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Salient Features Of International Commercial Arbitration In East Asia: A Comparative Study Of China And Japan

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SALIENT FEATURES OF INTERNATIONAL COMMERCIAL ARBITRATION IN EAST ASIA: A COMPARATIVE STUDY OF CHINA AND JAPAN

FAN KUN*

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INTRODUCTION

Driven by the trend of harmonization, arbitration in East Asia reflects an increasing uniformity of local legislation. Most East Asian countries have now ratified the New York Convention and a growing number of jurisdictions in the region have amended outdated laws, adopting the principles of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"). Has this trend led to the harmonization of arbitration law and practice across the region? What are the salient features of international commercial arbitration in East Asia?

Despite the harmonization of law, legal systems do not exist independently of social and cultural contexts. Arbitration is generally seen as a meeting point for different legal cultures. Some suggest that there is an emergence of an "international arbitration culture," which fuses together elements of different legal traditions.¹ Others see arbitration as a locus of conflicts among legal cultures and traditions.²

This paper discusses the salient features of arbitration in East Asia through case studies from Japan and China. It illustrates the recent trends of arbitration development in East Asia. It then describes how the present state of the law and practice came to be in China and Japan by examining their historical developments and contemporary practices. This paper will draw comparisons between the countries' legislation, courts, and arbitration customs. This paper summarizes the country-specific features of arbitration in Japan and China and highlights some commonalities in the conduct of arbitration within these two countries and in East Asia generally. It analyzes the cultural reasons for both the divergences and convergences in arbitration in East Asia. This paper concludes with a prediction on the future trends of development.

II. RECENT TRENDS OF ARBITRATION DEVELOPMENT IN EAST ASIA

There is a strong movement towards the worldwide harmonization of international commercial arbitration law and practice. This is largely driven by globalization. East Asia is not immune to such forces. The development of trade and investment in the region has resulted in increased

1. Lara M. Pair, *Cross-Cultural Arbitration: Do the Differences Between Cultures Still Influence International Commercial Arbitration Despite Harmonization?*, 9 ILSA J. INT'L & COMP. L. 57, 57-75 (2002).

2. See CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS (Stefan N. Frommel & Barry A.K. Rider eds., 1999); Michael Kerr, *Concord and Conflict in International Arbitration*, 13 ARB. INT'L 121, 121 (1997).

international commercial transactions.³ Rapid development has increased caseloads for already overburdened courts, further leading to slow adjudication of commercial disputes.⁴ As a result, Alternative Dispute Resolution (“ADR”) mechanisms, including arbitration, have become crucial for businesses operating in East Asia.⁵ Driven by the need to resolve the ever-increasing number of international commercial disputes, East Asia has been endeavoring to improve its legal infrastructure and develop a sound environment for efficient international dispute resolution.

The broad international consensus surrounding the Model Law also drives the relevant authorities in East Asia to modernize and harmonize arbitration laws. All East Asian jurisdictions, except Taiwan, have ratified the New York Convention⁶ and a growing number of East Asian jurisdictions have amended outdated laws, instead adopting the Model Law principles.⁷ For example, Japan, Hong Kong, and Singapore have all adopted the Model Law with only some minor amendments.⁸ South Korea and India have adopted legislation that is closely patterned after the Model Law. The relevant legislation in China and Taiwan includes important principles of the Model Law.

3. Kun Fan, *International Dispute Resolution Trends in Asia*, 10 *TRANSNAT'L DISP. MGMT.* 1, 2 (2013), www.transnational-dispute-management.com/article.asp?key=1970 [hereinafter Fan, *International Dispute Resolution*].

4. *Id.*

5. *Id.*

6. *See infra* Chart 1.

7. *See infra* Chart 2.

8. *See id.*

Chart 1: Signatures of East Asian Jurisdictions to the New York Convention⁹

State	Notes ¹⁰	Signature	Ratification, accession, approval, acceptance or succession	Entry into force
China (including Hong Kong)	(a), (c), (h)		22/01/1987	22/04/1987
Indonesia	(a), (c)		07/10/1981	05/01/1982
Japan	(a)		20/06/1961	18/09/1961
Malaysia	(a), (c)		05/11/1985	03/02/1986
Philippines	(a), (c)	10/06/1958	06/07/1967	04/10/1967
Republic of Korea	(a), (c)		08/02/1973	09/05/1973
Singapore	(a)		21/08/1986	19/11/1986
Thailand			21/12/1959	20/03/1960

9. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited May 11, 2016) [hereinafter *New York Convention*].

10. *New York Convention*, *supra* note 9 (“Declarations or other notifications pursuant to article I(3) and article X(1): (a) This State will apply the Convention only to recognition and enforcement of awards made in the territory of another contracting State; (b) With regard to awards made in the territory of non-contracting States, this State will apply the Convention only to the extent to which those States grant reciprocal treatment; (c) This State will apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law; (h) Upon resumption of sovereignty over Hong Kong on 1 July 1997, the Government of China extended the territorial application of the Convention to Hong Kong, Special Administrative Region of China, subject to the statement originally made by China upon accession to the Convention. On 19 July 2005, China declared that the Convention shall apply to the Macao Special Administrative Region of China, subject to the statement originally made by China upon accession to the Convention. Reservations or other notifications (i) This State formulated a reservation with regards to retroactive application of the Convention. (j) This State formulated a reservation with regards to the application of the Convention in cases concerning immovable property.”)

Chart 2: Legislation based on the Model Law enacted in East Asia¹¹

State	Enactment	Notes ¹²
Hong Kong	2010	(a), (c)
Japan	2003	
Malaysia	2005	
Philippines	2004	
Republic of Korea	1999	
Singapore	1994	(d)
Thailand	2002	

East Asia's improvements on its legal infrastructure have facilitated the region's arbitral development and as a result, regional arbitration institutions have blossomed. The most active arbitration institutions in East Asia include the Hong Kong International Arbitration Center ("HKIAC"), the Singapore International Arbitration Centre ("SIAC"), the China International Economic and Trade Arbitration Commission ("CIETAC"), the Japan Commercial Arbitration Association ("JCAA"), the Korean Commercial Arbitration Board ("KCAB"), and the Kuala Lumpur Regional Centre for Arbitration ("KLRCA"). Many have modernized their arbitration rules with references to transnational standards such as the UNCITRAL Arbitration Rules. Some recent developments include the JCAA's amendment of its arbitration rules in 2014,¹³ KCAB's amendment in 2011,¹⁴ SIAC's amendments in 2010 and 2013,¹⁵ and CIETAC in 2012

11. *UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last visited May 11, 2016) [hereinafter *UNCITRAL Model Law*].

12. *Id.* (including the following notes: "(a) [i]ndicates legislation based on the text of the UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006[;] (b) [o]verseas territory of the United Kingdom of Great Britain and Northern Ireland[;] (c) [t]he legislation amends previous legislation based on the Model Law[;] (d) [t]his legislation has been further amended in 2001, 2003, 2005, 2009 and 2012.")

13. *See generally Commercial Arbitration Rules*, THE JAPAN COM. ARB. ASS'N, (Feb. 1, 2014), http://www.jcaa.or.jp/e/arbitration/docs/Arbitration_Rules_2014e.pdf.

14. *See generally KCAB International Rules 2011*, KOR. COM. ARB. BOARD (2011), http://www.kcab.or.kr/jsp/kcab_eng/law/law_02_ex.jsp (last visited May 11, 2016).

15. *See SIAC Announces Establishment of Users Council*, SIAC (Sept. 8, 2015), http://www.siac.org.sg/images/stories/press_release/SIAC-Announces-Establishment-of-Users-Council-8-Sept-2015.pdf (stating that the SIAC is currently reviewing its Arbitration Rules and that a revised version is scheduled to be released in mid-2016). *See generally SIAC Rules 2010*, SIAC, <http://www.siac.org.sg/our-rules/rules/siac->

and then 2015.¹⁶ KLRCA amended its arbitration rules in 2013.¹⁷ The HKIAC published the revised HKIAC Administered Arbitration Rules, effective since November 1, 2013.¹⁸

At the same time, we can observe an impressive increase of caseloads in East Asian arbitration institutions. For instance, the CIETAC handled only thirty–seven cases in 1985, but this number increased to 850 in 2004, and has exceeded 1,000 since 2007.¹⁹ Despite being entangled in post–split problems,²⁰ the CIETAC remained on top of the list of arbitration institutions in terms of the number of new cases accepted since 2001, ahead of the ICC International Court of Arbitration (“ICC”), the American Arbitration Association (“AAA”), and the London Court of International Arbitration (“LCIA”). In 2014, CIETAC handled a total of 1,610 cases, including 387 international cases.²¹ The HKIAC had only nine cases in 1985, and this number increased to 280 cases in 2004, reaching its peak of

rules-2010 (last visited May 11, 2016); *SIAC Rules 2013*, SIAC, <http://www.siac.org.sg/our-rules/rules/siac-rules-2013> (last visited May 11, 2016).

16. *See generally Arbitration Rules*, CHINA INT’L ECON. & TRADE ARB. COMM’N (Jan. 1, 2015), http://cn.cietac.org/rules/rule_E.pdf.

17. *See generally Arbitration Rules*, KUALA LAMPUR REGIONAL CTR. FOR ARB., http://klrca.org/downloads/rules/english/klrca_arbitration_en.pdf (2014).

18. *See generally Administered Arbitration Rules*, H.K. INT’L ARB. CTR., http://www.hkiac.net/images/stories/arbitration/2013_hkiac_rules.pdf (2013).

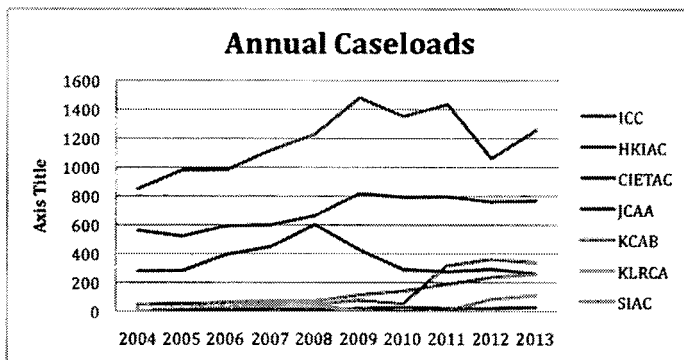
19. CIETAC’s increase of caseload is partly due to the economic growth of China in recent years.

20. *China International Economic and Trade Arbitration Commission An Open Letter to All Arbitrators*, CHINA INT’L ECON. & TRADE ARB. COMM’N, <http://www.cietac.org/index.php?m=Download&a=show&id=45&l=en> (last visited May 11, 2016). On May 1, 2012, CIETAC Beijing announced that the Shanghai sub-commission of CIETAC had split from the Beijing headquarters. The Shanghai sub-commission of CIETAC had, without approval from CIETAC Beijing, declared itself to be an independent arbitral institution, published its own arbitral rules and adopted its own panel of arbitrators. CIETAC Beijing considered the Shanghai sub-commission’s declaration of independence to be unlawful under the applicable Chinese arbitration laws and tribunals, as well as to be a violation of CIETAC’s Articles of Association. Three months later, on August 1, 2012, CIETAC Beijing announced that both the Shanghai and Shenzhen sub-commissions had decided to split from the Beijing headquarters. As a result, CIETAC Beijing revoked the authorisation it had granted to the Shanghai and South China sub-commissions to accept and administer arbitration cases under the authority of CIETAC. Press Release, China International Economic and Trade Arbitration Commission, China International Economic and Trade Arbitration Commission Announcement On Issues Concerning CIETAC Shanghai Sub-Commission and CIETAC South China Sub-Commission (December 31, 2012) (on file at <http://www.cietac.org/index.php?m=Download&a=show&id=42&l=en>); *see also* Kun Fan, *CIETAC’s Internal Conflicts: A Chronology of Events and Practical Implications*, ADR THOUGHTS (Apr. 27, 2013), <https://adrthoughts.wordpress.com/2013/04/27/cietacs-internal-conflicts-a-chronology-of-events-and-practical-implications/>, for a discussion of this topic.

21. Ning Fei & Shengchang Wang, *China*, ASIA-PAC. ARB. REV. (2016), <http://globalarbitrationreview.com/reviews/71/sections/238/chapters/2879/china/>.

602 cases in 2008.²² Despite a decreased caseload after the financial crisis, the HKIAC's caseload remains significant.²³ In 2014, HKIAC handled a total of 252 arbitration cases, 110 of which it fully administered.²⁴ The SIAC, another important regional arbitration center, saw an increased caseload from twenty in 1993 to 222 in 2014.²⁵ According to a recent international arbitration survey, the five most preferred arbitration institutions include the HKIAC and SIAC.²⁶ The HKIAC is also viewed as the most improved arbitration institutions in the past five years, followed by the SIAC.²⁷ Chart 3 demonstrates the annual caseloads of arbitration institutions in the region compared to the ICC.

Chart 3: Annual Caseloads of Arbitration Institutions in East Asia (compared to the ICC)²⁸



Furthermore, East Asian parties are beginning to play a more active role in international arbitration institutions beyond the region, as demonstrated by the ICC's statistics.²⁹ In 2014, there were a total of 123 East Asian parties in the newly filed ICC arbitration cases, 26.2% of which represented the Asia-Pacific Region, and 5.5% of those were ICC arbitrations that year.³⁰ Within East Asia, the leading parties include China

22. Fan, *International Dispute Resolution*, *supra* note 3, at 6.

23. *Id.*

24. *Case Statistics—2014*, H.K. INT'L ARB. CTR., <http://www.hkiac.net/en/hkiac/statistics/39-hkiac/statistics> (last visited May 11, 2016).

25. Fan, *International Dispute Resolution*, *supra* note 3, at 6.

26. *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, QUEEN MARY UNIV. OF LONDON & WHITE & CASE 1, 2 (2015), <http://www.arbitration.qmul.ac.uk/docs/164761.pdf> [hereinafter *2015 International Arbitration Survey*].

27. *Id.*

28. Data extracted from the official websites of the CIETAC, HKIAC, ICC annual Statistical Report, KCAB annual reports and information provided by the JCAA.

29. Fan, *International Dispute Resolution*, *supra* note 3, at 7. The statistics calculation is based on the parties' nationality.

30. See *2014 ICC Dispute Resolution Statistics*, ICC, <http://store.iccwbo.org/2014->

and Hong Kong, followed by Singapore, South Korea, and Japan.³¹ Even though the choice of ICC seats and the appointment of arbitrators continues to be Europe-dominated (e.g., in 2014, 65% of ICC seats were in Europe; 60.5% of the arbitrators appointed or confirmed in ICC arbitrations came from Europe), East Asian countries are beginning to gain popularity in the parties' choice of arbitration seats, as a result of their improved legal framework and court support.³² In 1980, no ICC arbitrations were seated in East Asia; however, in 2014 this figure increased to fifty.³³ Singapore and Hong Kong have become among the top ten most popular cities for ICC arbitration seats.³⁴ According to the 2015 International Arbitration Study, the five most preferred and widely used seats are London, Paris, Hong Kong, Singapore, and Geneva.³⁵ Singapore is the most improved arbitral seat, followed by Hong Kong.³⁶

As expertise in arbitration is growing in the region, East Asian arbitrators have also become much more active in international arbitrations. In 2014, forty-nine East Asian arbitrators were appointed to ICC arbitration.³⁷

icc-dispute-resolution-statistics (2015).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. 2015 International Arbitration Study, *supra* note 26, at 2.

36. *Id.*

37. 2014 ICC Dispute Resolution Statistics, *supra* note 30.

Chart 4: Parties, Arbitrators, and Places of Arbitration from East Asia in ICC Arbitrations in 2014 (A Country-by-country Breakdown)³⁸

	Parties	Arbitrators	Places of Arbitration
Mainland China	62	10	0
Hong Kong	11		16
Indonesia	2	N/A	N/A
Japan	11	1	2
Malaysia	3	7	1
Philippines	4	2	3
South Korea	13	2	3
Singapore	15	23	24
Taiwan	N/A	N/A	N/A
Thailand	2	4	1

III. COMPARISON OF THE CONTEMPORARY ARBITRATION REGIME BETWEEN CHINA AND JAPAN

The above analysis and data show that global economic integration has led to considerable convergence of law and legal institution designs across the region, which has been driven by the wide adoption of the New York Convention and Model Law, as well as the spread of commercial arbitration facilities in East Asia. Has this trend led to the unification of arbitral practice across the region? What are the salient features of international commercial arbitration in East Asia? Is there an East Asian culture of dispute resolution?

One should bear in mind that the classification of East Asia is, to a great extent, an externally imposed category. It combines many different cultural backgrounds, languages, and regional ethnic groups. However, the combined factors of former colonial influence, voluntary borrowing, and contemporary religious or ideological influences have contributed to the divergent legal systems in East Asia. Several former British colonies follow a common law tradition;³⁹ others inherited civil law traditions;⁴⁰ some

38. *Id.*

39. See H. Patrick Glenn, *LEGAL TRADITIONS OF THE WORLD* 346-47 (5th ed. 2014) (stating that the common law is most visible in Hong Kong, Malaysia, and Singapore).

40. See Michael Pryles & Michael J. Moser, *Introduction*, in *ASIAN LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 2* (Michael Pryles & Michael

inherited both.⁴¹ Some countries developed a socialist legal system,⁴² while others follow Islamic law.⁴³ Each country is at its own particular stage of development, influenced by various religious, political, and/or economic factors. Furthermore, cultural attitudes towards the law by individuals, corporations, and political elites also vary significantly within the region. The perception of what constitutes a dispute and how one reacts to it will be entirely different in Singapore than in Thailand, and different again from that in Indonesia, Japan, or China. The cultural diversity of East Asia permeates every aspect of the relationships of humans and businesses. It is therefore very difficult to identify common cultural and legal norms that are uniformly shared within East Asia.

Instead of attempting to make generalizations of culture in the region, this paper will take a microscopic approach to illustrate salient features of the current arbitration law and practice in China and Japan. As the second and third largest economies in the world, the two countries will play important roles in the development of arbitration in the region. Both China and Japan are deeply influenced by Confucian philosophy.⁴⁴ As a result, the dispute resolution mechanisms in the two countries are viewed as conciliatory, as opposed to the adversary mode utilized in the United States. The modern arbitration regimes of both jurisdictions, based on the Western model, are at a relatively early stage of development. In recent years, authorities in both jurisdictions have undertaken significant reforms to improve their arbitration legal framework. At the same time, the two countries diverge in their cultures, legal traditions, legal transplants, and contemporary political, social, and economic statuses. China and Japan can

J. Moser eds., 2007) (citing Indonesia, Japan, South Korea, Taiwan, and Thailand as countries that inherited civil law traditions).

41. See generally *The World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html> (last visited May 11, 2016) (listing the Philippines as a mixture of common and civil law).

42. See *Socialist Legal Systems*, WORLD ENCYCLOPEDIA OF L., <http://lawin.org/socialist-legal-systems/> (last visited May 11, 2016) (explaining that China developed a socialist legal system).

43. See DISPUTE RESOLUTION IN ASIA (Michael Pryles ed., 3d ed. 2006). For the classification of Asian legal systems by their predominant source of law, see also Yeni Salma Barlinti, *Harmonization of Islamic Law in National Legal System a Comparative Study between Indonesian Law and Malaysian Law*, 1 INDONESIA L. REV. 35, 35 (2011) (stating that Indonesia and Malaysia follow Islamic law).

44. See Kun Fan, *Glocalization of Arbitration: Transnational Standards Struggling with Local Norms Through the Lens of Arbitration Transplantation in China*, 18 HARV. NEGOT. L. REV. 175, 184 (2013) [hereinafter Fan, *Glocalization*] (stating that the Chinese approach to dispute resolution was strongly influenced by Confucian philosophy); see also Hoken S. Seki, *Effective Dispute Resolution in United States-Japan Commercial Transactions Perspectives*, NW. J. OF INT'L L. & BUS. 979, 986 (1985) (stating that Confucian ethics have "shaped the Japanese view toward law").

thus be used as case studies of how Western principles are adopted and adjusted with their traditional dispute processing. Comparisons in this section will examine legislation, court practices, and institutional arbitration practices.

A. Japan

i. History

Historically, Japan is one of several civilizations that grew independent of, but still under the influence of, classical Chinese imperialism.⁴⁵ Thus, the Japanese civilization of the Heian period (roughly 500–1100 AD) centered on the Imperial Court, which administered the country under a Confucian ideology and methodology, emphasizing harmony and conflict avoidance.

These concepts were later radically reshaped by a purely Japanese warrior, Ethos. By 1905, Japan had defeated Imperial Russia, one of the traditional European Great Powers, earning itself respect as a Great Power in its own right.⁴⁶ In the nineteenth century, Japanese law was remade almost entirely, drawing upon Western — primarily French and German — concepts and institutions, with a characteristic Japanese twist.⁴⁷ After World War II, Americans imposed a new Japanese constitution, which once again merged purely Japanese attitudes and characteristics with foreign input.⁴⁸ Throughout this extraordinary history of change and development, Japanese law has become a ‘hybrid’ or ‘mixed’ creature, much like the Japanese lunch box (Bento). Modern Japanese law is the product of a struggle to adapt foreign ideas to Japanese values, and Japanese values to ever-changing circumstances.

ii. Legislation

Japan has recognized arbitration as a technique of dispute resolution for at least a century.⁴⁹ In 1890, the part of the Japanese legal system

45. See Seki, *supra* note 44, at 985–86 (explaining that while Japan developed differently, the ancient Chinese influence still carried over into the Japanese legal tradition).

46. See *Russo-Japanese War*, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/event/Russo-Japanese-War> (last updated Mar. 30, 2016) (describing the Russo-Japanese War).

47. See Seki, *supra* note 44, at 986 (“Despite its Western European civil law roots, in the application of the laws Japanese courts and lawyers have developed institutions and procedures which are peculiarly Japanese.”).

48. See generally Justin Williams, *Making the Japanese Constitution: A Further Look*, 59 AM. POL. SCI. REV. 665 (1965).

49. Tony Cole, *Commercial Arbitration in Japan: Contributions to the Debate on*

pertaining to arbitration, the “Law Concerning Procedure for General Pressing Notice and Arbitration Procedure” (“Notice”), was enacted as Book VIII of the Code of Civil Procedure. The Code of Civil Procedure itself (Law No. 29 of 1890) was substantially modeled after the German Code of Civil Procedure of 1877.⁵⁰

The Code of Civil Procedure is silent on international arbitration and the enforcement of foreign arbitration awards. After passage of the Trade Association Law of 1948 (Law No. 191), private trade associations primarily arbitrated international commercial disputes.⁵¹ However, domestic disputes, under this 1948 law, could only be arbitrated under the Law of Arbitration in the Code of Civil Procedure.⁵² Despite the Code’s silence on international arbitration, Japan has entered into a number of multilateral and bilateral arbitration treaties, including the 1923 Geneva Protocol on Arbitration Clauses,⁵³ the 1927 Geneva Convention on the Enforcement of Foreign Arbitral Awards, the New York Convention,⁵⁴ and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”). At home, no domestic legislation was passed at the time to demonstrate firm national support and provide implementing mechanisms for these conventions.

In recent years, many strongly advocated the necessity of amending the Notice due to (i) the increasingly active efforts to promote the use of ADR, and (ii) the Notice’s inadequacies in resolving the large variety of disputes that exist in this modern age. Simultaneously in 1985, the United Nations Commission on International Trade Law adopted the UNCITRAL Model Law. Under such circumstances, the Ministry of Justice began a preliminary study into reforming arbitration law in 1997. The official preparation work for law reform did not start until December 2001, when the Consultation Group on Arbitration was established under the auspices of the office for Promotion of Justice System Reform of the Cabinet Office (Shiho-Seido Kaikaku Suishin Honbu, hereinafter referred to as “Reform Office”).⁵⁵ The Reform Office started a study group of arbitration experts

“*Japanese Non-Litigiousness*”, 40 INT’L L. & POL. 29, 38–39 (2007).

50. See T. Doi, *Japan*, 2 INT’L HANDBOOK ON COM. ARB. 1 (1986).

51. New York Convention on the Enforcement of Foreign Arbitral Awards, Sep. 26, 1927, U.S.T. 2517.

52. Toshio Sawada, *Practice of Arbitral Institutions in Japan*, 4 ARB. INT’L 2, 120–21 (1988); see also Charles Ragan, *Arbitration in Japan: Caveat Foreign Drafter and Other Lessons*, 7 ARB. INT’L 2, 93–113 (1991).

53. Protocol on Arbitration Clauses, *ratified* June 24, 1928, L.N.T.S. (Sep. 24, 1923).

54. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 4739.

55. Shunichiro Nakano, *International Commercial Arbitration Under the New Arbitration Law of Japan*, 47 JAPANESE ANN. INT’L L. 96, 97 (2004).

that considered the new law and reformed it based upon the Model Law. On March 14, 2003, the Reform Office submitted a bill for the New Law to the Japanese National Diet (Japan's legislature), and the Arbitration Law of Japan, promulgated on August 1, 2003 (Law No. 138 of 2003), which came into effect on March 1, 2004.⁵⁶ The New Law, promulgated as Law No. 138 of 2003, is applicable to both national and international arbitration. The New Law has adopted the majority of the Model Law with some slight modifications.⁵⁷

The Arbitration Law of Japan was enacted as a part of the Japanese government's efforts to enhance and promote ADR, such as methods for resolving disputes without litigation, with the purpose of making it easier for people to utilize arbitration. Provisions of the Law concerning the arbitration system are organized on the basis of the Model Law in the following major respects:

- (1) Concerning the validity of arbitration agreement, writing is required as to its form, but no specific substantive requirements are set out in the statutes. An action which is brought before a court in respect to a civil dispute which is the subject of an arbitration agreement shall, if the defendant so requests, dismiss the action; unless (i) the arbitration agreement is null and void, cancelled, or for other reasons invalid; (ii) the arbitration proceedings are inoperative or incapable of being performed based on the arbitration agreement; or (iii) the request is made by the defendant subsequent to the presentation of its statement in the oral hearing or in the preparations for argument proceedings on the substance of the dispute.⁵⁸
- (2) The parties are free to agree on a procedure of appointing the arbitrators and the qualifications of arbitrators. No special qualifications are required in the statutes, apart from arbitrators' independence and impartiality.⁵⁹
- (3) In arbitral proceedings, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the arbitral proceedings, provided that it does not violate the provisions of the Arbitration Law relating to public policy. Failing parties' agreement, the arbitral tribunal may, subject to the provisions of the Arbitration Law, conduct the arbitral proceedings in such manner as

56. See Luke Nottage, *Japan's New Arbitration Law: Domestication Reinforcing Internationalisation?*, 7 INT'L ARB. L. REV. 54, 56 (2004); see also Tatsuya Nakamura, *Salient Features of the New Japanese Arbitration Law Based Upon the UNCITRAL Model Law on International Commercial Arbitration*, 17 JCAA NEWSLETTER (2004).

57. See Nottage, *supra* note 56, at 64; see also Nakamura, *supra* note 56, at 2, for a commentary on the New Law.

58. Minji soshōhō [Minsohō] [C. Civ. Pro.] 2003, art. 14, para. 1 (Japan).

59. *Id.* art. 17, ¶¶ 1, 6.

it considers appropriate.⁶⁰ Further, the arbitral tribunal or a party may apply to a court for assistance in taking evidence by any means that the arbitral tribunal considers necessary.⁶¹

- (4) The grounds for setting aside an arbitral award are similar to the Model Law.⁶² Japan acceded to the New York Convention on June 20, 1961 and it came into effect on September 18, 1961.⁶³ According to the Japanese Constitution, international conventions and treaties are directly treated as law without any implementing legislation and prevail over national law.⁶⁴ In addition, “if international conventions and treaties are of a self-executing nature, they are directly applicable by the Japanese courts.”⁶⁵ Accordingly, the New York Convention will directly apply to the recognition and enforcement of a foreign arbitral award in Japan, as long as it falls under the New York Convention.⁶⁶
- (5) Enforcement records: Given the relatively small numbers of arbitrations in Japan, there have been only a few cases in Japan in which the court has applied the New York Convention to the enforcement of foreign arbitral awards.⁶⁷ There have not been any reported court decisions that have refused the enforcement of a foreign arbitral award under any of these conventions and treaties.⁶⁸ Indeed, the Japanese courts have consistently demonstrated a pro-arbitration approach, and have liberally granted enforcement of foreign arbitral awards.⁶⁹

iii. Arbitration Institutions

With the exception of numerous “arbitration centers” of local bar associations, there are only a limited number of arbitral institutions in Japan: The Japan Commercial Arbitration Association (JCAA) and the Japan Shipping Exchange, Inc. (JSE). These two institutions are the only

60. *Id.* art. 26.

61. *Id.* art. 35.

62. *See id.* art. 44.

63. *Contracting States*, N.Y. ARB. CONVENTION, <http://www.newyorkconvention.org/countries> (last visited May 11, 2016); *see also* Yasuhei Taniguchi & Tatsuya Nakamura, *Japanese Court Decisions on Article V of the New York Convention*, 25 J. INT’L ARB. 857 (2008) [hereinafter Taniguchi, *Japanese Court Decisions*].

64. Taniguchi, *supra* note 63.

65. *Id.*

66. Nakamura, *supra* note 56.

67. *See* Hiroyuki Tezuka & Yutaro Kawabata, *Japan*, INT’L ARB. REV. 296, 302–03 (2012) (explaining Japanese trends relating to arbitration).

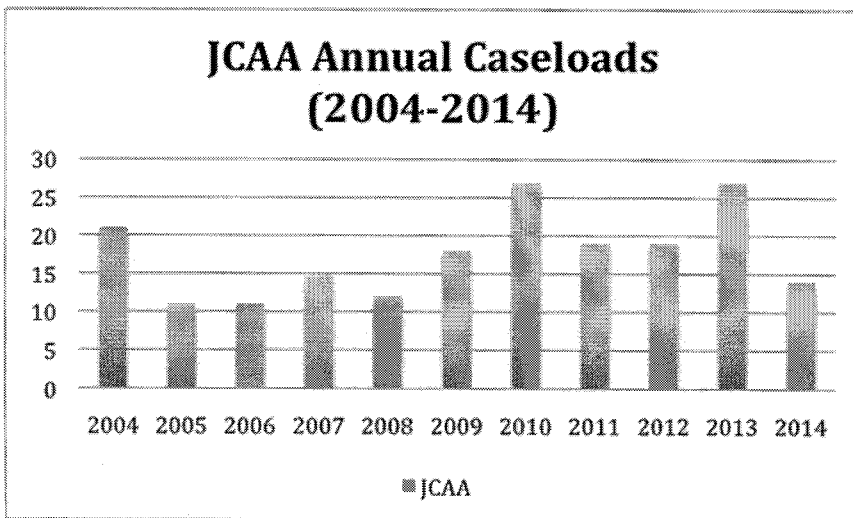
68. YASUHEI TANIGUCHI & TATSUYA NAKAMURA, NATIONAL REPORT FOR JAPAN, ICCA INT’L HANDBOOK COM. ARB. (Jan Paulsson & Lise Bosman ed. 2010) [hereinafter TANIGUCHI, NATIONAL REPORT]; *see also*, Nakamura, *supra* note 56.

69. Tezuka, *supra* note 68 at 302; *see also* Nakamura, *supra* note 56, for a record of enforcement cases in Japanese courts.

ones that handle international arbitration in Japan.⁷⁰

The Japan Chamber of Commerce and Industry established the JCAA in 1950, in co-operation with major trade and industrial organizations.⁷¹ The JCAA has dealt almost exclusively with international commercial disputes.⁷² JCAA “[a]rbitrations are administered in accordance with the JCAA’s Commercial Arbitration Rules” and the JCAA has an average of ten to twenty cases annually.⁷³

Chart 5: JCAA Annual Caseloads (2004–2014)



In terms of personnel, there is one general manager and one deputy general manager, plus two staff members in the Tokyo office, as well as one general manager and one staff member in the Osaka office. On average, they handle about twenty cases in Tokyo and about five cases on average. The JCAA maintains a panel list of arbitrators. In the current JCAA Panel list, there are about 150 arbitrators from twenty-five countries (some with dual nationality).⁷⁴

70. Nakamura, *supra* note 56.

71. *Id.*

72. Yasuhei Taniguchi & Tatsuya Nakamura, *Japan, in* ARBITRATION IN ASIA 3, 30 (Michael J. Moser ed., 2d ed. 2012).

73. *Id.*; see also Joongi Kim, *International Arbitration in East Asia: From Emulation to Innovation*, 4 ARB. BRIEF, 1, 6 (2014).

74. Telephone Interview with Tatsuya Nakamura, JCAA (Aug. 24, 2015); email from Tatsuya Nakamura, JCAA, to author (Aug. 31, 2015) (on file with author).

In light of recent trends in the amendments of arbitration rules by other arbitration institutions, the JCAA has decided to review its institution's rules, which were last amended in 2004, and established the Rules Amendment Committee in July 2012.⁷⁵ The Committee reviewed each provision of the Rules and considered necessary improvements and new provisions.⁷⁶ After the public consultation of the proposed amendments to the Rules, the final Rules were approved by the Board of Directors of the JCAA in December 2013, and came into effect on February 1, 2014.⁷⁷

Some highlights of the 2014 amendments of the JCAA Rules are summarized below:⁷⁸

- Allowing a third party to join the arbitration if certain requirements are satisfied;⁷⁹
- Incorporating improved provisions for consolidation of the parties' various claims;⁸⁰
- Containing new mediation rules enabling parties, by agreement, to refer their dispute to mediation any time during the arbitration;⁸¹
- Providing for emergency arbitrator provisions enabling a party, prior to the arbitral tribunal being constituted or when an arbitrator ceases to perform his or her duties, to seek appointment of an emergency arbitrator to grant interim measures;⁸² and
- Enabling parties, within two weeks of the request for arbitration, to jointly submit their dispute to expedite procedures, regardless of the amount of relief sought.⁸³

75. *The Key Points of the 2014 Amendment to the Commercial Arbitration Rules*, JCAA (Mar. 2014), <http://www.jcaa.or.jp/e/arbitration/docs/news31.pdf>.

76. *Id.*

77. *Id.*

78. *See id.*

79. *Id.*; *see also* JCAA Commercial Arbitration Rules, Chapter IV Rule 52 (2014).

80. *The Key Points of the 2014 Amendment*, *supra* note 75; *see also* JCAA Commercial Arbitration Rules, Chapter IV Rule 53.

81. *The Key Points of the 2014 Amendment*, *supra* note 75; *see also* JCAA Commercial Arbitration Rules, Chapter IV Rule 54.

82. *The Key Points of the 2014 Amendment*, *supra* note 75; *see also* JCAA Commercial Arbitration Rules Chapter V Rule 71.

83. *The Key Points of the 2014 Amendment*, *supra* note 75; *see also* JCAA Commercial Arbitration Rules Chapter VI Rule 75.

B. China

i. History

Since the 11th Century BC, the Chinese legal tradition has undergone continuous development.⁸⁴ This legal tradition is distinct from the common law and civil law traditions of the West and incorporates elements of both Legalist and Confucian traditions of social order and governance.⁸⁵ Three traditional Chinese terms approximate “law” in the modern sense — Fa, xing, and lü.⁸⁶ From a chronological perspective, what we today refer to as ancient law was, during the Three Dynasties (Xia, Shang and Zhou Dynasties) referred to as “xing,” during the Spring and Autumn Period and Warring States Period referred to as “fa,” and during Qin, Han, and later dynasties referred to mainly as “lü.”⁸⁷ The law was considered in ancient China merely as the instrument for the emperors to govern the country — which related to a compulsive and punitive imposition of order.⁸⁸ The ultimate rule of nature and human society is expressed in Chinese as li or dao (“理” or “道”), the standard of human behaviour is evaluated by li or li jiao (“礼,” “礼教”), and the national system is expressed as “zhi” (“制”).

During the 18th and 19th centuries, Western civilization was introduced into China, which “resulted in significant changes within the political, economic, and cultural structures of [Chinese] society.”⁸⁹ During this period, “[t]he 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.⁹⁰ However, traditional Chinese values will not disappear in such a short period of time.⁹¹

After the Qing dynasty was overthrown in 1911, China experienced trade-centered Western colonialism, which led to the “systematic

84. *Judicial Reform in China*, EMBASSY OF CHINA IN THE UNITED STATES (2012), <http://www.china-embassy.org/eng/zt/bps/t978034.htm>.

85. See Anne Judith Farina, “Talking Disputes into Harmony” *China Approaches International Commercial Arbitration*, 4 AM. U.J. INT’L L. & POL’Y 137, 142 (1989).

86. Xingzhong Yao, *Fa and Law – Critical Examination of the Confucian and Legalist Approaches to Law*, <http://tkugloba.tku.edu.tw/english/doc-e/AFa%20and%20Law.htm> (last visited May 13, 2016).

87. See *id.*

88. See Farina, *supra* note 85, at 141 (“Traditional Chinese society equated ‘law’ or *fa* with coercion.”).

89. Yu Xingzhong, *Legal Pragmatism in the People’s Republic of China*, J. OF CHINESE L. 29, 32 (1989); see also Xin Ren, *Tradition of the Law and Law of the Tradition: Law, State, and Social Control in China* 1, 7 (1992) (Ph.D. dissertation, University of Pennsylvania) (on file with proquest.com).

90. Xingzhong, *supra* note 89, at 32; Ren, *supra* note 89, at 3.

91. Xingzhong, *supra* note 89, at 32 (stating that traditional notions still remain influential today).

replication of Western law.”⁹² During this period, Western contacts pressured China to adopt economic laws that would govern trade. As a result, “the ruling Nationalists abrogated traditional Chinese law remaining from imperial times, and enacted a new body of law based largely on European-style civil law.”⁹³

Soon after its inception in February of 1949, “the government of the People’s Republic of China (PRC) abolished the old Nationalist laws” pursuant to the “instructions” issued by the Chinese Communist Party (the “CCP”), “and began building a socialist legal system.”⁹⁴ The PRC “rejected Nationalist legal theory, along with its laws, and sought to develop a new socialist legality to serve the needs of a socialist country.”⁹⁵ This process entailed a campaign of criticism against Western legal theory and large-scale borrowing from the Soviet model.⁹⁶

Pragmatists within the CCP, which had been led by Den Xiaoping since 1978, carried out an economic reform in an attempt “to generate sufficient surplus value to finance the modernization of the mainland Chinese economy.”⁹⁷ Since the far-changing economic reforms, “[t]he growth has fueled a remarkable increase in per capita income and a decline in the poverty rate from 64% at the beginning of reform to 10% in 2004,” indicating that about 500 million people climbed out of poverty during this period.⁹⁸ In this economic and political renewal process, many of the capitalist legal structures and concepts that early reformers sought to

92. *Id.*

93. *Id.* at 32–33.

94. *Id.* at 29. The Instructions stated: “The judicial organs should educate and transform the judicial cadres with a spirit that holds in contempt and criticizes the Six Laws of the Nationalists and all reactionary laws and regulations, and holds in contempt and criticizes all the anti-people laws and regulations of bourgeois countries in Europe, America and Japan. To accomplish this aim, they should study and master the concepts of state and law of Marxism-Leninism and Mao Zedong Thought, and new democratic policies, programmatic principles, laws, orders, regulations and decisions.” *Id.* at 33 (quoting Zhongguo Zhongyang Guanyu Feichu Guomindang de Liufa Quanshu yu Queding Jiefangqu Sifa Yuanze de Zhishi (Instructions of the Chinese Communist Party Central Committee Relating to Abolishing the Complete Six Laws of the Guomindang and Establishing Judicial Principles for the Liberated Areas) (1949), reprinted in 2 FAXE LILUN XUE-XI CHANKAO ZILIAO (Referencing Materials for the Study of Jurisprudential Legal Theory) 1 (1983) [hereinafter Instructions]).

95. *Id.* at 29.

96. *Id.*

97. Xu Ying, *Economic Reform in the People’s Republic of China (I)*, ETEACHER CHINESE OFFICIAL BLOG, <http://blog.eteacherchinese.com/history-of-china/economic-reform-in-the-peoples-republic-of-china> (last visited May 13, 2016).

98. David Dollar, *Poverty, Inequality and Social Disparities During China’s Economic Reform* (2007), <http://china.usc.edu/sites/default/files/legacy/AppImages/Dollar.pdf>; Ravallion Martin & Chen Shaohua, *China’s (Uneven) Progress Against Poverty*, 82 J. DEV. ECON. 1, 8–9 (2007).

eradicate were re-introduced.⁹⁹ As a result, China's new legal system was shaped by the often "divergent pulls of models drawn from China's historical experience on the one hand, and models based on the experience of Western countries and the newly industrialized nations of Asia on the other hand."¹⁰⁰

Early in the history of PRC, an arbitral organ was established to handle international commercial disputes based on the model of the Soviet Union. Arbitration otherwise received little serious consideration before the economic reforms. In 1962, a notice of the State Council "provided that disputes among state enterprises should be 'arbitrated' by local branches of the State Economic Commissions that was charged . . . with executing the five-year and yearly plans" of the Chinese government.¹⁰¹ However, even though "the term 'arbitration' appeared, in reality this was not arbitration, but rather administrative handling."¹⁰² Thereafter, the Culture Revolution intervened, preventing further experimentation with legal institutions and arbitration mechanisms did not reappear until twenty years later.¹⁰³

As legislation defined new commercial transactions in the early 1980s, arbitration bodies were created to deal with a growing number of disputes.¹⁰⁴ These arbitral bodies were created on an ad hoc basis and lacked a formal legal infrastructures or unifying principles to support them. According to statistics, by the end of June 1994, there were fourteen laws, eighty-two administrative regulations, and 192 local regulations applicable to arbitration.¹⁰⁵ In this legislative welter, the arbitration was developed as an un-systematized assortment of institutions. Approximately twenty different types of arbitration organizations existed, all varying on fundamental issues such as the requirement of an agreement between the parties as a prerequisite to arbitration and the relationship of arbitration to mediation. Moreover, in some cases the parties could go directly to the courts.¹⁰⁶

99. Yu Xingzhong, *Legal Pragmatism in the People's Republic of China*, 3 J. CHINESE L. 29, 30 (1989).

100. Kun Fan, *ARBITRATION IN CHINA: A LEGAL AND CULTURAL ANALYSIS* (2013) [hereinafter Fan, *ARBITRATION IN CHINA*].

101. Stanley B. Lubman, *Dispute Resolution in China after Deng Xiaoping: Mao and Mediation Revisited*, 11 COLUM. J. OF ASIAN L. 229, 304 n.218 (1997).

102. *Id.*

103. Stanley Lubman, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* 242 (1999) [hereinafter LUBMAN, *BIRD IN A CAGE*].

104. Zhao Xiuwen & Lisa A. Kloppenberg, *Reforming Chinese Arbitration Law & Practices in the Global Economy*, 31 U. DAYTON L. REV. 421, 421-22 (2006).

105. 谭兵:《中国仲裁制度研究》,法律出版社(1995), p17. (Research on Chinese Arbitration System)

106. Lubman, *BIRD IN A CAGE*, *supra* note 107, at 242.

ii. Legislation

In 1995, the Arbitration Law was implemented in China to create a new nationwide arbitration system and to diminish administrative interference in the old domestic arbitration system.¹⁰⁷ Many internationally recognized principles were recognized in the Arbitration Law, such as: party autonomy, independence of arbitration, and finality of arbitral awards.¹⁰⁸ However, the notion of control can still be found throughout the arbitration proceedings, which restricts party autonomy.¹⁰⁹ Administrative powers interfere with the key players of the arbitration proceedings, that is, the parties and the arbitral tribunal.¹¹⁰ The salient features in the Chinese practice that differ from the Model Law approach are highlighted as follows:¹¹¹

- (1) Concerning the validity of arbitration agreement, the Arbitration Law sets out substantive requirements, namely, (a) the expression of the parties' wish to submit to arbitration; (b) the matters to be arbitrated; and (c) the designated arbitration institution.¹¹² An arbitration agreement failing to designate an arbitration institution will be considered invalid under the Arbitration Law. This specific requirement excludes the possibility of ad hoc arbitration in China and puts the possibility of foreign arbitration institutions administering arbitration in China in doubts.¹¹³
- (2) The generally accepted principle of competence—competence is not recognized under the Arbitration Law of China.¹¹⁴ The power to determine the validity of an arbitration agreement is vested in the Court and Arbitration Institution, instead of the individual Arbitral Tribunal.¹¹⁵
- (3) The qualifications of arbitrators are specifically set out in the Arbitration Law, particularly: (a) to have been engaged in arbitration work for at least eight years, (b) to have worked as a lawyer for at

107. Fan, ARBITRATION IN CHINA, *supra* note 100 (“The Arbitration Law of China was adopted by the 9th Session of the Standing Committee of the eighth NPC of the PRC on 31 August 1994 and came into force on 1 September 1995.”).

108. *Id.*

109. *Id.*

110. *Id.*

111. See Kun Fan & Clarisse Von Wunschheim, *Arbitrating in China: The Rules of the Game – Practical Recommendations concerning Arbitration in China*, 26 ASA BULL. 35 (2008), for further details; Kun Fan, *Arbitration in China Practice, Legal Obstacles, and Reforms*, 19 ICC INT’L CT. OF ARB. BULL. 25 (2008).

112. ICC Rules of Arbitration, Article 16 (2009).

113. See Jingzhou Tao and Clarisse Von Wunschheim, *Articles 16 and 18 of the PRC Arbitration Law: The Great Wall of China for Foreign Arbitration Institutions*, 23 ARB. INT’L 309, 309–25 (2007).

114. Fan & Wunschheim, *supra* note 111, at 37.

115. ICC Rules of Arbitration art. 20 (2009).

least eight years, (c) to have been a judge for at least eight years, (d) to have engaged in legal research or legal teaching in senior positions, or (e) to have legal knowledge and be engaged in professional work relating to economics and trade, and to possess a senior professional title or to have an equivalent professional level.¹¹⁶ The legislative control went further to set the procedural rules of appointment. Article 13 of the Arbitration Law requires each arbitration institution to draw up its own panel of arbitrators according to different professions.¹¹⁷ This stipulation is generally interpreted as creating a compulsory panel system in China.¹¹⁸

- (4) The procedure for enforcement of arbitral awards in China depends on the type of award: “domestic,” “foreign-related,” or “foreign.”¹¹⁹ Foreign arbitral awards are enforced in China in accordance with the New York Convention. Grounds for setting aside and refusing to enforce foreign-related awards are similar to the Model Law and limited to procedural grounds.¹²⁰ When it comes to enforcing domestic awards, on the other hand, Chinese courts are allowed to review both procedural and substantive issues, on the following grounds: (1) evidence on which the forged award was based, and (2) the other party withheld sufficient evidence to affect the impartiality of the arbitration.¹²¹

To reduce the risk of decisions being invalidated because of local protectionism and lower court corruption, a so-called Report System¹²² was established by the Supreme People’s Court in 1995,

116. *Id.* article 13.

117. Fan & Wunschheim, *supra* note 111, at 40.

118. *Id.*

119. Foreign awards are those rendered outside China (including in Hong Kong, Macao and Taiwan). Awards rendered within China will be considered either domestic awards or foreign-related awards, depending on whether a foreign element presents.

120. 1995 Arbitration Law of the People’s Republic of China (promulgated by Decree No.31 of the President of the People’s Republic of China, Oct. 31, 1994), art. 70-71, [hereinafter Arbitration Law]; (中华人民共和国民事诉讼法) [Civil Procedure Law of the People’s Republic of China] (promulgated by Nat’l People’s Cong., Apr. 9, 1991, effective Apr. 9, 1992, amended by the Standing Comm. Nat’l People’s Cong., Aug. 31, 2012, effective Aug. 31, 2012), art. 274, [hereinafter Civil Procedure Law].

121. 1995 Arbitration Law of the People’s Republic of China (promulgated by Decree No.31 of the President of the People’s Republic of China, Oct. 31, 1994), art. 58(1), [hereinafter Arbitration Law]; (中华人民共和国民事诉讼法)[Civil Procedure Law of the People’s Republic of China] art. 258 (promulgated by Nat’l People’s Cong., Apr. 9, 1991, effective Apr. 9, 1992, amended by the Standing Comm. Nat’l People’s Cong., Aug. 31, 2012, effective Aug. 31, 2012), art. 237, [hereinafter Civil Procedure Law].

122. *See* Press Release, Notice from the Supreme People’s Court on Several Issues Regarding the Handling by the People’s Courts of Certain Issues Pertaining to International Arbitration and Foreign Arbitration (Aug. 28, 1995) (on file with author); Press Release, Notice from the Supreme People’s Court on Relevant Issues Relating to

under which a lower court cannot refuse to enforce a foreign-related or foreign arbitral award or deny the validity of an arbitration agreement in foreign-related or foreign arbitration proceedings without the prior examination and confirmation of the Supreme People's Court.

- (5) Thanks to the Report System, some negative rulings by local courts have become accessible. In September of 2001, the Fourth Division of Civil Trials of the SPC started to publish its replies to its subordinate courts' reports on whether to refuse applications for enforcement of foreign-related and foreign arbitral awards, in a series of books named *Guide on Foreign-related Commercial and Maritime Trials* (from 2004 onwards) or *Guide and Study on China's Foreign-related Commercial and Maritime Trials* (from 2001–2003).¹²³ A review of such enforcement records shows that the Report System has had a positive effect in protecting foreign investors and limiting the influence of local protectionism. However, there are still inconsistent decisions by courts of different levels and regions due to the unbalanced development of the economy, legal consciousness, and the quality of judges in different regions of China.¹²⁴

Because of the lack of a centralized registry for statistics dealing with the enforcement of arbitral awards in China, no definite conclusions can be reached as to the extent to which enforcement actions have been brought to the Mainland Courts and how successful such actions have been. In 2007, the Fourth Civil Division of the SPC conducted a sample survey on the judicial review of foreign-related and foreign arbitration by the people's courts,¹²⁵ involving courts of seventeen regions.¹²⁶ According to the survey, of the seventy-four cases for the recognition and enforcement of

the Setting Aside of International Awards by the People's Courts (Apr. 23, 1998) (on file with author).

123. EXIANG WAN, *GUIDE AND STUDY ON CHINA'S FOREIGN-RELATED COMMERCIAL AND MARITIME TRIALS* 1–6, 7–18 (2003); Judge Gao Xiaoli, Fourth Division of Civil Trials, Speech at the Annual Conference of International Economic Law at the Northwest University of Politics and Law at Xi'an, Shanxi, China (Nov. 2006).

124. See FAN, *ARBITRATION IN CHINA*, *supra* note 100, at 101–13.

125. See Honglei Yang, *Report on the Judicial Review of International Arbitration by Chinese Courts*, 9 *WU DA INT'L L. REV.* (2009). The sample survey covers the following types of cases: (i) application for the confirmation of the validity of arbitration agreement; (ii) application for setting aside foreign-related arbitral awards; (iii) application for the recognition and enforcement of foreign-related awards from one party and the application for refusal of enforcement from the other; and (iv) application for the recognition and enforcement of foreign awards. Hong Kong, Macao and Taiwan awards are not included in the survey. The survey collected a total of 610 cases heard by the investigated courts between 2002 and 2006.

126. The 17 regions include: Beijing, Shanghai, Tianjin, Jiangsu, Guangdong, Liaoning, Fujian and Shandong, Hubei, Zhejiang, Hei Longjiang, Hunan, Guangxi, Hainan, Shanxi, Sichuan and Chongqing.

foreign arbitral awards heard by the Chinese courts, rulings to reject recognition and enforcement of such awards were made in only five of these cases (6.76% of the total cases).¹²⁷ The courts have made affirmative conclusions in the majority of these cases and ruled to enforce foreign awards in fifty-eight cases (78.38% of the total applications).¹²⁸ Furthermore, the survey also reflects the importance of the Report System in current judicial practice.¹²⁹ In the applications for recognition and enforcement of foreign awards, nine were rejected by the lower level courts.¹³⁰ Thanks to the Report System, four of these rejected cases were overruled by the SPC, accounting for forty-four percent of the total reported cases.¹³¹

According to the SPC judges, from 2000 to September 2011, a total of fifty-six cases had been reported to the SPC, in which lower courts refused to recognize and enforce foreign awards.¹³² The SPC confirmed the refusal of recognition and enforcement of foreign awards in twenty-one of those reported cases: eight cases due to the lack of a valid arbitration agreement; nine cases were refused on the ground of no proper notice of the appointment of arbitrator or of the proceedings or violation of due process; two cases of partial refusal of recognition and enforcement due to partial *ultra vires*; and one case due to the in-arbitrability under the Chinese law.¹³³ In three cases the claimant's request was dismissed due to the expiration of the time limit for enforcement.¹³⁴

iii. Arbitration Institutions

CIETAC is considered to be the leading arbitral institution for international arbitration in China, although it faces mounting competition from other domestic institutions, such as Beijing Arbitration Commission ("BAC"). Established in 1956 under the auspices of the Chinese Council for the Promotion of International Trade, CIETAC's administration was initially confined to disputes with a "foreign element."¹³⁵ However,

127. *Id.* at 306–08.

128. *Id.* at 309 (Among the 74 applications, 6 cases were withdraw upon the parties' settlement agreement, and 5 cases were pending or under other circumstances).

129. *Id.*

130. *Id.*

131. *Id.*

132. Fan, *ARBITRATION IN CHINA*, *supra* note 100.

133. *Id.*

134. Guixiang Liu & Hongyu Shen, *RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN CHINA: A REFLECTION ON A DECADE OF COURT PRACTICES* 10, 22–23 (2011).

135. See Andrea Sturini & Lorrain Hui, *Commentary on the Arbitration Rules of the China International Economic and Trade Arbitration Commission* 268, 269 (2011), http://www.maa.net/uploads/VJ/5._Sturini_and_Hui.pdf.

amendments to CIETAC's arbitration rules in 2000 expanded its jurisdiction to allow administration of both domestic and foreign-related disputes, as well as disputes involving no Chinese parties.¹³⁶

CIETAC accepted a total of 1,610 cases in 2014 alone, with 1,223 domestic cases and 387 international cases, which has made CIETAC one of the most important permanent arbitration institutions in the world.¹³⁷ The 2014 caseload represents a twenty-eight percent increase (by 354 cases) from 2013.¹³⁸ In 2014, "[t]he total amount of claims of all cases accepted by CIETAC . . . reached 37.8 billion renminbi, which represents an increase of fifty-five percent or 13.4 billion renminbi from 2013."¹³⁹ These cases involved parties from forty-eight countries and regions.¹⁴⁰ CIETAC amended its list of arbitrators in 2014 to include 1,212 arbitrators from forty-one countries.¹⁴¹

In 2014, "CIETAC published its new Arbitration . . . which became effective as from 1 January 2015" (the "CIETAC Rules 2015").¹⁴² The CIETAC Rules 2015 "are designed to improve the efficiency of CIETAC arbitral proceedings and bring CIETAC rules further in line with international best practice."¹⁴³ "Key amendments include provisions dealing with problems after CIETAC's split, multiparty arbitration, joinder of additional parties, consolidation of arbitration, arbitrator's power to order interim protection, emergency arbitrators, and special provisions in relation to arbitration administered by CIETAC Hong Kong Arbitration Center."¹⁴⁴

136. *Id.*

137. *See* CIETAC, www.cietac.org (last visited Oct. 30, 2015).

138. Fei & Wang, *supra* note 21.

139. *Id.*

140. *Id.*

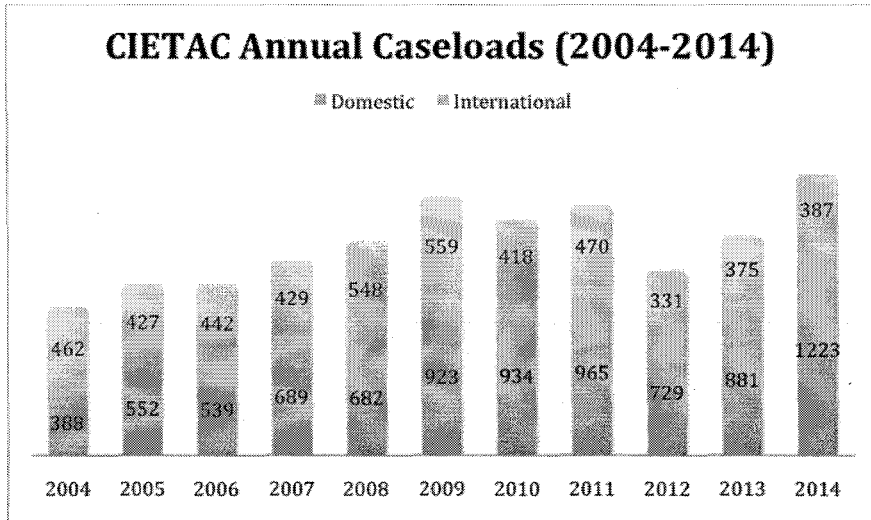
141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

Chart 6: CIETAC Annual Caseloads (2004–2014)



Meanwhile, the BAC is handling an increasing number of international arbitration cases.¹⁴⁵ On December 4, 2014, “BAC officially released its new Arbitration Rules, which took effect on 1 April 2015” (the BAC Rules 2015).¹⁴⁶ The eighth revision of its arbitration rules since 1995 reflect “BAC’s fast growing experience in arbitration, as well as its close attention to the developments in international arbitration practice.”¹⁴⁷ These amendments increase the flexibility of the arbitral tribunal to run arbitration hearings;¹⁴⁸ provide for arbitration proceedings to continue pending BAC’s determination of a jurisdictional objection in the same proceedings;¹⁴⁹ and enlarge the scope of an arbitration agreement “in writing” so that a party’s intention to arbitrate is not thwarted by a failure to comply with strict

145. *Id.*

146. *Id.*

147. *Id.*; see also *Beijing Arbitration Commission Arbitration Rules: Revision Draft Description*, BEIJING ARBITRATION COMM’N, 1 (Oct. 31, 2013) www.bjac.org.cn/images/20131211/Revision%20Draft%20Description.doc at 1.

148. BEIJING ARBITRATION COMM’N, Arbitration Rules art. 34 (2015), http://www.bjac.org.cn/page/data_dl/bjac_guize_en.pdf. (“The Arbitral Tribunal shall have the power to, depending on the circumstances of the case, determined the agenda of cases and take such various hearing measures as issuing question lists, holding pre-hearing conferences or producing terms of reference”).

149. *Id.* art. 6, § 3 (The arbitration shall proceed notwithstanding any jurisdictional objection raised by any party to the BAC).

written form requirements.¹⁵⁰

Other Chinese arbitration commissions were established by local provincial or city governments at various times after the first PRC Arbitration Law came into effect in 1995. There are currently over 200 such commissions. However, these arbitration commissions generally have less experience in handling international arbitration cases.

IV. SALIENT FEATURES OF ARBITRATION IN EAST ASIA

The above comparison finds that the recent reforms, in terms of legislation and institutional infrastructure in both Japan and China, have produced positive effects for the development of arbitration. It also illustrates the divergences in the conduct of arbitration in Japan and China. This section will summarize the country-specific features of arbitration in Japan and China and will highlight some commonalities in the countries' conduct of arbitration and in East Asia more generally. It also attempts to analyze the cultural reasons that contributed to divergences and convergences in the practice of arbitration in East Asia.

A. *The Inactiveness of Arbitration in Japan*

A curious phenomenon in cotemporary arbitration development is the sharp contrast between the drastic growth of arbitration in China¹⁵¹ and the continued inactiveness of arbitration in Japan.¹⁵²

Japan adopted a Model Law type of arbitration legislation in 2003 and has since developed strong institutional support for arbitration, including Japanese courts generally taking a pro-arbitration approach.¹⁵³ Nonetheless, arbitration has not taken off in Japan as one would expect. Although the JCAA increased its caseload slowly over the years, it has

150. *Id.* art. 4, §§ 2–3. (stating (2) An arbitration agreement shall be in written form, including but not limited to contractual instruments, letters and electronic data messages (including telegrams, telexes, facsimiles, EDIs and e-mails) and any forms of communication where the contents are visible. (3) Where, in the exchange of the Application for Arbitration and the Statement of Defence, one party claims the existence of the Arbitration Agreement whereas the other party does not deny such existence, it shall be deemed that there exists a written Arbitration Agreement).

151. Kanishk Verghese, *Arbitration in Asia: The Next Generation?*, ASIAN LEGAL BUS. (July 1, 2014), <http://www.legalbusinessonline.com/reports/arbitration-asia-next-generation> (explaining that CIETAC has attracted more than 1,000 new arbitration cases per year since 2007).

152. Lars Markert, *The JCAA Arbitration Rules 2014- One Step Forward in the Modernization of Japanese Arbitration*, JAPAN COM. ARB. ASSOC. (Oct. 2014), <http://www.jcaa.or.jp/e/arbitration/docs/news32.pdf> (explaining that the JCAA accepts less than twenty cases per year); see also *supra* Charts 5 & 6.

153. Herbert Smith Freehills et. al., *Japan – Law & Practice*, CHAMBERS & PARTNERS (2016), <http://www.chambersandpartners.com/guide/practice-guides/location/265/7770/2188-200>.

done so at a slower rate than other arbitration institutions in the region. Furthermore, international arbitration institutions administer only a few arbitrations in Japan. For instance, from 1997 to 2014 only a total of forty-six ICC arbitrations, an average of three per year, took place in Japan.¹⁵⁴ In contrast, in 2014 alone, ninety-four ICC arbitrations took place in France, eighty-two in Switzerland, and twenty-four in Singapore.¹⁵⁵

For decades, scholars have heavily debated the reasons for Japanese non-litigiousness.¹⁵⁶ “Culturalists” argue that Japan is reluctant to litigate because of the Japanese culture’s emphasis on the need for harmony in social relations.¹⁵⁷ “Institutionalists,” on the other hand, insist that Japan’s low litigation rates are due to the structural impediments to litigation 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.¹⁵⁸ The institutionalists’ theory presents a more comprehensive picture of the Japanese legal system and may explain why Japan avoids litigation. However, the question remains: why is there a similarly low use of arbitration, which does not have such structural barriers in the court system? Some scholars argue that Japan’s continuing low rate of arbitration and litigation is best explained by the “disjunction” between Japanese law and social rules, rather than institutional barriers.¹⁵⁹ 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.”¹⁶⁰ One such disjunction exists between arbitration as a formalistic mechanism and the deeply rooted informal relational traditions in Japan.

However, reducing Japan’s relative slow growth in arbitration to single point issues is too simplistic. The slow growth rate may be attributable to a combination of various factors, such as Japanese local culture, economic structure, and persistent organizational norms and practices within Japanese

154. ICC Statistical Report 1997-2014.

155. ICC Statistical Report 2014.

156. See John Owen Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359, 366-71 (1978) (raising serious doubts to the notion of the ‘non-litigiousness of the Japanese’); see also K. ZWEIGERT & H. KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 327-28 (2d ed. 1988).

157. 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, 501-02 (1979).

158. See John Owen Haley, *The Myth of the Reluctant Litigant* 4 J. JAPANESE STUD. 359, 385 (1978); Mark Ramseyer, *Reluctant Litigant Revisited: Rationality and Disputes in Japan*, 14 J. JAPANESE STUD. 111, 116-17 (1988).

159. Tony Cole, *Commercial Arbitration In Japan: Contribution to the Debate on Japanese Non-Litigiousness* 40 N.Y.U. J. INT’L L. & POL. 29, 79-80 (2007).

160. *Id.*

corporations.

For domestic disputes, the high quality and efficiency of its domestic civil court system has made arbitration an unpopular alternative. For example, “[t]he Japanese hold their judges in extremely high esteem and regard them as sacred in the proper social order. On the other hand, arbitrators are mere private persons who are not State officials.”¹⁶¹ As a result, court decisions are preferred over arbitral awards, “because they are made by fair and reliable judges, whereas decisions of arbitrators do not carry the same weight.”¹⁶² For instance, in 2014, only fourteen arbitration cases were filed at the JCAA, while a total of 1,524,018 cases (civil and administrative) were filed with Japanese courts.¹⁶³ Furthermore, Japanese courts have made significant efforts to expedite civil trials and increase their capacity to deal with complex disputes.¹⁶⁴ With the trust for the Japanese judiciary, there seems to be less need to search for an alternative forum to resolve domestic disputes.

Where international business is concerned, the Japanese are prepared to use arbitration to resolve conflict because of its perceived neutrality.¹⁶⁵ Empirical evidence suggests that the majority of Japanese companies surveyed (sixty-six percent) typically include arbitration clauses in their international contracts, one or more times more so than any other dispute resolution mechanism (only twenty-seven percent include provisions subjecting a prospective dispute to international litigation).¹⁶⁶ However, Japanese companies have been prone to agree to arbitration with an arbiter outside Japan. The growing investments of Japanese companies overseas may also undermine the incentives to press for the use of Japanese substantive law and Japan as the seat of arbitration for resolving cross-border disputes involving Japanese interests.¹⁶⁷ Another reason might be that at the time of contract, Japanese companies do not pay enough

161. Russell Thirgood, *A Critique of Foreign Arbitration in Japan* 18 J. INT’L ARB. 177, 178–79 (2001).

162. *Id.*

163. Statistics are provided by the JCAA.

164. Yasuhei Taniguchi, *The Development of the Adversary System in Japanese Civil Procedure*, in *LAW IN JAPAN: A TURNING POINT* 80–98 (Daniel H. Foote, ed., 2007); Tatsuya Nakamura & Luke Nottage, *Arbitration In Japan* 1, SYDNEY L. SCH. (2012), <http://ssrn.com/abstract=2070447>.

165. Thirgood, *supra* note 161 at 178–79.

166. 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, another based on a total of 57 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*, 8 *TRANSNAT’L DISP. MGMT.* (2011).

167. See generally Nottage, *supra* note 56.

attention to the dispute settlement clauses.¹⁶⁸

It is important to note that incorporation of an arbitration clause into the contract does not necessarily mean that arbitration will be used to ultimately resolve the disputes. Empirical survey data shows that Japanese companies typically resolve approximately eighty-three percent of all their international commercial disputes through negotiated settlements. Furthermore, a significant number of Japanese companies (37.5%) have filed for arbitration in order to further settlement negotiations.¹⁶⁹ Such behavior may be explained by the “persistent organizational norms and practices within Japanese corporations.”¹⁷⁰ When disputes arise, Japanese corporate executives’ first choice would still be to settle it amicably through negotiation. As top corporate executives are often ignorant about arbitration, the responsibility rests upon the legal department staff, who is hesitant and wants to avoid the risk of losing arbitration by settling the dispute amicably, sometimes with large concessions. According to Professor Taniguchi, “this is a part of the Japanese corporate culture which has been basically unchanged for decades or for a century despite a radically changed business environments in which they operate.”¹⁷¹ In this way, he describes “the Japanese corporate dispute resolution culture has affinity with the conciliation culture, but, in a peculiar way, also with the litigation culture. Arbitration culture is not yet well accepted in the Japanese business society.”¹⁷²

Such corporate behavior—the reluctance of Japanese companies to initiate arbitration—is arguably related to cultural factors such as Japan’s reputation for being traditionally dispute-averse and its preference for amiable settlements. Traditionally, the Japanese prefer extra-judicial and informal means of settling disputes. A face-saving, mutually agreeable compromise is much more acceptable than confrontational forms of dispute resolution.¹⁷³

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 a negotiated settlement when a dispute actually arises.

168. Yasuhei Taniguchi, *Arbitration Cultural Revisited 18 years later*, Workshop on “Towards A Theory of Arbitration”, co-hosted by the Faculty of Law, Chinese University of Hong Kong and Harvard Yenching Institute (June 27–28 2014).

169. Richter, *supra* note 166.

170. Nottage, *supra* note 56.

171. Taniguchi, *supra* note 168.

172. *Id.*

173. Thirgood, *supra* note 161, at 178–79.

B. Top-Down Approach of Arbitration in China

Another noticeable feature is the unique practice of arbitration in China, which differs from transnational standards. “While China considered, but ultimately decided against, adopting the Model Law, a number of its key principles are nonetheless reflected in the 1995 legislation.”¹⁷⁴ China’s Arbitration Law has “made an important contribution by unifying the previously scattered legislative enactments governing arbitrations in China.”¹⁷⁵ Nevertheless, restrictions on party autonomy and elements of state control can also be found in various aspects of arbitration in China. For example, ad hoc arbitration is not allowed, the appointment of arbitrators is restricted by statutory qualifications and a compulsory panel system, and enforcement of arbitral awards are sometimes influenced by local protectionism. Traces of extensive state control can be found along the whole process of arbitration, from the arbitration agreement, to the constitution of the tribunal, and the court review of arbitral awards.

Furthermore, strong administrative features exist in institutional practice in China. The starting point of institutional arbitration in China is the role of the institution, which acts as the guardian of rights and the quality control of the arbitration.¹⁷⁶ This practice is not entrusted to individuals in the role of the arbitrators. As a result, government control and administrative influence can be gleaned in the following aspects of institutional arbitration in China:

- Unilateral institutional arbitration makes it impossible for parties to escape institutional control through ad hoc arbitration;
- Chinese arbitration institutions are generally more “institutional” than any other international arbitration institutions; and
- Chinese arbitration institutions are still subject to administrative influence and government control in terms of their establishment, financial resources and personnel.

State control over institutional practice can be explained through the metaphor of a “bird in a cage,” in which the state functions as a cage and captures all business activities (the birds) within the cage.¹⁷⁷ In other words, the freedom to contract only extends to the boundaries of the cage established by the state.¹⁷⁸

Given that the notion of “individual rights” is not emphasized in the Chinese tradition, the law in China comes from above. The Chinese

174. Pryles & Moser, *supra* note 40, at 11.

175. *Id.* at xxiii.

176. See Fan, ARBITRATION IN CHINA, *supra* note 100.

177. Lubman, BIRD IN A CAGE, *supra* note 103.

178. Fan, ARBITRATION IN CHINA, *supra* note 100.

system begins with the state as a guardian of rights and the quality control of arbitration as a “public” means of dispute resolution.¹⁷⁹ This top-down notion casts a long shadow on the way arbitration is conducted in China.¹⁸⁰

C. *The Wide Use of Mediation in Arbitration Proceedings*

In the context of arbitration, the combination of mediation and arbitration are widely adopted and viewed favorably in both Japan and China. Such attitude is indeed shared in many other East Asian jurisdictions.

In Japan, Article 38 of the Japanese Arbitration Act provides that “an arbitral tribunal or one or more arbitrators designated by it may attempt to settle the civil dispute subject to the arbitral proceedings, if consented to by the parties.”¹⁸¹ Article 54 of the latest JCAA Rules 2014 contains detailed provisions concerning mediation: “the Parties, at any time during the course of the arbitral proceedings, may agree in writing to refer the dispute to mediation proceedings under the International Commercial Mediation Rules of the JCAA (the “ICMR”);” however, “no arbitrator assigned to the dispute shall be appointed as mediator, except if appointed under Rule 55.1.”¹⁸² If an Arbitrator serves as a Mediator, Article 55.1 provides Special Rules for the ICMR, which allows the parties to agree in writing to appoint an arbitrator, assigned to the same dispute as a mediator, and refer the dispute to mediation proceedings.¹⁸³ Further, Article 55.1 provides that, “the Parties shall not challenge the arbitrator based on the fact that the arbitrator is serving, or has served, as a mediator,” since the amendment of the JCAA Rules.¹⁸⁴ There has not been any case where a different person carried out mediation. In roughly twenty to twenty-five percent of the JCAA Arbitration proceedings, arbitrators have acted as mediators in order to facilitate settlements.¹⁸⁵

In terms of parties’ attitudes, Japanese parties easily accept the same person acting as both a mediator and an arbitrator. Empirical research shows that most Japanese practitioners (seventy-six percent) felt that arbitrators’ suggestions of settlements were generally appropriate. This figure is higher with domestic practitioners (ninety-five percent) than with international practitioners (sixty-five percent). Similarly, a total of seventy-four percent of Japanese practitioners (eighty-five percent of

179. *Id.*

180. *Id.*

181. JCAA Commercial Arbitration Rules art. 38.

182. *Id.* art. 54.

183. *Id.* art. 55.1.

184. Interview with Tatsuya Nakamura, Secretary General of the JCAA, & Toshiyuki Nishimura, case manager JCAA (Aug. 24 2015).

185. *Id.*

domestic practitioners, sixty-five percent international practitioners) consider it appropriate for the arbitrators to conduct conciliation with the parties' consent.¹⁸⁶ According to the JCAA, because Japanese judges frequently act as mediators in court proceedings, Japanese parties are accustomed to having the same person act as both the settlement facilitator and decision maker.¹⁸⁷ When arbitrators do facilitate settlement, Article 55.2 of the JCAA Rules 2014 provides that "an arbitrator who serves as mediator in regard to the same dispute shall not consult separately with any of the Parties orally or in writing, without the agreement of the Parties in writing." In actual practice, arbitrators still frequently use caucus.¹⁸⁸

In China, judges customarily promote settlement to relieve heavy caseloads and reduce costs.¹⁸⁹ The legal basis for judges to mediate disputes can be found in Civil Procedure Law, which provides that "when adjudicating civil cases, the people's courts may mediate the disputes according to the principles of voluntariness and lawfulness."¹⁹⁰ Following court practice, promotion of settlement by arbitrators is admissible and actively encouraged under Arbitration Law. Article 49 of Arbitration Law allows parties to settle disputes on their own, notwithstanding the commencement of arbitration proceedings. Article 51 of Arbitration Law provides that "[t]he arbitration tribunal may carry out conciliation prior to giving an award. The arbitration tribunal shall conduct conciliation if both parties voluntarily seek conciliation. If conciliation is unsuccessful, an arbitration award shall be made promptly." Most institutional rules in China expressly allow a combination of mediation and arbitration.¹⁹¹ The CIETAC Arbitration Rules 2015, for instance, allow the arbitral tribunal to commence mediation in the process of arbitration proceedings upon the parties' agreement.¹⁹² Article 42 of the BAC Arbitration Rules 2015 gives parties the option to choose conciliation by the Tribunal, which allows the arbitration tribunal to conciliate the case in such a manner as it considers

186. 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). *Id.*, 319–21. Due to the limitation of samples, quality of the method and the lapse of time, the survey could not provide conclusive evidence. However, as the population of arbitration practitioners is still small in Japan, and almost all the leading figures replied, the survey may still illustrate some general attitude for the purpose of this work, qualified by a future comprehensive survey.

187. *Id.*

188. Interview with Nakamura & Nishimura, *supra* note 184.

189. Fan, ARBITRATION IN CHINA, *supra* note 100.

190. Code of Civil Procedure (民事诉讼法) (promulgated by National People's Congress, 1991, effective 2012) art. 9 (China).

191. Fan, ARBITRATION IN CHINA, *supra* note 100.

192. China Int'l Econ. & Trade Arb. Comm'n Arb. Rules, art. 47(1) (2015).

appropriate.¹⁹³ Article 43 allows for Independent Conciliation, which is conducted by mediators at the Mediation Center of the BAC (the “Mediation Center”) in accordance with the Rules of the Mediation Center.

In actual practice, according to a series of interviews with Chinese practitioners conducted by Professor Gabrielle Kaufmann-Kohler and the author during a research trip, Chinese arbitrators systematically offer the parties mediation as an alternative.¹⁹⁴ If the parties agree, the arbitrator will act as a mediator. If mediation fails, the arbitrator will then shift back into the role of an arbitrator and render a binding decision. A subsequent online survey conducted by the author in November of 2011 and April of 2012 confirms this finding.¹⁹⁵ 88.9% of the respondents considered that it is appropriate for arbitrators to facilitate settlement.¹⁹⁶ In actual practice, a majority of arbitrators have attempted mediation during arbitration proceedings.¹⁹⁷ Fifty percent of respondents have proposed mediation to parties in over ninety percent of the cases in which they act as arbitrators.¹⁹⁸ The survey also shows that Chinese arbitrators consider the combination of

193. BEIJING ARBITRATION COMM’N, art. 42 (2015).

194. See Gabrielle Kaufman-Kohler & Kun Fan, *Integrating Mediation into Arbitration: Why it Works in China*, 25 J. INT’L ARB. 479 (2008) (The research trip was conducted while the author worked at the Geneva University Law School on a research project on international arbitration in China. The research project was directed by Prof. Gabrielle Kaufmann-Kohler and funded by the Swiss National Science Foundation. 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).

195. See Kun Fan, *An Empirical Study on Arbitrators Facilitating Settlement in China*, 15 CARDOZO J. CONFLICT RESOL. 777 (2014) (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. From a statistical point of view, thirty-six responses was not a very large sample. It should be emphasized that the target of our survey was limited to ‘active’ arbitrators, who have actual arbitration experience. Counsels 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 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).

196. *Id.* at 805.

197. *Id.* at 791.

198. *Id.*

mediation and arbitration as being reflective of traditional culture.¹⁹⁹ When arbitrators propose the use of mediation, both the surveyor and the interviewer show a wide range of variation in the percentage of positive responses from both parties.²⁰⁰ Generally, the percentage is higher when both parties are Chinese than when a foreign party is involved.²⁰¹ When both parties are Chinese, the mean response is 54.65%, and the median is 59.50%.²⁰² When a foreign party is involved, the mean response is 37.50%, and the median is 19.50%.²⁰³

The general public's cultural attitude towards dispute resolution may explain such behavioural patterns in China and Japan's conduct of arbitration. The concept of conciliation and arbitration were not clearly distinguished in Japanese and Chinese minds. Even though the term "arbitration" did appear in traditional Japanese society, it appears as "arbitrary conciliation" or "conciliatory arbitration," and is used as a kind of reconciliation. Kijien, one of the most popular Japanese dictionaries, states that "conciliation means arbitration" in daily use.²⁰⁴ Arbitration is understood to be closer to conciliation than litigation in Japanese culture.²⁰⁵ Similarly, in traditional Chinese society, the function of the dispute resolver (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 defined in the Western context.²⁰⁶ Sometimes their role resembled that of an arbitrator, who heard the arguments of the parties, looked into the evidence, and handed down a decision.²⁰⁷ 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.²⁰⁸ However, before the dispute reached the stage of decision-making, the dispute resolver often first adopted a conciliatory role and suggested ways in which the disputants could come to a compromise or

199. *Id.* at 811.

200. *Id.* at 792.

201. *Id.*

202. *Id.*

203. *Id.*; see also Kaufman-Kohler & Fan, *Integrating Mediation into Arbitration: Why it Works in China*, *supra* note 194.

204. Niiimura (ed.), Kijien (Tokyo, Iwanami Shoten, 5th ed.1998), referred to in SATO (2001), 236.

205. Yasunobu Sato, *COMMERCIAL DISPUTE PROCESSING AND JAPAN* 316 (2001).

206. Kun Fan, *Cultural Dimensions, Psychological Expectations and Behavioral Patterns in Arbitration* (last visited May 15, 2016), http://www.brunel.ac.uk/_data/assets/pdf_file/0008/299528/Cultural-Dimensions,-Psychological-Expectations-and-Behavioral-Patterns-in-Arbitration_Fan-Kun.pdf [hereinafter Fan, *Cultural Dimensions*].

207. *Id.*

208. *Id.*

suggested possible solutions satisfactory to both disputing parties.²⁰⁹ In that sense, their role may be comparable to that of a mediator, who assists the parties to arrive at a satisfactory settlement.²¹⁰ With that blurring in notion, the same person assuming the role of a mediator and later the role of an arbitrator, is also culturally acceptable by the arbitrators and parties in both Japan and China.

Many other institutional rules in East Asian jurisdictions also allow the arbitrators to assume the role of mediators. The International Arbitration Act of Singapore expressly provides that the arbitrator may act as a conciliator if all the parties consent in writing and for so long as no party withdraws its consent in writing.²¹¹ In Hong Kong, the Arbitration Ordinance (Cap 609)²¹² also contains express provisions on the power of an arbitrator to act as a mediator, if this is stipulated in an arbitration agreement.²¹³ In Korea, the KCAB Arbitration Rules allow mediation to be conducted by a mediator listed on the KCAB's panel of arbitrators before arbitration proceedings start.²¹⁴ In India, the Arbitration and Conciliation (Amendment) Ordinance 2015²¹⁵ provides that "it is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the

209. *Id.*

210. See Fan, *Glocalization*, *supra* note 44, for a detailed discussion on the conceptual difference between arbitration and mediation in China and in the West.

211. Int'l Arbitration Act, art. 17(1) (2005).

212. The Hong Kong Arbitration Ordinance (Cap 609) was approved by the Hong Kong Legislative Council on 10 November 2010. It came into effect on 1 June 2011, replacing the existing Arbitration Ordinance (ch 341). The Ordinance draws heavily on the Model Law, with certain modifications (and additions) which reflect the specific features of arbitration in the region. The current Arbitration Ordinance (Cap 609) has unified the domestic and international arbitration regimes and provides for an opt-in mechanism to retain the rights formerly granted to parties to domestic arbitration for seeking the assistance of the Court of First Instance on certain matters. The opt-in mechanism gives rise to doubts as to whether parties to a domestic arbitration agreement which specifies the number of arbitrators would still be able to seek the Court's assistance. On 23 January 2015, the Arbitration (Amendment) Bill 2015 was introduced into the Legislative Council, in order to remove such legal uncertainties and to update the list of parties to the New York Convention. The Arbitration (Amendment) Ordinance 2015 (Ordinance No. 11 of 2015), was enacted by the legislative council on 17 July 2015.

213. Arbitration Ordinance, sec. 32(3)(a) (2014).

214. KOREAN COMMERCIAL ARBITRATION BD., Int'l Arbitration Rules of KCAB, art. 18 (2011).

215. The Indian Government has taken steps to implement long awaited arbitration reforms by promulgating an ordinance, the Arbitration and Conciliation (Amendment) Ordinance 2015, amending the Arbitration and Conciliation Act 1996. Although the Ordinance is effective immediately, it will need Parliamentary approval in the upcoming session.

arbitral proceedings to encourage settlement.”²¹⁶ The Bangladesh Arbitration Act contains a similar provision.²¹⁷

Empirical research has also illustrated a regional variation in the role of arbitrators in settlement facilitations, showing East Asian arbitrators’ tendency to play a more active role in settlement interventions in arbitration proceedings.²¹⁸ The survey revealed that a significantly higher number of respondents working in East Asia (eighty-two percent) saw the facilitation of voluntary settlement as one of the goals of arbitration, in comparison to sixty-two percent of practitioners working in the West.²¹⁹ More than forty percent of practitioners working in East Asia report regularly suggesting settlement negotiations to the parties, in comparison to sixteen percent of their counterparts working in the West.²²⁰ Similarly, over thirty percent of practitioners working in East Asia reported that arbitrators regularly participate in settlement negotiations, in comparison to sixteen percent of those surveyed working in the West.²²¹

This common attitude in East Asia may be explained by the deeply rooted “conciliation culture,”²²² comprising a variety of forms, which has flourished in the region for centuries. The “conciliation culture . . . stems from a deep mistrust in any pre-set rules of law and the concept of right as an absolute entitlement.”²²³ The belief is that no such general rules can deal with every aspect of complicated human relations.²²⁴ A just solution must take into account the particularities of each case.²²⁵ A conciliatory process offers a socially and individually satisfactory result and is thus a

216. Arbitration and Conciliation Act, art. 30(1) (1996).

217. Arbitration Act, art. 22(1) (2001).

218. See Christian Bühring-Uhle ET AL., *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* (2d ed. 2006) (Shahla Ali’s 2006–2007 survey covers practitioners across the region, with a focus on practitioners from East Asia (77 respondents, 75 %) and a small portion from the United States and Europe (26 respondents, 25 %). Close to 250 surveys were distributed to arbitrators, academics, attorneys and in-house counsel, and a total of 115 individuals responded. Ali’s survey was essentially based on the questionnaires developed by Bühring-Uhle); Shahla F. Ali, *The Morality of Conciliation: An Empirical Examination of Arbitrator “Role Moralities” in East Asia and the West*, 16 HARV. NEGOT. L. REV. 1 (2011) (providing information on the attitudes of practitioners working in East Asia regarding the role of arbitrators in the settlement process).

219. Ali, *supra* note 219.

220. *Id.*

221. *Id.*

222. This symbolic dichotomy is used for the sake of illustration of cultural trends. The reality is more complex.

223. Grant L. Kim, *East Asian Cultural Influences*, in *ASIAN LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION* 17, 27 (Michael Pryles & Michael J. Moser, eds., 2007).

224. *Id.*

225. *Id.*

preferred way to reach a just solution.²²⁶ Under such an ideology, it is not socially acceptable to sue in order to win one's right without first giving the other party the opportunity to find a reasonable solution.²²⁷ Influenced by the local culture emphasizing conciliation to maintain harmony, arbitrators are generally viewed as individuals, familiar with the parties and their dispute, who will not only end their dispute, but also assist them in reaching a mutually agreeable solution and restore harmony. Thus, the role of a settlement facilitator and that of a decision-maker is not clearly distinguished and can be combined in Asian minds. As a result, the combination of mediation and arbitration is generally recognized and widely practiced in East Asia, in both common law and civil law jurisdiction.²²⁸

CONCLUSION

Many jurisdictions in the region have made continuous efforts to introduce the best innovations in policing and enhancing global arbitration standards. Through these innovations, coupled with East Asia's growing economic power and industry expertise, the arbitration community in the region is on track to build East Asia as an arbitration hub, providing relevant practices and expertise that are unmatched in any other region in the world.

The comparison between arbitration in Japan and China illustrates the country specific features of arbitration practice, despite the general trend of harmonization. Still, local culture continues to play an important role in the contemporary development of arbitration.

In order to further promote international commercial arbitration in Japan, China, and across the region, it is important to consolidate the efforts of all stakeholders (in different sectors, public and private, domestic and international), to enhance the legal and institutional infrastructure, to understand the cultural differences, and to enhance collaborations in terms of professional training and arbitration of arbitrators.

226. Fan, *Cultural Dimensions*, *supra* note 206.

227. Yasuhei Taniguchi, IS THERE A GROWING INTERNATIONAL ARBITRATION CULTURE? - AN OBSERVATION FROM ASIA 36 (Albert Jan Van Den Berg ed. 1996).

228. See Fan, ARBITRATION IN CHINA, *supra* note 100., for a comparative study on the law and practice of arbitrators facilitating settlement.