese society (family heads, clan heads, village leaders, guild leaders, or other elders) was neither equivalent to the role of a mediator nor that of an arbitrator as defined in the Western context. Sometimes their role resembled that of an arbitrator, who heard the arguments of the parties, looked into the evidence, and then handed down a decision. Although not directly enforceable as a judgment, such decisions were often respected by the disputing parties, as it was considered dishonorable to disobey the elders. In the closely-knit context of social life, social pressure largely supplanted legal coercion as a method of settling disputes. Before the dispute reached the stage of decision-making, however, the dispute resolver often first adopted a conciliatory role and suggested ways in which the disputants could come to a compromise or suggested possible solutions satisfactory to both disputing parties. In that sense, their role may be comparable to that of a mediator who assists the parties to arrive at a satisfactory settlement.<sup>102</sup> The line between mediation and arbitration was historically blurred in Chinese minds.

## 2) Legal Transplant

The introduction of Western civilization into China during the eighteenth and nineteenth centuries resulted in significant changes in the political, economic and cultural structures in Chinese society. The pre-existing social order was destroyed by several major political upheavals, and the legal tradition that was part of that social order was greatly challenged by the new values, ideologies, and norms imported from the West. The new legal system in China is shaped by often divergent models drawn from China’s historical experience on the one hand and by models based on the experience of Western countries and the newly industrialized nations of Asia on the other hand. How did the blurring of the notions of mediation and arbitration affect the transplantation of arbitration and its subsequent

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*Local Lineages and Local Development: A Case Study of the Fan Lineage, Hsiuning 'Hsien' Hui-chou 800-1500*, 70 T'OUNG PAO 18 (1984).

<sup>102</sup> For a detailed discussion on the conceptual difference between arbitration and mediation in China and in the West, see Kun Fan, *Glocalisation of Arbitration: Transnational Standards Struggling with Local Norms*, 18 HARV. NEGOT. L. REV. 175 (2013).

development in China? To address these questions, we need to trace the history of the transplantation of arbitration in China.

The Western model of arbitration was imported into China in the late Qing and early Republican period, shortly after the chamber of commerce was introduced in 1904. However, when the Western notion of “arbitration” was imported to China, there was much discussion on the use of terminology.

The chambers of commerce proposed to adopt the term “adjudication” (*caipan*). In 1907, the first institution established by the Chengdu Chamber of Commerce was named the “commercial adjudicatory institute” (*shangshi caipansuo*).<sup>103</sup> This proposal, however, was rejected by the Ministry of Justice, as they were suspicious of the establishment of an independent body which could exercise an adjudicatory function outside state courts. The government suggested, or indeed insisted, on the adoption of the term “arbitration” (*gongduan*), in order to distinguish the power of these institutions from judicial courts. An important limitation was imposed on their scope of authority: the decisions rendered by these commercial bodies would not be binding unless both parties accepted it. In 1909, the institutions established under the Chongqing and Baoding Chambers of Commerce adopted the name “commercial arbitral body” (*shangshi gongduanchu*). Since then, other newly established bodies under the chambers of commerce consistently used the term “commercial arbitral body.”

In the transplantation process, we can see that the borrowed concept was severely challenged by the Chinese native legal culture. The extra-judicial nature of arbitration—a semi-formal institution with an adjudicatory function producing a binding result—was incompatible with Chinese local cultures. Adjudicatory functions were reserved for the state courts. The notion of private justice was historically foreign to the Chinese mind. Thus, the relevant authorities in the Qing government were reluctant to recognize an important feature of arbitration—the adjudicatory function and the finality of the result. The transplanted institutions (so-called “commercial arbitral bodies”) were transformed to mirror local traditions, in that they did not have adjudicatory functions and their

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<sup>103</sup> *Sichuan Chengdu Shanghui Shangshi Caipansuo Guize* (四川成都商会商事裁判所规则) [*Rules of the Commercial Adjudicatory Institute of Sichuan Chengdu Chamber of Commerce*], 17 HUASHANG LIANHE BAO HAINI WAI GONGDU (华商联合报海内外公牍) [UNITED J. CHINESE MERCHANTS] 1 (1910).

decisions were not binding unless both parties accepted.<sup>104</sup> The binding effects of the arbitral decision were finally recognized in 1923 in the Arbitration Act.<sup>105</sup> This process demonstrates how transplanted institutions are brought into harmony with local traditions. In the constant struggle between borrowed concept and local culture, the concept of arbitration was translated in its native language, which differed from its original meaning. As a result of this “cultural translation,” the native tradition of mediation was integrated into the Western notion of arbitration. A new form of institution or process gradually came into being—the integration of mediation into arbitration.

One may argue that the popularity of mediation in arbitration proceedings in China today is attributable to the top-down political campaign to promote mediation as the key to resolving all disputes in line with the Party’s “harmonious society” political doctrine. Since 2003, after two decades of the civil justice reform emphasizing law, litigation and courts as institutions for resolving civil grievances in the 1980s-1990s, the courts carried out a campaign emphasizing shifting its priority from judiciary to mediatory justice.<sup>106</sup> The Party’s policy of emphasizing mediation is implemented at courts of all levels through the judicial target responsibility system, under which the mediation ratio is linked with the judges’ salary and career rewards. As a result, an increasing number of cases accepted by the courts are *settled* rather than *adjudicated*.<sup>107</sup> Scholars argued that the revival of

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<sup>104</sup> For a detailed discussion on the transplantation process of arbitration in China and the complex interplay between the state actors and non-state actors in conceptualizing the borrowed institution, see Fan, *supra* note 102.

<sup>105</sup> Gongduanfa Caoan (公断法草案) [Draft Arbitration Act], art. 21, 1926 FALÜ CAOAN HUIBIAN (法律草案汇编) [LIST OF DRAFT LAWS] (1926) (China).

<sup>106</sup> Hualing Fu & Richard Cullen, *From Mediator to Adjudicator: The Limits of Civil Justice Reform in China*, in *CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA* at 25-57 (Cambridge, Cambridge University Press, 2011); Carl Minzner, *China's Turn Against Law*, 59 AM. J. OF COMP. L. 935, 939 (2011).

<sup>107</sup> See, for instance, Fu & Cullen, *id.* The courts’ policy on mediation started to get more balanced when Zhou Qiang took office in March 2013 as the President of the Supreme People’s Court. In August 2013, Zhou Qiang made a public speech to point out the defects of overemphasis on settlement rate and completion rate in the past years. On October 29, 2013 the Supreme People’s Court released Several Opinions Regarding the Actual Practice of Justice for the People, Vigorously Strengthening a Fair Judiciary and Continuously Increasing Judicial

mediation in the Chinese judiciary system was a result of the party-state commitment to a “socialist harmonious society,”<sup>108</sup> the top-down authoritarian response motivated by social stability concerns,<sup>109</sup> the “state channeling of social grievances,”<sup>110</sup> and “an exercise of state power by local bureaucrats under the guise of tradition.”<sup>111</sup>

While the above top-down authoritarian campaign may explain the revival of mediation in Chinese courts today, the political incentive of the judges cannot explain the arbitrators’ tendency to mediate in China. Arbitrators are not hired by the states, but are selected by the parties, either by direct nomination, or by indirect appointment through one of the arbitration institutions that the parties have chosen on an *ad hoc* basis. The arbitrators’ mandate will terminate once an arbitral award is rendered. The arbitrators’ fees are generally determined according to the fee scale of a chosen arbitration institution. Different from judges, arbitrators do not have any salary or career rewards linked to the mediation ratio. Indeed, the arbitrators are generally paid less if the parties reach a settlement and withdraw the arbitration proceeding than if the matter results in a final award.<sup>112</sup> Nevertheless, Chinese arbitrators still tend to play an active role in promoting mediation in arbitration proceedings.

Psychologists have increasingly recognized the important role that culture and cultural values have in shaping conflict and conflict resolution.<sup>113</sup> Culture may offer an explanation for the wide use of mediation in arbitration proceedings in today’s China. As discussed

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Credibility, which emphasized the need to correctly handle the relationship between mediation and adjudication, and to adequately advance the functions and values of the two options.

<sup>108</sup> Michael Palmer, *Compromising Courts and Harmonizing Ideologies: Mediation in the Administrative Chambers of the People’s Courts in the People’s Republic of China*, in NEW COURTS IN ASIA 251 (Andrew Harding & Penelope Nicholson eds., 2009).

<sup>109</sup> Minzer, *supra* note 106.

<sup>110</sup> Haitian Lu, *State Channeling of Social Grievances: Theory and Evidence from China*, 41 H. K. L. J. 231, 232 (2011).

<sup>111</sup> Hualing Fu, *The Politics of Mediation in a Chinese Country: The Case of Luo Lianxi*, 5 AUSTRALIAN J. OF ASIAN L. 107 (2003).

<sup>112</sup> See, for instance, Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 268-276 (London, Thomson Sweet & Maxwell, 2004)

<sup>113</sup> Tom Tyler and E Lind, *Cultural Values and Authority Relations: The Psychology of Resolution Across Cultures* 6 *Psychology, Public Policy, and Law* 4 (2000) at 1138.

earlier, the local tradition blurs the line between mediation and arbitration. The family heads, clan heads, village leaders, guild officials, or other dispute resolvers often attempted to facilitate the parties to settle their disputes with a result satisfactory to both. If a settlement was not reached, the same person would play a more authoritative role and render a decision. As a result, Chinese parties may be more ready to accept an arbitrator acting as a mediator and less concerned about due process and natural justice objections raised by the opponents of the combination.<sup>114</sup> The imported concept of arbitration has been given a Chinese face—the combination of mediation and arbitration. To use a metaphor, it is like grafting an apple branch to a pear root stock. The grafted fruit tree produces both pears and apples.

The Chinese experience also illustrates the Kahn-Freund theory of legal transplant to a great extent, in the sense that laws must not be separated from their purpose or from the circumstances in which they are made.<sup>115</sup> This is in contrast to Watson’s theory of legal transplant, according to which law is largely autonomous, with a life of its own, and therefore rules or institutions are readily transplantable from one system to another.<sup>116</sup> When law and legal institutions of a society are transplanted into another society, there will be a constant struggle between the imported rules, institutions, and ideas and the deeply embedded local culture. As a result, the

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<sup>114</sup> The due process objection is that during the private meetings (caucuses) of the mediation phase, information communicated confidentially to the mediator is not known to the opposing party, and it is not subject to response or clarification by the opposing party. As a result, the other party may be deprived of its due process right to rebut those facts. Another objection is the fear that, in the event that the settlement fails and the arbitration continues, the impartiality of the mediator-turned-arbitrator may be affected because of confidential information he or she obtained during the mediation phase and which is not part of the record. *See*, Fan, *supra*, note 102, at 142-44; Kaufmann-Kohler, *supra*, note 84.

<sup>115</sup> Kahn-Freund argues, “we cannot take for granted that rules or institutions are transplantable” and believes that “there are degrees of transferability.” *See* Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 6, 27 (1974).

<sup>116</sup> *See* Alan Watson, *Aspects of Reception of Law*, 44 AM. J. COMP. L. 335 (1996); Alan Watson, *From Legal Transplants to Legal Formants*, 43 AM. J. COMP. L. 469 (1995); Alan Watson, *The Evolution of Law*, 5 LAW & HIST. REV. 537 (1987); Alan Watson, *Legal Change: Sources of Law and Legal Culture*, 131 U. PA. L. REV. 1121 (1983); ALAN WATSON, LEGAL TRANSPLANTS (1974).

emerging new form of mediation-arbitration retains some features of traditional means of dispute resolution, but also features foreign ideas. Local culture continues to have a significant role in the process of China's legal modernization. This cultural element represents a powerful force that will influence the development of transnational arbitration, in parallel with the forces of globalization.

### *B. Localization of Globalism in Japan*

Having illustrated the localization of globalism through the Chinese example, we will now move to another important economy in East Asia—Japan. What can we learn from the Japanese experience?

#### 1. Contemporary Features of Arbitration in Japan

In the wave of globalization, Japan has abolished its old law of 1890 and adopted the new Arbitration Law in 2003 to reflect the principles of the Model Law.<sup>117</sup> Japanese courts are generally pro-arbitration. There is also strong institutional support from the Japan Commercial Arbitration Association (JCAA) to promote arbitration. Despite the seemingly strong legal and institutional support for arbitration, arbitration has not taken off in Japan as one would expect. The JCAA's caseload has not grown significantly since the new Arbitration Law was put in place, with an average of 21 cases annually from 2010 to 2014,<sup>118</sup> contrasted to an average of 290 cases per year at the Korean Commercial Arbitration Board (KCAB) and an average of 1,343 cases a year at the China International Economic and Trade Arbitration Commission (CIETAC).<sup>119</sup> While the JCAA caseload has increased slowly compared to the situation a decade ago, it has not kept pace with the growth at other arbitration institutions.

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<sup>117</sup> For a commentary on the new Arbitration Law, see Tatsuya Nakamura, *Salient Features of the New Japanese Arbitration Law Based Upon the UNCITRAL Model Law on International Commercial Arbitration*, 17 JCAA Newsletter (2004) (describing Japan's adoption of the UNCITRAL Model Law); Luke Nottage, *Japan's New Arbitration Law: Domestication Reinforcing Internationalisation?*, 7 INT'L ARB. L. REV. 54 (2004); .

<sup>118</sup> The annual caseloads at the JCAA are 27, 19, 19, 26 and 14 from 2010 to 2014. Information provided by the JCAA in an email dated 31 August 2015.

<sup>119</sup> Data extracted from the official website of the CIETAC and KCAB annual reports.

To be sure, the low levels of arbitration activity in Japan are insufficient to indicate that Japanese dislike international commercial arbitration. Empirical evidence suggests that Japanese companies have similar preferences with respect to international arbitration as foreign companies.<sup>120</sup> The majority of Japanese companies surveyed (66%) typically include arbitration clauses in their international contract one or more times, more so than any other dispute resolution mechanism (only 27% include provisions subjecting a prospective dispute to international litigation).<sup>121</sup> This figure is higher than the attitudes of corporations with long time experience in international arbitration, from Europe, North America, Central and South America, Asia and Pacific and Africa according to the survey conducted by PricewaterhouseCoopers and Queen Mary University School of International Arbitration (‘PWC & QML Report 2008’) showing that 44% of the participating corporations mostly used international arbitration while 41% mostly used transnational litigation.<sup>122</sup> The popularity of arbitration has increased over the years. In a later survey conducted by PricewaterhouseCoopers and Queen Mary University School of International Arbitration in 2013 (‘PWC & QML Report 2013’), where respondents were general counsel, heads of legal departments from worldwide, 52% of the respondents ranked arbitration first as their order of preference, compared with 28% of the respondents that chose court litigation as their first choice.<sup>123</sup>

However, it is important to note that a preference for arbitration as the default dispute resolution mechanism does not necessarily mean that arbitration will be used to ultimately resolve

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<sup>120</sup> In order to investigate the Japanese corporations’ attitudes and practices towards international arbitration, two surveys were conducted by the JCAA in 2007: one based on a total of 296 responses of Japanese companies in Japan and another based on a total of fifty-seven responses from Japanese subsidiaries in Europe. For an analysis of the surveys, see Michael Allan Richter, *Attitudes and Practices of Japanese Companies with Respect to International Commercial Arbitration: Testing Perceptions with Empirical Evidence*, 5 *TRANSNAT’L DISP. MGMT.* 8 (2011).

<sup>121</sup> *Id.*, at 13.

<sup>122</sup> *International Arbitration: Corporate Attitudes and Practices*, (2008), <http://www.arbitration.qmul.ac.uk/docs/123294.pdf> (last visited Feb 27, 2016).

<sup>123</sup> 2013 Corporate Choices in International Arbitration: Industry Perspectives, available at <http://www.arbitration.qmul.ac.uk/research/2013/index.html> (last visited 19 April 2016).

disputes. In fact, the survey shows that Japanese companies typically resolve approximately 83% of all their international commercial disputes by negotiated settlement. This observation is further confirmed by an empirical research the author conducted in February 2016, when she interviewed a number of corporate counsels working in Japan. Some corporate counsel explained the different cultural attitudes towards arbitration as follows: the Japanese corporations generally try to negotiate very hard before they file any claims for arbitration, and as a result, we see a relatively low settlement rate in arbitration cases involving Japanese parties. In contrast, the US companies often file an arbitration as a strategy in order to push the other side to negotiate seriously, and a number of arbitration cases are indeed settled before a final award is rendered.<sup>124</sup>

Even when the Japanese parties agree to incorporate an arbitration clause in the contract and decide to start an arbitration proceeding when a dispute arises, they still tend to structure arbitration in a conciliatory fashion. Hattori, one of the directors of the JCAA, noted that it still appeared to be usual for the arbitral tribunal to recommend settlement to parties after completion of the examination of witnesses and evidence and, with the parties' consent, the JCAA will provide mediation or conciliation for settlement negotiations.<sup>125</sup> According to the author's interview with the Secretary General and a Case Manager of the JCAA, in roughly 20-25% of the total cases, arbitrators act as mediators to facilitate settlement in the JCAA arbitration proceedings.<sup>126</sup> In terms of the parties' attitude, the Japanese parties easily accept the same person acting as both a mediator and an arbitrator. Some empirical research also shows that most Japanese practitioners (76%) felt that the arbitrators' suggestion of settlement was in general appropriate. The

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<sup>124</sup> The author conducted a research trip in Kyoto and Kobe in February 2016, for a research project about "Comparative Study of Arbitration in Japan and China: Implications for the Development of Transnational Arbitration". The author is the Principal Investigator of the research project, and the Sumitomo Foundation funded it.

<sup>125</sup> Yasunobu Sato, *COMMERCIAL DISPUTE PROCESSING AND JAPAN* 258 (Kluwer Law International, 2001).

<sup>126</sup> Interview with Mr. Tatsuya Nakamura, Secretary General of the JCAA, and Mr. Toshiyuki Nishimura, case manager JCAA, on 24 August 2015, for a research project about "Comparative Study of Arbitration in Japan and China: Implications for the Development of Transnational Arbitration". The author is the Principal Investigator of the research project, and the Sumitomo Foundation funded it.



figure is higher with domestic practitioners, i.e. in-house counsel for companies, scholars and *bengoshi* (lawyers) (85%) than with international practitioners, i.e. members of JCAA and the Japan Shipping Exchange (JSE) (65%). Similarly, a total of 74% of Japanese practitioners (85% of domestic practitioners, 65% of international practitioners) consider that it is appropriate for the arbitrators to conduct conciliation with the parties' consent.<sup>127</sup> According to the JCAA, because Japanese judges frequently act as mediators in the court proceedings, the Japanese parties are accustomed to have the same person acting as a settlement facilitator and a decision maker.<sup>128</sup>

Why is arbitration still inactive in Japan despite its pro-arbitration structure? Why is there a preference over mediation even when arbitration is initiated? Can we find some explanation from Japanese legal culture?

## 1. Tradition and Cultural Influence on Contemporary Arbitration

### 1) Local Tradition

Japanese history features a strong cultural continuity and the ability to adapt imported culture and technology to the traditional culture.<sup>129</sup> The homogeneity of its population is one critical characteristic of Japanese culture.<sup>130</sup> Japan has a long tradition of seeing a statement of morals in law, and the government has long always used the law for the purpose of moral education.<sup>131</sup> Relatively

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<sup>127</sup> SATO (2001), *supra* note 124., at 341-42 (displaying results of a survey on the linkage of arbitration and mediation, conducted in June–July 1999 with members of JCAA and the Japan Shipping Exchange (JSE), in-house counsel for companies, scholars and *bengoshi* (lawyers)). Due to a limited sample size, issues concerning the quality of its methodology, and the age of the survey, this survey does not provide conclusive evidence. However, as the number of arbitration practitioners is still small in Japan, and almost all of the leading figures replied, this survey still illustrates general attitudes in Japan. *Id.*, at 319 n. 125.

<sup>128</sup> *Supra* note 126..

<sup>129</sup> Fred E. Jandt, *An Introduction to Intercultural Communication-Identities in a Global Community*, at 169 (Sage Publications, 2010).

<sup>130</sup> *Id.*, at 172.

<sup>131</sup> Arthur Taylor von Mehren, *The Legal Order in Japan's Changing Society: Some Observations*, 76 HARV. L. REV. 1173, 1174 (1963) (noting that the

little reliance is placed on the formal legal order as an agency for resolving disputes.<sup>132</sup>

In Japan's Edo period (1603–1868), 80% of the population lived in rural villages, which were often geographically isolated from any large city.<sup>133</sup> As a result of this isolation, villages were empowered to manage their own internal affairs, so long as the tax was paid.<sup>134</sup> “Reinforced by the Confucian ethic's insistence on harmony in human relations, the prevalent values in traditional Japanese society” emphasized the maintenance of the group at the local village level, rather than the protection of individual rights.<sup>135</sup> As Kawashima notes, “Traditionally, the Japanese people prefer extra-judicial, informal means of settling a controversy. Litigation presupposes and admits the existence of disputes and leads to a decision which makes clear who is right or wrong in accordance with standards that are independent of the will of the disputants [...] Because of the resulting disorganisation of traditional social groups, resort to litigation has been condemned as morally wrong, subversive and rebellious.”<sup>136</sup> Under this cultural tradition, the Japanese people prefer extrajudicial, informal means of settling a controversy.

To be sure, Japan did have a sophisticated court system during the Edo period. However, ordinary citizens were discouraged from bringing lawsuits to court. Villagers generally were denied access to the courts or police for enforcement of civil law, unless official approval of the village's headman was obtained.<sup>137</sup> Even if the headman's permission was obtained, there were further obstacles to proceed with a formal litigation within the Japanese court system.<sup>138</sup>

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proposition that in traditional Japanese society very little reliance is placed on the formal legal order was a frequently raised as a problem during the 1961 Harvard Law School Conference on Japanese Law).

<sup>132</sup> *Id.*

<sup>133</sup> Dan F. Henderson, “Contracts” in *Tokugawa Villages*, 1 J. JAPANESE STUD. 51, 52 (1974).

<sup>134</sup> Thomas Smith, *The Japanese Village in the Seventeenth Century*, 12 J. Econ. Hist. 1 (1952) (discussing systems of peasant taxation in seventeenth century Japan).

<sup>135</sup> von Mehren, *supra* note 131.

<sup>136</sup> Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan, in Law in Japan: The Legal Order in a Changing Society* (ARTHUR TAYLOR VON MEHREN ed. 1963), at 41-72.

<sup>137</sup> Henderson, *supra*, note 132 at 62.

<sup>138</sup> Tony Cole, *Commercial Arbitration in Japan: Contributions to the Debate on “Japanese Non-Litigiousness”*, 40 N.Y.U. J. OF INT'L L. & POL. 29, 55 (2007).

The court procedure was highly complex and strictly applied, and “plaintiffs were subject to continual pressure to settle, including repeated adjournments to facilitate negotiations.”<sup>139</sup>

One interesting observation is that, different from the Chinese aversion to the use of precise contract terms in transactions, historical evidence indicates a full awareness on the part of ordinary Japanese citizens of both the nature of their rights and their ability to enforce them through clear contractual language.<sup>140</sup> Some studies show that villagers in Japan typically put important agreements into formal contracts, many of which were clearly written with the possibility of future court enforcement in mind.<sup>141</sup> This forms an important feature of Japanese legal culture: non-confrontational dispute settlements that do not take place in the context of a lack of formal contracts and vague classifications of rights and obligations. Instead, Japanese parties were fully aware of their individual rights protected by the law, but preferred to negotiate instead of fight. In the traditional ways of settling a dispute, the resolution was mostly reached through agreements by both parties.

The notion that justice measured by universal standards can exist independent of the wills of the disputants was alien to traditional Japanese culture.<sup>142</sup> Within the communal system, techniques of dispute resolution appropriate for controversies arising in an individualist setting were not developed.<sup>143</sup> As in China, though the term “arbitration” appeared in traditional Japanese society, it appears today as “arbitrary conciliation” or “conciliatory arbitration” and is used as a kind of reconciliation.<sup>144</sup> This blurring of the notions of conciliation and arbitration in Japan can be vividly illustrated by a scene in *Sannin Kichisa Kuruwa no Hatsugai*, a traditional Japanese *Kabuki* play written by Kawatake Mokuami: a Buddhist priest named Kissa, entrusted as an arbitrator by two gangsters both named Kissa, resolved a dispute by using his wisdom to reach a consensus

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<sup>139</sup> *Id.* at 55-56.

<sup>140</sup> *Id.* at 53.

<sup>141</sup> See generally Henderson, *supra* note 132.

<sup>142</sup> Kawashima (1963), *supra* note 135.

<sup>143</sup> Mehren, *supra* note 131, at 1174.

<sup>144</sup> SATO (2001), *supra* note 121., at 2.

between the disputants.<sup>145</sup> The role of the arbitrator here is not just as an adjudicator, but also a settlement facilitator. Kawashima portrays this blurring of the notions of conciliation and arbitration in Japan as follows:

In principle, the third person who intervenes to settle a dispute, the go-between, is supposed to be a man of higher status than the disputants. When such a person suggests conditions for reconciliation, his prestige and authority ordinarily are sufficient to persuade the two parties to accept the settlement. Consequently, in the case of mediation also, the conditions for reconciliation which he suggests are in a sense imposed, and the difference between mediation and arbitration is nothing but a question of the degree of the go-between's power. Generally speaking, the higher the prestige and the authority of the go-between, the stronger is the actual influence on the parties in dispute, and in the same proportion conciliation takes on the coloration of arbitration or of mediation.<sup>146</sup>

In the process of establishing a modern civil justice system modeled on German law and procedure, traditional conciliation was institutionalized as *kankai* conciliation in 1876.<sup>147</sup> *Kankai* was legitimized as a court procedure, resulting in its preferred usage prior to a regular judicial proceeding modeled on the French system of *conciliation préliminaire*.<sup>148</sup> It was abolished at the time of enforcement of the Code of Civil Procedure in 1891.<sup>149</sup> During the reform of civil procedure in the 1920s and 1930s, the government reinstated *chōtei* conciliation, which established a court-annexed conciliation system.<sup>150</sup>

## 2) Legal Transplantation

Foreign law arrived in Japan in three different stages.<sup>151</sup> The first stage was “in the seventh and eighth centuries when Japan imported the Chinese political and legal system”.<sup>152</sup> The second stage

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<sup>145</sup> CHARLES R. STEVENS & KAZUNOBU TAKAHASHI, *The East Asian Preference for Conciliation: An Example in a Kabuki Play*, 5 ARB. INT'L 43, 43-44 (1989).

<sup>146</sup> KAWASHIMA (1963), *supra* note 141, at 50-51.

<sup>147</sup> SATO (2001), *supra* note 124, at 73-74.

<sup>148</sup> *Id.* at 52.

<sup>149</sup> SATO (2001), *supra* note 124, at 79.

<sup>150</sup> SATO, *supra* note 124, at 236.

<sup>151</sup> ODA, *supra* note 79, at 7.

<sup>152</sup> *Id.*

was “in the process of industrialization after the overthrow of the Tokugawa Shogunate in the late nineteenth century and the early twentieth century”.<sup>153</sup> During this period, massive borrowing of foreign law took place, “in part for purposes of reform, in part for reasons of survival and national independence.”<sup>154</sup> Japanese law was almost completely remade, drawing on Western (primarily French and German) concepts and institutions, although these were given a characteristically Japanese twist. The Japanese civil litigation system drew heavily on Continental European—especially German—models.<sup>155</sup> The third stage began after the Second World War and continued during the period of the Allied Occupation.<sup>156</sup> There was “conscious, and often more or less imposed, borrowing from the American system,”<sup>157</sup> in particular the adversarial form of litigation and the U.S. Constitution. Legal developments again merged a new foreign input with purely Japanese attitudes and characteristics.

Throughout this extraordinary history of legal transplantation, Japanese law has become a “hybrid” or “mixed” creature like the Japanese lunch box (*bentō*)—the product of the struggle to adapt foreign ideas to Japanese values and to adapt Japanese values to ever-changing circumstances. What is the role of Japanese local culture in the development of arbitration? This leads us to the history of arbitration transplantation in Japan.

When the Western system of chambers of commerce was imported into Japan in the early Meiji period, the arbitration of disputes was included amongst their functions.<sup>158</sup> The Western concept of arbitration was legitimized under Book VIII of the old Code of Civil Procedure (CCP, Law No. 29 in 1890). The provisions were almost a literal translation of the German Code of Civil Procedure 1877. Book VII and VIII of the old CCP were renamed the

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<sup>153</sup> *Id.*

<sup>154</sup> Mehren, *supra* note 131, at 1173

<sup>155</sup> SATO (2001), *supra* note 124., at 78.

<sup>156</sup> ODA, *supra* note 79, at 7.

<sup>157</sup> MEHREN (1963), 1178.

<sup>158</sup> *Kokusai Shōji Chūsai Shisutemu Kōdoka Kenkyūkai Hōkokusho* (国際商事仲裁システム高度化研究会報告書) [Report by the Study Group for Advancement of the International Commercial Arbitration System], 43 JCA ジャーナル[JCA J.] 1, 109 (1996).

Law on Procedure for General Publication Notice and Procedure for Arbitration (Old Law).

However, the imported concept of arbitration—which is confrontational and replaces the court trial with a private person’s decision to finalize disputes, was incompatible with the native Japanese culture of conciliation — a consensus and harmony-oriented process. Due to the absence of the concept of “private justice” in Japanese culture, arbitration has not been well accepted by the Japanese people, who believe that the final decision on disputes should be monopolized by public authorities. Neither was the transplanted institution favored by the Japanese authorities. As Sato notes:

. . . throughout the modern history of Japan, arbitration was not a priority of judicial policy. In the process of modernizing the judiciary during and after the Meiji modernization, priority was placed on adjudicative dispute processing with modern laws by the courts through establishing a unified modern judicial court system for the promotion of capitalism. The priority remained the same in the process of post-war democratization and economic rehabilitation.<sup>159</sup>

Consequently, despite the provisions of arbitration procedure in the Old Law, it was seldom used in practice. Arbitration clauses are normally not employed except in agreements with foreign business firms.<sup>160</sup>

Following the Meiji modernization and the post-war democratization, Japan is now faced with a new wave of massive law reforms—the wave of “globalization.”<sup>161</sup> This means that Japanese business and commercial activities will inevitably result in more cross-border commercial disputes. Globalization requires a new system of commercial dispute resolution that reflects global standards and calls for reforms of Japan’s outdated arbitration law. Japanese authorities are beginning to see the importance of improving its arbitration framework to build Japan into an attractive international arbitration center. The reform of arbitration law was initiated in late December 2001 by the Japanese government’s Office for Promotion

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<sup>159</sup> SATO, *supra* note 124, at 326.

<sup>160</sup> KAWASHIMA (1963), *supra* note 141, at 56.

<sup>161</sup> SATO (2001), *supra* note 124, at 326.

of Justice System Reform (*Shihō Seido Kaikaku Suishin Honbu*). The Reform Office set up a study group of experts on arbitration for consideration of the new law and experts studied the law reform based upon the Model Law. On March 14, 2003, the Reform Office submitted a bill for the Arbitration Law of Japan (New Law) to the Japanese National Diet, and the New Law was promulgated on August 1, 2003. The New Law, promulgated as Law No. 138 of 2003, is applicable both to national and international arbitrations.<sup>162</sup> It has adopted the majority of the Model Law with some slight modifications.<sup>163</sup> Nevertheless, arbitration remains inactive in Japan.

For decades, scholars have heatedly debated the reasons for Japanese non-litigiousness.<sup>164</sup> The “culturalists” argue that the reluctance of the Japanese to litigate can be attributed to the Japanese culture’s emphasis on the need for harmony in social relations.<sup>165</sup> The “institutionalists,” on the other hand, insist that Japan’s low litigation rates is due to the structural impediments to litigation that are built into the Japanese legal system such as the high costs of litigation, the lack of lawyers and judges, the relative absence of discovery procedures and the incredible amount of time required to obtain a judicial resolution.<sup>166</sup> The institutionalists’ theory, led by Ramseyer, presented a more comprehensive picture of the Japanese legal system, and may offer a good explanation for the Japanese avoidance of litigation. However, the question remains as to why there is a similarly low usage of arbitration, which does not have such structural barriers in the court system. Cole argues that Japan’s continuing low rate of arbitration and litigation is best explained by

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<sup>162</sup> Yasuhei Taniguchi and Tatsuya Nakamura, *National Report for Japan (2010)* in Jan Paulsson and Lise Bosman (eds), *ICCA International Handbook on Commercial Arbitration*, (Kluwer Law International; Kluwer Law International 1984, Supplement No. 62, December 2010), at 1 – 42.

<sup>163</sup> For a commentary on Japan’s new Arbitration Law, see generally, Nakamura, *supra* note 117; Nottage, *supra* note 117.

<sup>164</sup> Some also raise serious doubts to the notion of the “non-litigiousness of the Japanese.” See generally, ZWEIGERT & KÖTZ, *supra* note 79, at 370-72; JOHN HALEY, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359, 376-78 (1978).

<sup>165</sup> See, e.g., CHIN KIM & CRAIG M. LAWSON, *The Law of the Subtle Mind: The Traditional Japanese Conception of Law*, 28 Int’l & Comp. L.Q. 491 (1979).

<sup>166</sup> See, e.g., JOHN HALEY, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359 (1978); MARK RAMSEYER, *Reluctant Litigant Revisited: Rationality and Disputes in Japan*, 14 J. JAPANESE STUD. 111 (1988).

the disjunction between the Japanese law and social rules rather than institutional barriers.<sup>167</sup> According to this theory, “no formal dispute resolution system will be widely used where it does not conform to the social relations it is allegedly resolving”.<sup>168</sup>

One such disjunction exists between arbitration as a formalistic mechanism and the deeply rooted informal relational traditions in Japan. As a result, even though the structural barrier is lifted with Japan’s modernization of arbitration law and strong institutional support, arbitration is still not widely used today. Even when the Japanese parties agree to incorporate an arbitration clause into their contract, they will first seek for a negotiated settlement when a dispute actually arises. Even when the disputing parties decide to start an arbitration proceeding, it is often filed with the aim of provoking settlement negotiations, and mediation is often used during an arbitration proceeding. Furthermore, as illustrated earlier, the concepts of conciliation and arbitration were traditionally not so distinct in Japan. Such a blurring in notion remains in the Japanese minds. For instance, *Kōjien*, one of the most popular Japanese dictionaries, states that “conciliation means arbitration” in daily use.<sup>169</sup> Arbitration is understood to be closer to conciliation than litigation in Japanese culture. Consequently, the same person assuming the role of a mediator, and later the role of an arbitrator is also culturally acceptable by the Japanese arbitrators and parties.

The Japanese experience shows how the imported civil justice system was adapted to accord closely with local culture. During the Japanese modernization process, “the conciliation culture played the role of conduit for the Western principle of the rule of law to Japanese society, and acted as a buffer or cushion for conflicts between modern law and traditional values.”<sup>170</sup> It also confirms our earlier observation that the transplantation of laws and institutions from one country to another is not viable without an adequate adaptation based on an understanding of the indigenous culture and the local setting of the receiver.

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<sup>167</sup> Cole, *supra* note 137.

<sup>168</sup> *Id.*

<sup>169</sup> SATO, *supra* note 124, at 236.

<sup>170</sup> *Id.* at 7.



### C. Summary of the Localized Globalism

A curious phenomenon in the above case study is the sharp contrast between the drastic growth of arbitration in China and the continued inactiveness of arbitration in Japan today. The different attitudes towards arbitration in the two countries seem to indicate that local cultures have reacted to the transplanted institution differently. Japanese culture is like a sponge—it absorbs what is compatible with the local culture, and rejects what is not compatible. Arbitration, as a formalistic mechanism, seems to be incompatible with the deeply rooted informal relational traditions in Japan, and is thus still not widely accepted by the Japanese people. Chinese culture is more prepared to absorb a foreign concept, but interprets it with something that they are familiar with.<sup>171</sup> As a result of this cultural translation, the local elements are incorporated into the borrowed norms. Thus, although the Western concept of arbitration was initially rejected by the local authorities during the transplantation process, it subsequently developed in China but was injected with local elements.

The case of Japan and China proves that legal homogenization and universalism are only some of the possible outcomes of legal globalization. Resistance, hybridity and indifference are also entirely legitimate possibilities.<sup>172</sup> Japan offers an example of selection, rejection and hybridity while China is an example of resistance, adaptation, and hybridity in the process of legal transplant.

To summarize, the above analysis demonstrates two points. First, powerful forces of globalization have succeeded in achieving a high level of global participation in arbitration and the harmonization of arbitration laws and institutional rules. Second, there are also strong forces of cultural diversity, which have led to the divergences in the concept and conduct of arbitration.<sup>173</sup> Through the influence of these two forces, the transplanted institution was repackaged to fit local norms, combining concepts and processes from both mediation

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<sup>171</sup> This idea is drawn from Xingzhong Yu’s comments on this paper.

<sup>172</sup> GILLESPIE, *supra* note **Error! Bookmark not defined.**, at 209.

<sup>173</sup> See ANNE MARIE SLAUGHTER, A NEW WORLD ORDER (2004) (describing the role of the two forces of “harmonization” and “legal diversity” in forming a new world order).

and arbitration. Global processes are incorporated into the local setting—a phenomenon we will describe as “localized globalism.”<sup>174</sup>

#### IV. Diffusion Of Cultures And Globalized Localism

The concept of legal culture I have discussed so far is in its first sense—those aspects of national culture that find expression in the legal system. I will now look at legal culture in its second sense, consisting of “shared norms and expectations produced by legal actors.”<sup>175</sup> From this perspective, I will discuss the prospects of the emergence of a common international arbitration culture, crossing national and geographical boundaries—the “diffusion of cultures.”

At the present stage, no global law or procedure has been realized, despite the trends of harmonization in the wave of globalization. There are still a number of different arbitral practices associated with divergent legal cultures. International arbitration has not yet been able to bridge the cultural gaps between Western and non-Western legal norms, the conflicts between foreign and indigenous cultures, and differences in legal tradition between civil law and common law countries. The very concept of arbitration is often interpreted differently by different cultures.

Looking forward, will globalization and the cross-national interactions in the arbitration community eventually drive to the emergence of an international arbitration culture? From a normative perspective, such a convergence may be desirable in light of the need for predictability in cross-cultural dispute processing. The purpose of international arbitration is to serve the global business community, not just regional or national interests.<sup>176</sup> The question is how this convergence might occur. What are the forces that may lead to the emergence a culture of arbitration, common to practitioners, arbitrators and parties involved in arbitral practice?

Dezalay and Garth argue that one such force is the “symbolic capital”—“the social class, education, career, and expertise that is contained within a person.”<sup>177</sup> Based on Bourdieu’s construct of a

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<sup>174</sup> GILLESPIE, *supra* note **Error! Bookmark not defined.**, at 209.

<sup>175</sup> Ginsburg, *supra* note 72, at 1337.

<sup>176</sup> Yasuhei Taniguchi, *Is There a Growing International Arbitration Culture? - An Observation from Asia*, in ICCA CONGRESS SERIES, NO. 8 38, (Albert Jan van den Berg ed., 1996).

<sup>177</sup> DEZALAY & GARTH, *supra* note **Error! Bookmark not defined.**, at 18.

social field,<sup>178</sup> the authors explain the evolution of arbitration as a competition among “the grand old men” and the large Anglo-American law firms over the rules of the game. The success of the competition depends on strength of their “symbolic capital,” in other words, “on the recognition, institutionalized or not, that they received from a group.”<sup>179</sup> Through these struggles based on symbolic capital, arbitration has gradually moved from a small number of “grand old men” to multinational law firms operating in a global market.<sup>180</sup> The contested process the authors described may produce the culture of arbitration.

Another driving force towards a common arbitration culture is considered the practitioners’ “normative commitment to establishing international arbitration as a global system of governance for cross-border commercial relationships,” either for its own sake or for the sake of serving the needs of the business community.<sup>181</sup> Karton argues that,

[P]artly by self-selection, partly by internalization of community norms, and partly out of a desire for esteem from other members of the community, those seeking to break into the upper echelons of international arbitral practice will emulate the résumés, practices, and perspectives of the current elite, thus reinforcing existing values and standards.<sup>182</sup>

From an economic perspective, Ogus perceives legal culture as a combination of procedures and concepts that “constitute a ‘network’ which, because of the commonality of usage, reduces the costs of interactive behavior.”<sup>183</sup> According to Ogus, networks in economics are systems in which users are linked, and network goods

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<sup>178</sup> Pierre Bourdieu, *Epilogue: On the Possibility of a Field of World Sociology*, in *SOCIAL THEORY FOR A CHANGING SOCIETY* 72 (Pierre Bourdieu & James Coleman eds., 1991).

<sup>179</sup> DEZALAY & GARTH, *supra* note **Error! Bookmark not defined.**, at 18.

<sup>180</sup> *Id.*, at 18-29.

<sup>181</sup> KARTON, *supra* note 69, at 1-45.

<sup>182</sup> *Id.*, at 20.

<sup>183</sup> Anthony Ogus, *The Economic Basis of Legal Culture: Networks and Monopolization*, 22 OXFORD J. LEGAL STUD. 419, 420 (2002).

are those for which a user's benefit increases as the number of network users increases.<sup>184</sup> Examples of such "network goods" include telephone, Facebook, LinkedIn, Twitter, Weibo among others. They are useless for a user unless others also use them; the more people own them, the more useful they become. Using Ogus's theory, Ginsburg describes the arbitration culture as a "network."<sup>185</sup> He claims that "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" and also the "demand for new rules and intense competition to define the network."<sup>186</sup> Consequently, according to Ginsburg, we 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" and "practitioner-scholars competing with each other to establish and influence the shape of the law."<sup>187</sup>

To better appreciate the cultural complexity of the modern world, it may be useful to think of culture as a big "open system." As Yu Xingzhong notes:

Social practices interact and coordinate with each other through several subsystems, including law, economics, and morality. A change of the first subsystem can lead to a change of the second, the change of the second system can lead to a change of the third, and the change of the third can in turn cause a new change of the first subsystem through feedback effects. During this process, the subsystems constantly interact with and adapt to each other and the change is not linear.<sup>188</sup>

Considering culture as an open system allows us to study its interactions with subsystems such as law, economics, politics, and history. The formation of an arbitration culture will be under the influence of a variety of factors including law, politics, economy, and

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<sup>184</sup> *Id.*

<sup>185</sup> GINSBURG, *supra* note 72, at 1335–45.

<sup>186</sup> *Id.*, at 1335–36.

<sup>187</sup> *Id.*

<sup>188</sup> Xingzhong Yu's response to Ko Hasegawa on Law and Cultural Complexity (June 7, 2011), available at <http://meridian-180.org/node/151>.

morality. But certain factors are affecting it more strongly than others. As Taniguchi puts it, “national politics, which would dominantly affect the national court system and even the domestic arbitration system, would affect international commercial arbitration taking place in the same country much less, if at all.”<sup>189</sup> International commercial arbitration is developed by businessmen to resolve conflicts between them. Economic factors may thus be more influential than other factors.

From an economic perspective, arbitration is a service industry, and evolves as part of competition within the “law market.”<sup>190</sup> Parties that desire arbitration can choose the applicable law, the seat of arbitration, and the arbitration institutions in their contract. In order to attract international commerce, states endeavor to implement arbitration-friendly laws and to commit the courts to enforce the arbitration agreements and the resulting arbitral awards. Arbitration institutions now compete worldwide for the business of resolving international commercial disputes by modernizing their arbitration rules, hiring professional arbitrators who have an established reputation in the community, and by organizing arbitration seminars and conferences to promote their services. Other professional organizations (such as the Chartered Institute of Arbitrators, International Council for Commercial Arbitration, Center for Effective Dispute Resolution, and Institute of Transnational Arbitration) organize various kinds of arbitration conferences and provide professional training for arbitration practitioners and arbitrators, to familiarize them with the rules of the procedure. An increasing number of educational institutions have developed a specialized master’s program on international commercial arbitration, which also plays a role in forging the shared norms of the arbitration community. As a result, an American lawyer, a Chinese lawyer, and a Japanese lawyer, all having taken the arbitration courses at one of the arbitration master’s programs, gone through the arbitration training at one of the professional organizations, and having worked in the arbitration practice group in one of the multinational law firms, may indeed produce a common set of expectations, norms, and behaviors. These shared norms and

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<sup>189</sup> Taniguchi, *supra* note 161, at 38.

<sup>190</sup> For a discussion on arbitration and the law market, see ERIN A. O’HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* (1999).

expectations will form a “legal culture” in the second sense of the term. Driven by competition within the law market, different forms of arbitration may slowly converge to form a common culture in the international arbitration community—a phenomenon I describe as “globalized localism.”<sup>191</sup>

By acknowledging the powerful tendencies of “globalized localism,” I do not assert that cultural diversity is destined to vanish. Neither do I endorse the assumption that it is inevitable that law and practice will converge around Western legal traditions as a result of competition in the law market. On the contrary, much of the growth of international commerce today is exclusively non-Western. A notable example is the rise of China on the world stage as the nation with the largest trade volume<sup>192</sup> and the second largest economy in terms of GDP.<sup>193</sup> China is now the second largest FDI recipient worldwide, and its outward FDI continues to grow, reaching a record level of \$84 billion in 2012.<sup>194</sup> Since 2009, China has become Africa's largest trading partner surpassing the US, exchanging about \$160 billion worth of goods a year.<sup>195</sup> Why should we assume that the emergence of an international arbitration culture will predominantly reflect Western values and dispute resolution styles?<sup>196</sup>

Furthermore, the growth of worldwide non-Western mass migration also casts doubt on the assumption of Westernization as a result of convergence.<sup>197</sup> In the flat world of maps, sharp lines show where one country ends and another begins. The real world, however,

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<sup>191</sup> Another form of globalized localism occurs when local traditions are directly exported to the wider arbitration world. *See generally*, FAN, *supra* note 83.

<sup>192</sup> *China Eclipses U.S. as Biggest Trading Nation*, BLOOMBERG NEWS, Feb. 10, 2013, <http://www.bloomberg.com/news/articles/2013-02-09/china-passes-u-s-to-become-the-world-s-biggest-trading-nation>.

<sup>193</sup> David Barboza, *China Passes Japan as Second-Largest Economy*, N.Y. TIMES, Aug. 15, 2010, [http://www.nytimes.com/2010/08/16/business/global/16yuan.html?pagewanted=all&\\_r=1](http://www.nytimes.com/2010/08/16/business/global/16yuan.html?pagewanted=all&_r=1).

<sup>194</sup> United Nations Conference on Trade and Development, *World Investment Report 2013: Global Value Chains: Investment and Trade for Development*, at xiv, xvii, U.N. Sales No. E.13.II.D.5 (2013).

<sup>195</sup> *One Among Many*, THE ECONOMIST, Jan. 17, 2015, <http://www.economist.com/news/middle-east-and-africa/21639554-china-has-become-big-africa-now-backlash-one-among-many>.

<sup>196</sup> This idea is drawn from the comments by Philip McConaughay at the 2nd Annual ITA Winter Forum, Miami, January 25, 2013.

<sup>197</sup> *Id.*

is more fluid. Peoples do not have borders the way that parcels of land do. They move from place to place; they wander; they migrate. According to a report in *The Economist*, “more Chinese people live outside mainland China than French people live in France, with some to be found in almost every country. There are some 22 million ethnic Indians scattered across every continent”.<sup>198</sup> It further reports that “diasporas have been a part of the world for millennia. Today, they are far bigger than they were.”<sup>199</sup> The world has 40% more first-generation migrations than in 1990. If migrants were a nation, they would be the world’s fifth-largest”.<sup>200</sup> These “diasporan” nations that cross national boundaries operate largely according to relational principles, not according to the formalistic Western legal mechanisms.<sup>201</sup>

If the common arbitration culture is not destined to reflect Western standards, what then will it look like? In fact, it has been widely accepted by social scientists that “it is no longer possible to assume that the world is divided up into discrete ‘societies,’ each with its corresponding and well-integrated ‘culture’”.<sup>202</sup> Some commentators have argued that “modernity is slowly giving way to a new ‘postmodern’ framework characterized by a less stable sense of identity and knowledge.”<sup>203</sup> Within this new “postmodern” framework, what we might see is a diffusion of cultures around the globe, bridging Western and non-Western differences.

Such processes of diffusion or hybridization have become most visible in food, music, dance, film and language. Glocalized food, glocalized language, glocalized music, glocalized marketing, business and brand communication, glocalized medicine, and even glocalized military defense are now part of our daily lives.<sup>204</sup>

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<sup>198</sup> *Weaving the World Together*, THE ECONOMIST, Nov. 19, 2011, <http://www.economist.com/node/21538700> (last accessed 13 April 2016).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> McConnaughay, *supra* note 195.

<sup>202</sup> SEWELL, *supra* note 52, at 152-74.

<sup>203</sup> Steger, Manfred *Globalization: A Very Short Introduction*, 77 (Oxford, Oxford University Press, 2009).

<sup>204</sup> See Nicola Luigi Bragazzi, *Glocalization: The New Established Trend After Globalization?*, 7TH INTERNATIONAL SCIENTIFIC CONFERENCE, Nov. 15, 2012, [https://www.researchgate.net/publication/234051720\\_The\\_7\\_th\\_International\\_Scientific\\_Conference\\_DEFENSE\\_RESOURCES\\_MANAGEMENT\\_IN\\_THE\\_21st](https://www.researchgate.net/publication/234051720_The_7_th_International_Scientific_Conference_DEFENSE_RESOURCES_MANAGEMENT_IN_THE_21st)

McDonalds is a good example. It is a globally recognized brand, but it responds to local tastes in developing its menu. So, you can buy a McItaly burger, a Maharaja Mac in India, a McLobster in Canada, and an Ebi Filet-O with Seaweed Shaker fries in Japan. Another example is the Disneyland's glocalization in Hong Kong. In response to the initial failure when it opened in Hong Kong in 2005, Disneyland made an effort to cater to the local Chinese taste by reducing prices, adapting to local Chinese customs and labor practices, and changing the decor and settings. Having successfully glocalized its theme park in Hong Kong, Disneyland achieved great success in park attendance and revenue growth. The fusion of rock and hip hop, later known as "rap rock"<sup>205</sup> is also a result of the cultural diffusion. The integration of mediation and arbitration into one single proceeding is yet another illustration of this cultural diffusion—"glocalization."

## V. Conclusion And Further Study

To conclude, the development of arbitration is a hybrid blended and creolized process of glocalization. On the one hand, global norms are localized with adaptations to accord more closely with local cultures—"localized globalism." On the other hand, through interactions with different cultures, local practices may produce shared norms and expectations, and eventually form a common culture—"globalized localism." The future of international arbitration will continue be influenced by the combined forces of globalism and localism.

To be sure, this article is not suggesting that culture is the sole or the prime determinant of behavior. Indeed, a variety of other constraints act upon arbitrators and parties, such as economic self-interest, personal political or moral beliefs.<sup>206</sup> It is impossible to identify "direct causal relationships between specific social norms and corresponding behaviors" or to "separate entirely the effects of culture from other factors."<sup>207</sup> Nevertheless, "the malleability

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<sup>205</sup> Rap rock is a cross-genre fusing vocal and instrumental elements of hip-hop with various forms of rock.

<sup>206</sup> KARTON, *supra* note 68, at 11.

<sup>207</sup> *Id.*



surrounding the notion of ‘culture’ does not prevent the ascription of determinative efficacy and the articulation of various characteristics which can prove of direct relevance.”<sup>208</sup> The analysis and prediction in this paper is only suggestive, not conclusive. It hopes to stimulate idea on future study in legal culture, international arbitration, and globalization.

The cultural analysis in this paper is also not free from the danger of generalizations. However, “language itself is a product of generalization—we cannot argue each time if a red round fruit in a grocery store is really an apple with a shopkeeper.”<sup>209</sup> Generalization is inevitable, but we may reduce the danger of generalization by conscious effort. We should not assume that cultures are logically consistent, highly integrated, consensual, static and clearly bounded, as the classic ethnographic model of culture has assumed. Instead, we should consider cultures as being “contradictory,” “loosely integrated,” “contested,” “subject to constant change,” and “weakly bounded.”<sup>210</sup> In the globalizing world of today, the boundaries of cultures are becoming more porous and open-ended. As Sewell noted: “whether we call these partially coherent landscapes the meaning of ‘cultures’ of something else—worlds of meaning, or ethnoscapas, or hegemonies—seems to me relatively unimportant so long as we know that their boundedness is only relative and constantly shifting.”<sup>211</sup>

Furthermore, this study suggests that future scholarships go beyond the conventional tradition-modernity, East-West model, which places and retains Western traditions and practices as the center and norm. This paper examines the experience in China and Japan, and more work needs to be done to study the non-Western traditions and their role in the diffusion of law and cultures, such as other parts of Asia, Latin America, and Africa.

Finally, the proliferation of these “cosmopolitan institutions,” such as the international arbitration discussed in this paper, may push global legal scholars to find new definitions and methodologies to approach globalization, and to move away from the exclusive standpoint of legal norms to the standpoint of the actors themselves

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<sup>208</sup> PIERRE LEGRAND, FRAGMENTS ON LAW-AS-CULTURE 28-9 (1999).

<sup>209</sup> IINO, *supra* note 82, at 39.

<sup>210</sup> SEWELL, *supra* note 52, at 152-74.

<sup>211</sup> *Id.* at 174.

and their legal practices. More collaborative research is needed to give international arbitration a solid conceptual backing, breaking through conventional sub-disciplinary boundaries—legal history, comparative law, jurisprudence, sociology of law, legal anthropology, law and economics, and other areas of substantive interest.