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Facilitating Settlement at the Arbitration Table: Comparing Views on Settlement Practice Among Arbitration Practitioners in East Asia and the West

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Abstract

This article presents a cross cultural examination of how international arbitrators in East Asian and Western countries view the goal of settlement in international arbitration. The result of a 115 person survey and 64 follow up interviews shed light on the underlying cultural attitudes and approaches to settlement in international arbitration as practiced in diverse regions. The findings indicate that arbitration practitioner's perceptions of the frequency of compromise decision in international arbitration demonstrate a high degree of convergence across regions. At the same time, cultural and socio-economic distinctions are reflected in varying arbitrator perceptions regarding the arbitrators' role in settlement, whether settlement is regarded as a goal in arbitration and the types of efforts made pre-arbitration to settle disputes. In particular, arbitrators working in the East Asian region regard the goal of facilitating voluntary settlement in the context of international arbitration with greater importance and generally make greater efforts pre-arbitration to settle disputes as compared with counterparts in the West.

Key words

International Arbitration; Settlement; Law and Globalization; Comparative Law

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Introduction

The process and place of settlement in the context of adjudication has received significant attention since the mid twentieth century. Lon Fuller and Owen Fiss articulated early insights into the role, forms and limits of adjudication beginning in the late 1970's. Fiss (1979 and 1984) argued that adjudication is about providing a public forum to enact public values and not a place for settlement proceedings. Fuller saw alternative processes such as settlement as potentially appropriate in cases where adjudication reached "its limits." This occurred, Fuller (1978) argued, when adjudication attempted to resolve what he described as "polycentric" type disputes (such as when there is no clear issue subject to proofs and contentions).

In more recent times, the search to understand the proper place of settlement in the context of adjudication continues. This examination occurs not only at the domestic level in courts, but also internationally in global arbitration forums where the ethics, values and norms of settlement can be examined from a cross cultural perspective.

This article is divided into three parts: Part 1 explores the relevance of the study of settlement in the context of international arbitration to the field of the globalization of international legal practice. A general overview of the survey research is presented.

Part 2 reviews both the impact of the United Nations Commission on International Trade Law on harmonizing procedural aspects of international arbitration practice as well as how such practiced are enriched by diversity in arbitration practices in East Asia and the West.

Drawing on both the globalizing impact of United Nations Model Laws as well as the historic context of diverse dispute resolution preferences in East Asian and Western countries, Part 3 presents survey findings regarding how international arbitrators in these regions view the role of settlement in international arbitration. The results of a 115-person survey and 64 follow up interviews shed light on the underlying cultural attitudes and approaches to international arbitration as practiced in diverse regions. The findings indicate that the frequency of compromise solutions demonstrate a high degree of convergence across regions. At the same time, cultural and socio-economic distinctions are reflected in varying arbitrator perceptions regarding the arbitrators' role in settlement, whether settlement is regarded as a goal in arbitration and the types of efforts made pre-arbitration to settle disputes. In particular, East Asian arbitrators regard the goal of facilitating voluntary settlement in the context of arbitration with greater importance and generally make greater efforts pre-arbitration to settle disputes as compared with counterparts in the West.[1]

1. Overview of Survey Research & Relevance to the Field of the Globalization of Law

1.1. The Impact of Globalization on Settlement in International Arbitration Practice

The impact of globalization on the international practice of law can be viewed through current developments in international arbitration, as an emerging mechanism of global dispute resolution. Slaughter (2004, p. 11) describes how legal networks such as those associated with international arbitration have proliferated in recent years. Such networks offer "a flexible and relatively fast way to conduct the business of global governance, coordinating and even harmonizing national government action while initiating and monitoring different solutions to global problems." On the one hand, these networks promote "convergence," while

[1] For full discussion see: Ali (2010).

on the other hand they also allow for "informed divergence (Slaughter 2004)." Such interactions are founded on the basis of what Slaughter calls the foundational norm of "global deliberative equality." She (2004, p. 245) cites Michael Ignatieff, who derives this concept from the basic moral precept that "our species is one, and each of the individuals who compose it is entitled to equal moral consideration."

In promoting convergence, such legal networks "bring together regulators, judges, or legislators to exchange information and to collect and distill best practices. (Slaughter 2004, p. 19)" Specifically, Slaughter (2004, p. 102) describes how "judges around the world are coming together in various ways that are achieving many of the goals of a formal global legal system: the cross-fertilization of legal cultures in general and solutions to specific legal problems in particular; the strengthening of a set of universal norms regarding judicial independence and the rule of law (however broadly defined)." Such "harmonization networks" Slaughter argues, "exist primarily to create compliance." Interestingly, "however, those who would export—not only regulators, but also judges—may also find themselves importing regulatory styles and techniques, as they learn from those they train. Those who are purportedly on the receiving end may also choose to continue to diverge from the model being purveyed, but do so self-consciously, with an appreciation of their own reasons. (Slaughter 2004)"

This leads to the second process at work which is "legitimate difference." This principle allows for diversity within certain boundaries. In describing this principle, Slaughter (2004, p. 247) cites Justice Cardozo:

> We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home. The courts are not free to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.

This principle of legitimate difference is limited when such solutions or approaches come in conflict with fundamental principles or values. In the case of the United States, this is true when a law violates the Constitution itself (Slaughter 2004, p. 248).

With the increasing integration of global markets as Slaughter cites, the demand for dispute resolution forums that are international in scope yet responsive to diverse users and cultures accelerates. With developments in information technology and regional and global integration of trade, the parameters of business activity are becoming more global. Transnational enterprises are operating on a global scale, with contracts entailing greater complexity and characterized by long-term arrangements. This has lead to the increased need for neutral forums that provide for effective conflict management to resolve the growing number of international disputes.

Examining the insights of how diverse cultures approach conflict in the context of the integration of markets is a new arena for research and practice. Confirming Slaughters findings regarding the existence of both "convergence" and "informed divergence" among national legal systems, research in social psychology makes clear that diverse cultures demonstrate unique ways of resolving conflict. In particular, with regard to East Asia and the West, concepts of individual versus collective identity as well as dialectical versus non-dialectical thinking have influenced unique preferences for adversarial or mediated approach to dispute resolution. [2]

[2] *See* Peng (2007). In another study, Peng and Nisbett (1999) found that 72% of Chinese observers to a given conflict scenario attributed fault to both parties and attempted to reconcile the contradiction, while in contrast, 74% of American respondents attributed fault to only one party.

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Such findings suggest that in order to operate effectively on a global scale, it is important to explore the underlying interrelationship between the operations of "convergence" and "informed divergence" in the field of international arbitration so that such global frameworks are better equip to function in an increasingly integrated and interrelated global system.

1.2. Expanding "International Arbitration" Beyond Western Models

To date most research on international arbitration has focused exclusively on Western models of arbitration as practiced in Europe and North America. While such studies accurately reflected the geographic foci of international arbitration practice in the mid-20th century, in recent years, the number of international arbitrations conducted in East Asia has grown steadily and on par with growth in Western regions. In 2005 the combined total number of arbitration cases received by major international arbitration institutions in Western nations—the American Arbitration Association (AAA), the International Chamber of Commerce's International Court of Arbitration (ICC), the London Court of International Arbitration (LCIA), and the international arbitration centers in Stockholm, Vienna and Vancouver was 1,407. This figure was nearly equal to the combined total number of cases received by prominent international arbitration institutions located in East Asia—the China International Economic and Trade Arbitration Commission (CIETAC), the Japan Commercial Arbitration Association (JCAA), the Hong Kong International Arbitration Centre (HKIAC), the Kuala Lumpur Regional Center for Arbitration (KLRCA), the Singapore International Arbitration Center (SIAC), and the Korean Commercial Arbitration Board (KCAB), which totaled 1,388.[3] Surprisingly, however, few if any studies of international arbitration have included Asian nations among those surveyed.[4] To represent the emergence of a truly global examination of the practice of arbitration, research on international arbitration must extend to include Asia.

To address this gap, this paper examines how arbitration practitioners in East Asia and Western nations view the advantages of international arbitration drawing on the overarching framework of "convergence" and "informed divergence". [5] Through comparative empirical survey based research, it will examine two related questions: *1) Does diversity of culture and worldview, in particular, values and attitudes held in East Asia reflecting preferences for conciliated outcomes, translate into differing understandings and expectations of the role of arbitrators in promoting settlement? And 2) Are global economic and legal forces simultaneously exerting a harmonizing influence on the perceptions regarding conditions that facilitate settlement through conventions such as the UN Convention on Contracts for the International Sale of Goods and the UN Model Law on International Commercial Arbitration?*

East Asia presents an ideal context in which to examine this question as it is increasingly engaged in commercial pursuits with Western countries, yet is home to perhaps one of the most distinct systems of legal organization and has undergone perhaps the most radical series of legal transformations during the past three decades than any it has experienced since the inception of its first system of law over three millennia ago. By focusing on how international arbitrators view their role in the settlement of disputes, this paper seeks to contribute to the exploration of the impact of globalization on law by examining the question of how and to what extent global arbitration values respond to varying national legal contexts while providing standardized procedures to resolve transnational commercial disputes.

[3] It must be noted that data from both the International Chamber of Commerce and the China International Economic and Trade Arbitration Commission combined domestic and international cases in their totals for 2005.

[4] Research by scholars in China has mainly examined the theory of arbitration practice, enforcement issues, and the impact of the World Trade Organization on arbitration practice. Comparative studies have focused on nations within the Asian region.

[5] For full discussion see: Ali (2010).

1.3. A Survey of International Arbitrators

The survey used in this study was completed in 2007. [6] Nearly 250 survey questionnaires were distributed to practitioners throughout the world. A total of 115 arbitrators, lawyers and in-house counsel from over 18 countries responded. Those surveyed came primarily from East Asian countries, with the remaining from Europe and America and a small portion from Latin America and Africa. The participants represented highly experienced practitioners, members of the judiciary, arbitration commissions, representatives to UNCITRAL working group meetings, and both users and providers of international arbitration.

The survey design models one developed by Buhring-Uhle (1996) which he conducted between November of 1991 and June of 1992. Buhring-Uhle's study was the first of its kind examining how and why arbitration cases in the West are settled and the role of arbitrators in the settlement process, if any. The survey (Buhring-Uhle 1996) asked for the perceptions of European, American and German participants in international commercial arbitration regarding their reasons for choosing arbitration, the way in which amicable settlements are facilitated, and the extent to which "alternative" procedures are employed.

In his original study, Buhring-Uhle anticipated that parallel research would be required in countries such as East Asia. Based on the composition of the sample group, Buhring-Uhle reports that the findings of his survey must be viewed as representing the "classical", "Western-style" practice. He (1996, p. 131) notes that other distinct practices exist, particularly in the Far East and notes that such practices represent a unique approach to international arbitration that are of particular importance for continued research. Thus far, however, no extensive qualitative research study has systematically probed the parallel attitudes of East Asians regarding the practice of international arbitration, the reasons parties use arbitration and the role of arbitrators in settlement if any.

In order to fill this gap, and in particular determine the existence of variation or harmonization of attitudes and practices among practitioners in the East and West, this same survey was re-administered in East Asia and North America in order to compare responses across regions.

The survey sample pool consisted of lawyers, in-house counsel, professors and arbitrators in East Asia. It included members of China's International Economic and Trade Arbitration Commission (CIETAC), members of foreign law firms and in-house counsel in China, Malaysia, Singapore and Japan, participants at two regional arbitration conferences held in Malaysia and Hong Kong, and members of a network of arbitrators who are part of the Northern California International Arbitration Forum. In addition, Western arbitrators from North America and Europe were also surveyed. Because Buhring-Uhle's study was conducted in 1991–1992, 14 years earlier, it was necessary to update Buhring-Uhle's survey findings for purposes of present comparison.

Close to 250 surveys were distributed to arbitrators, attorneys, and in-house counsel and a total of 115 individuals responded. The questions were distributed at arbitration conferences in East Asia, on-line through an web-based survey collection site, and in person with members of law firms in Beijing, Hong Kong, Malaysia, Japan and Singapore and to registered arbitrators listed with two major arbitral institutions in China.

In order to supplement the survey findings, open-ended interviews were conducted to examine whether and how diversity and globalization influence the practice of international arbitration in East Asia.[7] Over 64 persons were interviewed between

[6] For full discussion see: Ali (2010).

[7] See Diessner (2000). A principle orientation of the research process employed here is an emphasis on participation from those immediately and substantially affected by the potential outcome of the research.

August 2006 and February 2007. Those interviewed came primarily from East Asian countries, with the remaining largely from Europe and America. The participants represented experienced arbitration practitioners, members of the judiciary, arbitration commissions, lawyers, in-house counsel, professors, representatives to UNCITRAL and arbitration users.

1.4. Principle Findings

The combined survey data and interviews, confirm the finding that cultural diversity and global standards simultaneously impact the practice of international commercial arbitration in East Asia. Because of the flexible structure of the international arbitration system based on a United Nations Model Law framework which allows countries to opt in or out of particular provisions, substantive variation pertaining to differing preferences for conciliatory or adjudicatory approaches to arbitration can coexist with a relatively high level of procedural uniformity across regions.

On the one hand, factors promoting the settlement of international arbitrations rooted in global treaties and norms such as simultaneous attention of both parties to the dispute and information sharing among participants demonstrated the highest degree of convergence across regions. Simultaneously, the findings indicated that in some key areas, distinction persists with respect to the perceived role of the arbitrator in promoting settlements within the context of arbitration. For example, participants in East Asian international arbitration proceedings exhibited a greater proclivity to view the facilitation of settlement as one of the goals of arbitration and make greater efforts pre-arbitration to settle disputes as compared to their North American and European counterparts.

As arbitration practitioners increasingly traverse diverse arbitration venues, exchange practices, and participate in joint conferences, a greater degree of information sharing is promoting harmonization within key areas of practice. At the same time, values and objectives across diverse regions regarding the aims and purposes of arbitration will need to be explicitly probed in order to better understand the origins and roots of diversity across regions.

2. Examining the Forces of "Harmonization" and "Legal Diversity" in East Asia and The West

This section examines the impact of forces of "harmonization" and "legal diversity" on the practice of international arbitration. [8] On the one hand, the United Nations Commission on International Trade Law has contributed to harmonizing procedural aspects of international arbitration practice. On the other hand, the unique historic roots of dispute resolution in East Asia and the West have given rise to diverse structures and rules regarding the approach taken toward the practice of arbitration and the permissibility of combining arbitration and conciliation. This background provides a context for viewing survey findings regarding East Asian and Western arbitrator perceptions of the role of the arbitrator in facilitating settlement.

2.1. Promoting Harmonization: Overview of the UNCITRAL Model Law System

In an effort to provide a forum to discuss and harmonize diverse institutional approaches to the practice of arbitration across the globe, the United Nations established a UN Commission on International Trade Law (UNCITRAL).

Participants were given a voice in framing and reframing the interview question under study, a voice in selecting the means of answering the question defined by the research, and a voice in determining the criteria to decide whether the question has been validly answered.

[8] For full discussion see: Ali (2010).

UNCITRAL was established by the General Assembly in 1966.[9] According to UN archival documents pre-dating the formation of UNCITRAL, the General Assembly created the body out of the recognition that disparities in national laws governing international trade created obstacles to the flow of trade, and it saw the Commission as the means by which the United Nations could play a more active role in reducing or removing these obstacles.[10]

The General Assembly gave the Commission the overarching mandate to further the harmonization and unification of the law of international trade.[11] Since its founding, UNCITRAL has prepared a wide range of conventions, Model Laws and other instruments dealing with the substantive law that governs trade transactions or other aspects of business law which have an impact on international trade.[12]

According to the Commission, "'harmonization' may conceptually be thought of as the process through which domestic laws may be modified to enhance predictability in cross-border commercial transactions."[13] UNCITRAL uses Model Laws or legislative guides to harmonize domestic law.

The UNCITRAL Commission is composed of sixty member States elected by the General Assembly.[14] Membership on the Commission is "structured so as to be representative of the world's various geographic regions and its principal economic and legal systems."[15] There are five regional groups represented within the Commission: African States, Asian States, Eastern European States, Latin American and Caribbean States, and Western European and Other States. Members of the Commission are elected for terms of six years, with the terms of half the members expiring every three years.[16]

Recognizing the need for greater uniformity of arbitration and conciliation practices, in 1998 the UNCITRAL secretariat suggested that a working group be created to draft a Model Law on Conciliation.[17] The principal legal officer stated, "UNCITRAL places dispute settlement as its highest priority."[18]

The process of drafting the model conciliation law reflected the process of global deliberation at work. While widely differing views were expressed, a Model Law was drafted in relatively short order. A US representative to the working group meetings noted that "the Conciliation Model Law was pretty easy to draft. The drafting took

[9] See UN Resolution 2205(XXI) of 17 December 1966).
[10] See UNCITRAL Web Site: http://www.uncitral.org/uncitral/en/about_us.html.
[11] Ibid.
[12] Ibid.
[13] Ibid.
[14] As from 14 June 2004, the members of UNCITRAL, and the years when their memberships expire, are: Algeria (2010), Guatemala (2010), Russian Federation (2007), Argentina (2007), India (2010), Rwanda (2007), Australia (2010), Iran (Islamic Republic of) (2010), Serbia (2010), Austria (2010), Israel (2010), Sierra Leone (2007), Belarus (2010), Italy (2010), Singapore (2007), Belgium (2007), Japan (2007), South Africa (2007), Benin (2007), Jordan (2007), Spain (2010), Brazil (2007), Kenya (2010), Sri Lanka (2007), Cameroon (2007), Lebanon (2010), Sweden (2007), Canada (2007), Lithuania (2007), Switzerland (2010), Chile (2007), Madagascar (2010), Thailand (2010), China (2007), Mexico (2007), The former Yugoslav Republic of Macedonia (2007), Colombia (2010), Mongolia (2010), Tunisia (2007), Croatia (2007), Morocco (2007), Turkey (2007), Czech Republic (2010), Nigeria (2010), Uganda (2010), Ecuador (2010), Pakistan (2010), United Kingdom of Great Britain and Northern Ireland (2007), Fiji (2010), Paraguay (2010), United States of America (2010), France (2007), Poland (2010), Uruguay (2007), Gabon (2010), Qatar (2007), Venezuela (Bolivarian Republic) (2010), Germany (2007), Republic of Korea (2007), Zimbabwe (2010)
[15] UNCITRAL Web Site: http://www.uncitral.org/uncitral/en/about_us.html.
[16] UNCITRAL Web Site: http://www.uncitral.org/uncitral/en/about_us.html.
[17] SEE: COMISSION SESSION year 32nd, 1999/ WORKING GROUP March 2000 #107,108 Conciliation/Arbitration.
[18] Principle legal officer, UNCITRAL, Interview 1.

place in two sessions in 2001. There were quite a few models already in existence… Our draft was not that different from the existing models."[19]

During the drafting process, the UNCITRAL forum provided space for wide-ranging discussion of diverse perspectives. The Chinese representative to the UNCITRAL working group meetings on the model conciliation law noted that "a heated topic at the UNCITRAL working group sessions was whether the arbitrator can act as a conciliator. Some say that this is a good process and that it works well in such countries as Singapore, China, Hong Kong, and Stockholm—if the parties agree to it."[20] He added that "many other countries say no, particularly the US and Mexico. They say that the role of the arbitrator and the mediator is different. The mediator assists parties to reach an agreement and persuade or push parties to settle. Arbitrators on the other hand just decide the dispute. If some information is shared during mediation, this could affect the arbitration."[21]

While ultimately the Model Conciliation Law did not provide a role for arbitrator to act as a conciliator, the process provided space for global dialogue on the topic. The Chinese representative to the UNCITRAL working group meetings noted, "China has been very involved in UNCITRAL—some of its suggestions were accepted, and some were not. The decision making is based on consensus…Through the exchange of views we can increase… understanding."[22] Ultimately, the Chinese drafting team did not incorporate the particular aspect of the Model Law restricting the arbitrators ability to simultaneously act as a mediator, but it did include a number of other significant provisions from the Model Law pertaining to pre hearing directives, the selection and appointment of the arbitrator, the procedure for the filing of claims and counterclaims, procedures for the issuing of awards and the time frame for award challenges.[23]

2.2. Legal Diversity: Underlying Cultural Roots of Arbitration in East Asia and the West

In recent years, while the process of harmonization is increasingly unifying global legal standards, it is important to simultaneously review the impact of the diverse context from which national legal systems have emerged on contemporary approaches to dispute resolution. This section will focus on the philosophical roots that have given rise to the diverse systems of dispute resolution in East Asia and the West. It will also review how these unique roots have impacted contemporary structures of arbitration in these regions. Traditional approaches to dispute resolution in East Asia and the West have come to influence each countries unique design of its arbitral institutions.

The institutional practices and structural arrangements of a country's system of dispute resolution serves as the foundation for understanding how and why particular advantages of arbitration are valued over others in Eastern and Western countries. Buhring-Uhle (1996, p. 162) notes that "different traditions exist with respect to the concept of arbitration… Accordingly the concept of arbitration varies with the personalities of arbitrators and is often influenced by their cultural background." Below, we will examine in greater depth, how particular aspects of traditional Confucian approaches to dispute resolution continue to affect the concept of arbitration and the role of the arbitrator in East Asia. We will compare these findings with a brief examination of the traditional characteristics of Western legal practice.

[19] Western arbitrator, US representative to UNCITRAL, Interview 61.
[20] East Asian arbitrator, Chinese representative to UNCITRAL, Interview 3.
[21] Ibid.
[22] East Asian arbitrator, Chinese representative to UNCITRAL, Interview 3.
[23] Ibid.

2.3. Traditional East Asian Approach to Dispute Resolution

Early Confucian society mirrored, in many respects, a preference for resolving interpersonal conflict outside the confines of formal law through relational networks.[24] Legal sanctions were used only when no alternative existed or the gains were thought to outweigh the costs of compromised relations and trust. In general, informal mechanisms, rather than formal legal rules, were used to resolve most civil disputes in traditional China.

The Chinese approach to dispute resolution is one that has sprung out of a rich set of traditions, history, culture, and values. In particular, from traditional Chinese civilization to the present era, conciliation has held a long-standing place in the Chinese justice system. It has long been viewed as the "pearl of the East," "an oriental experience,"[25] and as "China's original creation." (Palmer 1987, p. 231) Emphasizing the rule of man over the rule of law, harmony among the collective, and obedience to state authority, conciliation has been historically viewed as the preferred method of dispute resolution, and considered superior to adjudication (Lubman 1967, p. 1290). This preference for conciliation, according to Chinese legal scholar Stanley Lubman, traces back to the days when Confucianism was considered the "dominant political philosophy." During this time, the virtues of "compromise, yielding, and nonlitigiousness" were universally stressed and the social structure was organized in such a way as to promote mediation through authority relationships. The aim of government, and all relations in Confucian society was "to preserve natural harmony… the source of ethical behavior. (Lubman 1967, p. 1290)"

Conciliation found its roots as early as 210 B.C., when Confucian principles became the guiding orthodoxy of the Chinese state. Based on the assumption that "the natural state of society was one of harmony rather than contention,"[26] conflict was seen as an unnatural state of affairs that "disrupted the natural harmony which linked individual, group, society, and the entire universe."(Bodde and Morris 1967, p. 78) Such disharmony was amenable not through a reliance on positive or written law, but through the use of heavenly reason, natural law, compromise, and virtue. Conciliation or "tiao jie" when understood in its literal meaning, "to mix" or "bind" in order to reach a "solution" meant the reestablishment of unity through a process of give and take, sacrifice, and forgiveness. Thus, resolution was ultimately viewed as the reestablishment of unity. The virtues of "compromise, yielding, and nonlitigiousness"[27] were universally stressed, giving rise to preferences for preserving social harmony over the "conflictual articulation of individual rights."[28]

These Confucian principles became internalized and incorporated into all levels of society, from the family to interpersonal relations to the structure of the Chinese government itself. According to Lubman (1967, p. 1286), "the organization of the

[24] This tendency echoes Macaulay and Ellickson's description of non-contractual resolution of both business and community disputes.

[25] Department of Grass-Roots Work, Ministry of Justice of the PRC, *People's Mediation in China* (n.d.) p. 83.

[26] During this time, even the concept of "gain" was denoted by the happiness of the majority. See: Lieberthal (1995, p. 16).

27 See Lubman (1967, p. 1291). These early Confucian ethical principles became the foundation upon which the Chinese mediation system was built:

> Customary ethical rules of behavior which emphasized status and the necessity of preserving group harmony greatly inhibited the assertion of rights and caused such claims to be regarded as disruptive violations of fundamental ethical rules. The philosophical tenets, the structure of Chinese society, and the operation of imperial government institutions combined to produce striking preference for mediated settlement of disputes.

[28] Ross (1990, p. 15). He discusses the proper channels of mediation, education and the virtue of yielding. This virtue, or "jiang", was considered a primary value as it "prevented friction and disharmony."

imperial Chinese State, the operation of its governing institutions, and its traditional social nuclei—family[29], clan, village, guild—combined to create pressures and institutions for extrajudicial mediation." Due to the expectation in Confucian society that one defer individual interests to the collective while striving for the highest ideal of selflessness, "the justice system, rather than regarding individual responsibility as being legally accountable, relied upon the concept of collective responsibility." (Hook 1996, p. 8)

In addition to the prominence of early Confucian values, traditional Chinese social and political structures supported an emphasis on out of court dispute resolution. Through the rule of "just men" rather than "just laws," officials qualified to maintain Confucian ideals of social harmony and proper rule were selected to both govern and administer law. The guiding principle was "men govern law, law does not govern man" (ren guan fa, bu shi fa guan ren). Legal structures were thus founded on the belief that ideal social order could be obtained, "not by strict regulation or severe punishment, but by the rule of good men, whose virtuous example was the most effective form of persuasion." (Folsom and Minan 1989, p. 5) In short:

> The aim of government, and indeed of all human relations, was to preserve natural harmony, which was the source of, and was expressed in ethical behavior (Lubman 1967, p. 1290).

In addition to family relations and governmental channels, a social order based on a dense network of interpersonal relations required the maintenance of harmony at all costs. In particular, the necessity of cooperation in China's early agricultural society meant that, if given the choice, harmony was to be preferred above legal fairness. Harmony, in fact, was seen as the highest expression of justice. As parties to a dispute were often coworkers, close friends, or relatives, it was often more important to consider how the two sides would live and work together effectively in the same environment rather than rendering a procedurally fair resolution (Gao 1984, p. 14).

> In official opinion, it was undoubtedly more important to keep harmonious and peaceful social relations, than to uphold individual rights and duties. Keeping on good and intimate terms and becoming reconciled was better than making clear distinctions between right and wrong (Gao 1984, p. 17).

Relying on trusted intermediaries to assist with private resolution allowed individuals to keep personal affairs confidential. Public trial was commonly understood as "hanging one's private laundry out…allowing the scent fly in a hundred directions." Conciliation, handled in private, small, and familiar environments, (including either the disputant's home or a proximate location), ensured the maintenance of one's public face.

In addition to practical considerations, philosophical perceptions of natural law and the cultivation of virtue were valued as superior to positive law and written regulations. Confucian philosophy viewed virtuous deeds as a higher expression of righteousness than merely following a set of legal sanctions (Ross 1990, p. 16). In the Analects, the original writings of Confucius, this distinction is made clear:

> The people should be positively motivated by *li*, to do that which they ought; if they are intimidated by fear of punishment they will merely strive to avoid the punishment, but will not be made good. To render justice in lawsuits is all very

[29] Akigoro (1960, pp.604–608). The importance of following Confucian precepts of forgiveness and tolerance when resolving disputes were recorded in a Ming dynasty set of "Family Instructions." Established by the Miu lineage in Guandong province, these codes contained admonitions on resolving conflict through a process of introspection, tolerance, and forgiveness:

> If one gets into fights with others, one should look into oneself to find the blame. It is better to be wronged than to wrong others… Even if the other party is unbearably unreasonable; one should contemplate the fact that the ancient sages had to endure much more. If one remains tolerant and forgiving, one will be able to curb the other party's violence.

> well, but the important thing, Confucius said, is to bring about a condition in which there will be no lawsuits.[30]

Juxtaposed to conciliation, traditional Confucian society viewed "fa" or law as a "clumsy system of punishments directed only at strengthening the state and lacking proper regard for an ordered world of peace, harmony, and simple contentment." (Ross 1990, p. 1290) Litigation in the Confucian context was regarded as "time consuming, degrading, and costly." Furthermore, "the very idea that civil and economic behavior should be codified and regulated by external authority of the state through the judiciary," according to David Shambaugh, "struck many Chinese as odd and unnecessary given Confucian traditions of Civic duty." Thus for these reasons, Confucian society placed great emphasis on mediation as the primary means of resolving conflict, while it viewed formal litigation as an undesirable alternative.[31] From the first century A.D. to the turn of the 20th century, the dominant mode of resolution in China could be classified as the informal exercise of conciliation.[32] The idea that moral governance [德治] should take precedence over legal governance [法治] can be traced to this time period.

Because of the deeply rooted nature of ideas and beliefs within political and social institutions, they often "exist long beyond the mandate that created them." (Goldstein 1993, p. 17). The preference for harmony, amicable dispute resolution, cooperation and confidentiality in decision making—based on early Confucian values, a dense network of social and economic relations and a centralized political structure—has largely persisted to the present day.[33] This is reflected in continued preference for the integration of amicable settlement attempts[34] within the context

[30] Ross (1990 cited Confucius, The Analects 2.3, 12.13).

[31] See: Ginsburg (2000, p. 835) (translated into Chinese). In the absence of a formal legal system during traditional times, reputation-based alternatives were developed to establish predictability in commercial transactions. Other informal institutions, such as guilds and clan groups, also served to coordinate economic exchange by signaling trustworthiness in the absence of a formal legal system.

[32] See: Lubman (1967, p. 1290). Aversion to litigation did not mean that litigation was absent from East Asian history. On the contrary, during the Ch'in dynasty, the philosophical school of Legalism was the dominant framework for state organization. The government of the Ch'in regarded ethical principles as "irrelevant to government, whose essence was seen to lie in uniform and harsh regulation." However, the legalist school was greatly discredited when the Ch'in dynasty fell in 210 B.C. Thus, as with the longstanding emphasis on mediation, the traditional disparagement of law and legal processes persisted into the 1970s.

[33] Despite the rapid arrival of positive law in China, informal methods of dispute resolution continue to be preferred. The renewed Chinese Civil Procedures Code of 1982 laid heavy stress on the legitimate use of mediation. Article 6 of the Code states that "in trying civil cases, the peoples court should stress mediation." The court was even required to reconcile the parties through mediation before rendering a judgment in certain types of cases, such as divorce. (Marriage Law 1980, Article 25). The guiding principle was "tiaohe weizhu" or "give priority to conciliation." As a result, in1985 there were more than 4,570,000 mediators in the PRC. (See: Palmer (1987, p. 221). Chinese Legal Yearbook statistics indicated that mediation was used to resolve more than 90% of all civil cases during the mid 1980s and nearly 60% of civil cases in the late 1990s. Palmer outlines the general trends guiding the practice of post-Mao mediation, summarized as follows:

- The increased formalization and systematization of mediation (registration and analysis at the local level).
- The promotion of a formal study of mediation under the label of "Chinese Mediology".
- The precedence of mediation/conciliation over commercial priorities (Palmer relates a case in which an individual was allowed to return an item to a department store against store polices because the mediator believed that this would "preserve [the couple's] conjugal happiness." Pure economic considerations were seen as secondary to conciliation.)
- The adherence to a comprehensive set of mediation rules and procedures.

[34] In his recent studies of East Asian social psychology, Nisbett (2003) notes that the goal in Eastern conflict resolution generally continues to be "hostility reduction, and compromise is assumed to be the likely result." However, as agreeable as mediation might be for Chinese culture, Randall Peerenboom emphasizes that we should not exaggerate the Chinese preference for mediation and other informal means of dispute settlement. Many have observed that litigation has gradually increased while mediation has decreased in the last two decades.

of arbitration in many East Asian countries, in particular China, as will be discussed below.

2.3.1. Integration of Settlement Attempts into East Asian Arbitration

With the rapid development of arbitration institutions in East Asia, persistent elements of conciliation continue to influence the structure and organization of regional arbitration institutions. In East Asia, such organizations include the China International Economic and Trade Arbitration Commission (CIETAC), the Singapore Arbitration Commission, the Honk Kong Center for International Arbitration, the Japanese Arbitration Commission and the Malaysian International Arbitration Center.

2.3.2. The China International Economic and Trade Arbitration Commission (CIETAC)

The China International Economic and Trade Arbitration Commission (CIETAC) is among the most widely used arbitral institutions in East Asia, and it represents a rapidly growing percentage of global arbitrations.[35] Since it was founded in 1956, CIETAC has administered more than 10,000 international arbitration cases. Approximately 700 cases are filed with CIETAC each year, most of which are international.[36] Reflecting the continuity of preference for the "conciliatory arbitrator," in modern times, CIETAC resolves economic and trade disputes by means of arbitration and conciliation (mediation).[37]

In general, because most evidence and pleadings are fully exchanged in writing between the parties, CIETAC oral hearings are generally short, usually lasting one to three days. Most of CIETAC arbitration cases are concluded within six months after the tribunal is duly constituted.

2.3.3. Combination of Arbitration with Mediation within CIETAC

CIETAC arbitration is marked by a unique combination of arbitration with conciliation. According to CIETAC officials, this represents "an advantageous mixture of the merits of both, which not only resolves disputes, but also renews

[35] CIETAC officials have seen tremendous growth in the number of cases handled in recent years. In an interview with CIETAC Deputy Secretary-General Mr. Kang Ming, he noted that recently CIETAC is becoming better known to the public, especially to help resolve cases involving contractual relations and economic disputes.35 Most recently, in 1996, California federal courts began recognizing and enforce the rulings of CIETAC (which are also recognized in other countries such as Spain, Hong Kong and New Zealand). (Interview with Executive Deputy Director—China International Lawyers Exchange Center International Section).

[36] See: CIETAC Introduction, available at: http://www.cietac.org.cn/english/introduction/intro_1.htm CIETAC's main headquarters are located in Beijing with two sub-commissions in Shanghai and Shenzhen, respectively known as the CIETAC Shanghai Sub-Commission and the CIETAC South China Sub-Commission. CIETAC also successively established 19 liaison offices in different regions and specific business sectors.

CIETAC's organizational structure consists of one Chairman, several Vice-Chairmen, and a number of members who are independent of any government agency. The Chairman performs the functions and duties vested in him/her by the CIETAC Arbitration Rules. The Vice-Chairmen may perform the Chairman's functions and duties with the Chairman's authorization. Within each of CIETAC's headquarters and each of its sub-commissions is a secretariat established to handle logistical matters and daily affairs under the leadership of their respective secretaries-general. CIETAC's headquarters and its South China and Shanghai Sub-Commissions together form one institution.

CIETAC has jurisdiction to hear disputes arising from economic and trade transactions of a contractual or non-contractual nature. These disputes include: international or foreign-related disputes; disputes related to the Hong Kong Special Administrative Region or the Macao Special Administrative Region or the Taiwan region; and domestic disputes. CIETAC arbitrations are generally conducted under its Arbitration Rules effective as of May 1,2005. Where the parties have agreed to different rules, or a modification of CIETAC rules, the parties' agreement prevails, except where such agreement is inoperative or in conflict with a mandatory provision of the law of the place of arbitration.

[37] Ibid. CIETAC was founded in April 1956 by the China Council for the Promotion of International Trade (CCPIT) to meet the needs of the continuing development of China's economic and trade relations with foreign countries after adopting the "open door" policy.

positive business and personal relations between the parties."[38] From 1990 to 1997, CIETAC handled about 4,200 cases. Among these cases, at least 800 were settled by the parties through mediation performed by arbitrators (Wang 1998).

During the arbitration proceedings, the parties are generally asked if they would like to try conciliation, and if they consent, conciliation proceedings ensue. The arbitrators may, at any time during the proceedings, play the role of conciliators in an attempt to resolve the dispute. Either party may end the conciliation at any time if it thinks it is no longer necessary or will be fruitless (Wang 1998). This special feature is outlined in Article 45 of the 2000 CIETAC Arbitration Rules which provides that:

> If both parties have a desire for conciliation or one party so desires and the other party agrees to it when consulted by the arbitration tribunal, the arbitration tribunal may conciliate the case under its cognizance in the process of arbitration.[39]

Once the tribunal is formed, it will conduct the conciliation (Tang 1984, p. 519). The conciliation phase includes assisting the parties to establish and analyze the facts, as well as make recommendations concerning the strengths and weaknesses of each side's case (Nafziger and Ruan 1987, p. 635). According to Article 46 of the 2000 CIETAC Arbitration Rules, "the arbitration tribunal may conciliate cases in the manner it considers appropriate."[40] This provides a CIETAC Arbitrator with a great deal of influence over how the process is conducted. In particular, it allows for ex parte private caucuses between the arbitrator and one of the parties. According to Article 49 of the rules, once an agreement is reached the parties, will:

> sign a settlement agreement in writing when an amicable settlement is reached through conciliation conducted by the arbitration tribunal, and the arbitration tribunal will close the case by making an arbitration award in accordance with the contents of the settlement agreement unless otherwise agreed by the parties.[41]

If, during the course of the arbitration proceedings, the parties reach a settlement agreement between themselves through conciliation without the involvement of CIETAC, any of the parties may, if stipulated in their arbitration agreement, request that CIETAC appoint a sole arbitrator to render an arbitration award in accordance with the contents of the settlement agreement. In such cases, the arbitration fee is generally reduced, commensurate with the quantity of work and amount of the actual expenses incurred by CIETAC.[42]

If the parties decide, on the other hand, that continuing with conciliation is of no assistance to either party, then according to Article 47 of the CIETAC Rules:

> The arbitration tribunal shall terminate conciliation and continue the arbitration proceedings when one of the parties requests a termination of conciliation or when the arbitration tribunal believes that further efforts to conciliate will be futile.[43]

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[38] Ibid.
[39] CIETAC Arbitration Rules (2000), available at http://www.cietac.org.
[40] CIETAC Arbitration Rules (2000), available at http://www.cietac.org.
[41] CIETAC Arbitration Rules (2000), available at http://www.cietac.org.
[42] Ibid.
[43] Ibid. When applying for arbitration, the claimant must submit to the CIETAC secretariat at the Beijing headquarters or the Sub-Commissions an arbitration agreement, a written request for arbitration, and the facts and evidence on which its claim is based. Once the application is received, the CIETAC secretariat will simultaneously send the respondent a Notice of Arbitration, a copy of the Claimant's Request for Arbitration along with attachments, the Arbitration Rules, and a list of the Panel of Arbitrators. The respondent has 45 days (in foreign-related arbitration) from the date of receipt of the Notice of Arbitration to produce its written defense and relevant documentary evidence to the CIETAC secretariat. The respondent may also lodge its counterclaim during the arbitration procedure so long as the counterclaim arises from the same contract relations or legal relations as that of the claims raised by the Claimant, the counterclaim is directed against the Claimant, and the disputes involved in the counterclaim shall not be the same as the disputes involved in the arbitration claims.
According to the CIETAC Arbitration Rules, the arbitral tribunal may be composed of either a sole arbitrator or three arbitrators. Parties generally appoint arbitrators from the Panel of Arbitrators

During the arbitration hearing, the arbitral tribunal is free to examine the case in any way that it deems appropriate unless otherwise agreed by the parties.[44] In general, the arbitral tribunal is required to hold oral hearings when examining the case; however, *oral* hearings may be omitted and the case can be examined on the basis of documents only if the parties agree and the arbitral tribunal also finds that oral hearings are unnecessary.[45] A recent modification to CIETAC's arbitration rules allows for a choice on the part of the parties to select either an inquisitorial or adversarial approach when examining the case based on the circumstances of the case. [46]

2.3.4. Hong Kong International Arbitration Center

The Hong Kong International Arbitration Center (HKIAC) was established in 1985 to assist disputing parties to solve their disputes by arbitration and other means of dispute-resolution. It operates under a Council composed of business and professionals and is administered by the Centre's Secretary-General, who is its chief executive and registrar.[47]

Like CIETAC, dispute-resolution through the HKIAC offers a variety of approaches to resolving disputes, including negotiation, conciliation, mediation, and arbitration. According to HKIAC, the most common form of dispute-resolution is negotiation. By this means alone nearly all disputes are reported to be resolved. If negotiations fail, the assistance of a neutral third party or several neutral third parties is sought to facilitate a solution.[48]

In mediation, the mediator may act as a shuttle diplomat serving as a channel for communication, filtering out the emotional elements, and allowing the parties to focus on the underlying objectives. The mediator encourages the parties to reach an agreement themselves as opposed to having it imposed upon them. According to

provided by CIETAC, but in some cases, the parties may also appoint arbitrators from outside of CIETAC so long as the CIETAC Chairman confirms the appointment. If either the claimant or respondent fails to jointly appoint or jointly entrust the Chairman of CIETAC to appoint one arbitrator within 15 days from the date of receipt of the Notice of Arbitration, the arbitrator will be appointed by the Chairman of CIETAC.

[44] Ibid. CIETAC has created a set of Ethical Rules to regulate the arbitrators' behavior in the conduct of arbitration cases. According to these rules, arbitrators are required to examine and hear cases reasonably, independently and impartially on the basis of facts and in accordance with laws, and must give the parties equal opportunities to state their cases. If a candidate arbitrator has, in advance, discussed the case with a party or provided advice on a case to a party, he or she cannot serve as arbitrator in the case. Arbitrators cannot accept gifts from a party, and can not meet with one party alone and discuss matters or accept materials relating to the case. In addition, arbitrators must maintain the privacy and confidentiality of arbitration and must not divulge any substantive or procedural matters or their own personal views to outsiders. Arbitrators are finally required to fulfill their duties prudently and diligently.

[45] Reflecting the more active role played by arbitrators in the region, during the course of the hearings, the arbitral tribunal may, if it considers it necessary, issue procedural directions and a list of questions. It may also hold pre-hearing meetings and preliminary hearings and produce terms of reference, unless otherwise agreed by the parties. In addition, the arbitral tribunal may undertake investigation and collect evidence on its own initiative if it deems it necessary. If the arbitral tribunal investigates and collects evidence on its own initiative, it is required to inform the parties to be present at the investigation if it deems it necessary. In addition, the arbitral tribunal is free to consult an expert or appoint an appraiser for the clarification of special issues relating to the case. In such circumstances, the parties are obliged to submit or produce to the expert or appraiser any materials, documents, properties, or goods related to the case for inspection. The parties are also free to hire experts to be present at the hearing on their own initiative.

[46] Ibid. In most cases, CIETAC arbitrators must render an award within six months (in foreign-related cases) from the date on which the arbitral tribunal is formed. The arbitral award is decided by the majority of the arbitrators. When the arbitral tribunal cannot reach a majority opinion, the arbitral award shall be decided in accordance with the presiding arbitrator's opinion. A written dissenting opinion can be filed and may be attached to the award, but it does not form a part of the award. The arbitral award is final and binding upon both parties. Neither party may bring a suit before a court of law or make a request to any other organization for revising the arbitral award.

[47] See HKIAC Website: http://www.hkiac.org/HKIAC/HKIAC_English/main.html.

[48] Ibid.

the HKIAC, mediation has proven to be "an outstandingly successful management tool for resolving difficult disputes and should always be considered when negotiations fail before proceeding to arbitration or litigation. It is a means by which the parties can re-learn the basis of communication with which they can then resolve future disputes."[49]

For domestic arbitration, HKIAC has its own set of arbitration rules and an accompanying guide for the assistance of parties and arbitrators. For international arbitration, HKIAC supports the use of its Procedure for Arbitration (including the UNCITRAL Rules). If the parties wish to use the rules of the ICC, LCIA, AAA, or any other arbitral institution, they may also agree that any dispute under these rules will be heard at HKIAC.[50]

The Centre has its own set of Mediation Rules based on the Hong Kong Government's Mediation Service Rules but also has available a wide variety of other rules which may be adopted for particular disputes.[51] The Centre offers administrative assistance to the parties as a channel of communication between them and, where required, as an appointing authority to appoint mediators or arbitrators.[52]

Parties to an arbitration may select domestic rules which provide that a conciliator may later act as an arbitrator in the same proceeding.[53] If the conciliation is not successful, the process then moves into arbitration.[54] Similar to China's Arbitration Law, the Hong Kong Arbitration Ordinance recognizes settlement agreements as arbitral awards.[55]

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[49] Ibid; HKIAC operates panels of international and local arbitrators and also holds lists of accredited mediators. HKIAC administers the mediation service for Hong Kong Government contracts.

[50] Ibid.

[51] Ibid.

[52] Ibid.

[53] As reprinted in Kaplan (1990). This provision is outlined in the Hong Kong Arbitration Ordinance of 1997. Section 2A (2) provides that:

> where an arbitration agreement provides for the appointment of a conciliator and further provides that the person so appointed shall act as an arbitrator in the event of the conciliation proceedings failing to produce a settlement acceptable to the parties --
>
> (a) no objection shall be taken to the appointment of such person as an arbitrator, or to his conduct of the arbitration proceedings, solely on the ground that he had acted previously as a conciliator in connection with some or all of the matters referred to arbitration…

[54] Hong Kong International Arbitration Ordinance. Section 2B of the same ordinance further outlines that:

1. If all parties to a reference consent in writing, and for as long as no party withdraws in writing his consent, an arbitrator or umpire may act as a conciliator.
2. An arbitrator or umpire acting as conciliator
   a) may communicate with the parties to the reference collectively or separately;
   b) shall treat information obtained by him from a party to the reference as confidential, unless that party otherwise agrees...
3. Where confidential information is obtained by an arbitrator or umpire from a party to the reference during conciliation proceedings and those proceedings terminate without the parties reaching agreement in settlement of their dispute, the arbitrator or umpire shall, before resuming the arbitration proceedings, disclose to all other parties to the reference as much of that information as he considers is material to the arbitration proceedings.
4. No objection shall be taken to the conduct of arbitration proceedings by an arbitrator or umpire solely on the ground that he had acted previously as a conciliator in accordance with this section.

[55] Ibid. Hong Kong Ordinance 2A(4) provides that:

> If the parties to an arbitration agreement which provides for the appointment of a conciliator reach agreement in settlement of their differences and sign an agreement containing the terms of settlement (hereinafter referred as the "settlement agreement") the settlement agreement shall for the purposes of its enforcement be treated as an award on an arbitration agreement and may by leave of the Court or a judge thereof be enforced in the same manner

While parties to an international dispute can choose domestic arbitration rules, the applicable arbitration rules for international arbitrations at HKIAC are the 1976 UNCITRAL Arbitration Rules. Under these rules, the blending of conciliation and arbitration is not permitted. Article 16 of the 1980 UNCITRAL Conciliation Rules provides that:

> The parties undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.[56]

Some commentators have explained that the parallel rule structure in Hong Kong provides, on the one hand, consistency with Western practices separating the use of arbitration and mediation, and on the other hand, consistency with Mainland Chinese practices which allow for the combination of arbitration and mediation. Parties are given the choice regarding the method that best suits their particular leanings(De Vera 2004).

2.3.5. Singapore International Arbitration Center

The Singapore International Arbitration Center (SIAC) was established in 1991. Since then, the SIAC has handled approximately 700 arbitrations.[57] SIAC's operations are overseen by a Board of Directors which is composed of representatives from the international and local business communities in Singapore.

The Singapore Arbitration Center functions according to rules very similar to CIETAC and HKIAC. Arbitration can be conducted either under the SIAC Rules (1997) or under the UNCITRAL Arbitration rules. Mediation services are likewise provided to parties through the Singapore Mediation Center.

Substantively, the SIAC bases its arbitration rules largely on the UNCITRAL Model Law and the rules of the London Court of International Arbitration. [58] In the early 1990s, a subcommittee of the law reform committee was set up to consider amendments to Singapore's Arbitration Act, first enacted in 1953. Largely adopting the recommendations of the law reform committee, which included the re-enactment of the NY Convention, the International Arbitration Act (IAA) (Chapter 143A, 2002 Ed) was enacted on 31 October 1994 and came into force on 27 January 1995.[59]

With respect to provisions allowing for conciliation in the context of arbitral hearings, the IAA introduced several additional provisions aimed at outlining the conduct of international commercial arbitrations in Singapore including conciliation prior to arbitration. In addition, other amendments include provisions for the confidentiality of court proceedings in connection with arbitrations, immunity of arbitrators, and invoking the assistance of the court to enforce interim orders and directions.[60]

Similar to Hong Kong, analysts indicate that party autonomy within the arbitral process has been greatly increased and court interference drastically reduced.[61] In

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> as a judgment or order to the same effect and where leave is so given judgment may be entered in terms of the agreement.

[56] UNCITRAL Conciliation Rules (1980), available at http://www.uncitral.org/en-index.htm.
[57] Jones Day, Singapore, 2004. *International Commercial Arbitration in Asia - Jones Day Monday Business Briefing.* October 15.
[58] Ibid.
[59] Ibid.; The IAA adopts the Model Law for international arbitrations, while the amended Arbitration Act (Chapter 10, 2002 Ed) regulates domestic arbitrations. The operation of the IAA and the domestic Arbitration Act allow parties to arbitrations to opt in or out of either regime.
[60] Ibid.
[61] Ibid.

addition, costs and length of proceedings have all been reviewed in the process of reforming the SIAC.

2.3.6. Japan Commercial Arbitration Association

Like CIETAC, HKIAC, and SIAC, the Japan Commercial Arbitration Association (JCAA) provides for the resolution of international commercial disputes that are binding overseas through the New York Convention on the Recognition and Enforcement of Arbitral Awards.

Similar to CIETAC and HKIAC, the JCAA also provides for either the adjudication or settlement of disputes by the arbitral tribunal. According to Rule 47 of its Arbitration Rules, an arbitral tribunal may "attempt to settle the dispute in the arbitral proceedings if all of the parties consent, orally or in writing, thereto."[62]

2.3.7. Korean Commercial Arbitration Board

The Korean Commercial Arbitration Board (KCAB) hears both domestic and international trade disputes in Korea. KCAB reported administering 150 arbitration cases in 1999. On 31 December 1999, the KCAB introduced new arbitration rules largely modeled on the UNCITRAL Model Law. This marked a major shift from traditional arbitration rules modeled on Germanic arbitration law codified in the German Civil Code of 1877. Its laws are also influenced by models developed by the AAA in New York, the ICC in Paris, and LCIA in London.

KCAB administers international arbitration, mediation, and conciliation. It reports handling over 500 mediation cases a year with a near 50% success rate. In addition to mediation, conciliation services are available in which proceedings are conducted before a dispute is presented for arbitration. The proceeding is called a "last-chance" proceeding, which gives both parties the ability to work out an agreement before the more formal arbitration proceedings commence.[63] The ultimate result of the conciliation is binding on the parties. KCAB notes that "it does more than render arbitration services. It helps facilitate settlements and guarantee implementation thereof between trading partners at home and abroad."[64]

2.4. Summary

The forces of "harmonization" and "legal diversity" have both influenced the practice of international arbitration. On the one hand, the United Nations Commission on International Trade Law has contributed to harmonizing procedural aspects of international arbitration practice. On the other hand, the unique historic roots of dispute resolution practices in East Asia impacted diverse contemporary structures and rules regarding the approach taken toward the practice of arbitration and the permissibility of combining arbitration and conciliation.

The unique underpinnings of the concept of dispute resolution in East Asia has had a long lasting impact on its legal system and continues to impact the process of arbitration in the region. This foundation will provide the context for examining contemporary attitudes among arbitration practitioners in East Asia and the West toward the role of the arbitrator in promoting settlement.

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[62] See JCAA Website: http://www.jcaa.or.jp/e/index-e.html.
[63] See KCAB website at: http://www.kcab.or.kr/kcaben/index.htm.
[64] See KCAB website at: http://www.kcab.or.kr/kcaben/index.htm; KCAB works under the rules set forth in the Arbitration Act of Korea which was promulgated on 16 March 1966 as Law No. 1767. The Act is an independent body of law, and its provisions prevail in the event of any conflicts with other domestic codes. All commercial disputes are decided in accordance with its provisions and the KCAB Arbitration Rules, unless parties have agreed otherwise. Korea has acceded to special international conventions on dispute settlement such as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the New York Convention and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention) of 27 August 1965. Following the approval of the Korean Supreme Court, the Arbitration Rules of KCAB were promulgated on 15 May 2000.

3. A Survey of Settlement in the Context of Arbitration of International Business Disputes in Asia

In order to explore whether and how diversity and globalization influence the practice of international arbitration in East Asia a comparative survey was conducted in 2007.[65]

The survey questions dealt with the capacity of international commercial arbitration to facilitate voluntary settlement and the role arbitrators play in this context. Questions included how often arbitrators observed a "splitting the difference" in disputes rather than deciding the dispute based on the merits, and which proportion of cases that enter arbitration are settled voluntarily after the initiation of arbitration.

On the one hand, the findings suggest that in general there is growing convergence of perspectives regarding the practice of arbitration worldwide. In particular, arbitration practices rooted in widely held international legal treaties such as the UN Model Law on International Arbitration tend to exhibit the greatest openness to international harmonization throughout the various regions. This is reflected in a high level of uniformity within survey data pertaining to factors facilitating settlement such as the simultaneous attention of both parties to the dispute and the process of information sharing between parties.

On the other hand, the findings indicate that in some key areas, distinction can be seen with respect to aspects of international arbitration that appear to be culturally rooted, such as varying arbitrator perceptions regarding the arbitrators' role in settlement, whether settlement is regarded as a goal in arbitration and the types of efforts made pre-arbitration to settle disputes. In particular, East Asian arbitrators regard the goal of facilitating voluntary settlement in the context of arbitration with greater importance and generally make greater efforts pre-arbitration to settle disputes as compared with counterparts in the West.

In general, the findings bear out the central hypothesis. International treaties and commercial practice are found to influence harmonization of perspectives ("convergence") regarding the general legal framework of arbitration. This is indicated by non-statistically significant variation in perspectives of Eastern and Western practitioners on issues such as the importance of the simultaneous attention of both parties to the dispute and information sharing between parties in promoting settlement. In contrast, the survey revealed a higher level of East/West variation ("informed divergence") in response to questions touching on cultural values regarding the role of the arbitrator in promoting settlement as will be discussed below.

3.1. Internationally Based Considerations–Convergence

A significant area of convergence is the similarity between Eastern and Western practitioners regarding the proportion of settlements achieved as a result of compromise solutions. Sometimes arbitration awards are described as splitting the difference between the parties positions, known as "splitting the baby," rather than deciding the dispute on the merits. Survey participants were asked how frequently they had observed this approach in the course of arbitrations in which they participated.

[65] For full discussion see: Ali (2010).

Table 1: Frequency of Compromise Decisions: "Splitting the Baby" by Region of Practice (%), 2006/7

	Region of Practice	
Response*	East	West
Almost always/often	67%	62%
Rarely/Practically Never	33%	38%
Total	100%	100%
	(75)	(26)

Notes: * Difference is not statistically significant according to Chi-square analysis: Pearson's chi-square = 0.22 (p < 1).

Respondents from both East Asian and Western regions reported a similar level of openness to "splitting the baby" or compromise solutions. Nearly 67% of East Asians surveyed agreed that this occurs either "sometimes" or "often," in comparison with nearly 62% of Europeans and Americans surveyed. Several Western arbitrators were quite adamant about refraining from using compromise solutions in their arbitration awards. One Western arbitrator noted, "making a 50/50 split is misguided. Arbitration is an adversarial proceeding/a conflict in my view. It is not a mediation – parties want a winner and a loser."[66] Nevertheless, other Western practitioners noted that many arbitrators "have in the back of [their] mind what kind of record do I create, how am I regarded in the market place. In subtle ways this leads the arbitrator to give something to both sides in a lot of cases… Most arbitrators would be horrified if you said it to them – but I think you can see it."[67]

East Asian arbitration practitioners held similar views, noting that "this is not simply about 'mixing the mud' (he xue ni) or 'splitting the baby,'" but there is an openness to pragmatic compromises by "looking at all the facts and finding a practical solution. Chinese parties accept this practice – that is why it is efficient."[68]

3.2. Informed Divergence–Greater Emphasis on Settlement in East Asia

This study hypothesized that on the one hand, settlement can be achieved more often in East Asia due to general historic proclivity toward conciliation and the capacity of arbitrators in the region to facilitate settlement, but on the other, actual settlement rates are limited due to lower opportunity costs associated with proceeding with arbitration in the region. Settlement is regarded as a combination of both cultural and socio-economic factors. Cultural factors are relevant to the extent that the promotion of harmony is tied to the achievement of settlement, while socio-economic factors influence the extent to which external factors such as the costs of continuing litigation pressure parties to settle. The survey found that when the question of the desirability of settlement is raised as a goal of arbitration, a higher proportion of East Asian respondents share this view, but when the actual rates of settlement are examined, it is not necessarily true that East Asians exhibit a higher settlement rate because opportunity costs of continuing litigation in terms of legal fees are generally not as high as they are in the West. In addition, this section found that East Asian arbitration practitioners will make more efforts pre-arbitration to settle disputes.

Like the 1992 study, this survey first examined (a) the issue of whether the facilitation of voluntary settlements is considered to be a goal of arbitration and the effectiveness of the arbitral process in achieving this goal, then (b) how often arbitrators from the various regions rendered compromise decisions as a substitute for negotiated settlements agreed to by the parties; next it looked at (c) the

[66] Western arbitrator working in Japan, Interview 63.
[67] US representative to UNCITRAL, Interview 61.
[68] Chinese member of arbitration commission, Interview 10.

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frequency of settlements in arbitration, as well as (d) the way in which the process of arbitration affects the chances of settlement, and (e) the role of the arbitrators in particular.

3.2.1. Settlement as a Goal of Arbitration

The survey asked participants whether the facilitation of voluntary settlements was one of the goals of arbitration. Confirming the hypothesis, a statistically significantly higher numbers of East Asian respondents (82%) saw the facilitation of voluntary settlement as one of the goals of arbitration, while only 62% of Western respondents held this view. Follow-up interviews expanded on these findings. Interviewees from the United States and Europe expressed a more reticent view towards settlement in the course of arbitration. One arbitrator from the United States who does extensive arbitral work in Japan shared, "my aim is not to help them promote a settlement, my job is to render an adversarial decision."[69] He added that in the West, "when parties go to arbitration they want a judgment a decision on the merits – if they want a mediation they get a mediator."[70] He noted that some arbitrators he has co-arbitrated with on panels in Japan will "make mention of settlement possibilities frequently."[71] He added, "I have to remind the other arbitrator that I can't under the rules I work under. But if the parties ask for settlement negotiations and formally agree to it, then we proceed on that basis."[72]

Table 2: Response to Question of Whether Participants See Settlement as One of the Goals of Arbitration by Region of Practice (%), 2006/7

	Region of Practice	
Response*	East	West
Yes	82%	62%
No	18%	38%
Total	100%	100%
	(77)	(26)

Notes: * Difference is statistically significant according to Chi-square analysis: Pearson's chi-square = 4.47 ($p < 0.05$).

In contrast, arbitrators from East Asian countries pointed out the unique responsibility of arbitrators to examine possibilities for settlement in consideration of the parties' best interests. One arbitration staff member of a prominent Chinese arbitration institution noted that "the motive of arbitration is that parties can settle their case satisfactorily. They can put the whole picture into consideration. If it is only an issue of facts and law, then there is a very one-dimensional outcome."[73]

With regard to the effectiveness of arbitration in achieving the goal of settlement, the findings suggest that although survey participants regard settlement as one of the goals of arbitration, in practice it is not necessarily an effective means of achieving settlement.

[69] Western arbitrator working in Japan, Interview 63.
[70] Ibid.
[71] Ibid.
[72] Ibid.
[73] Chinese member of arbitration commission, Interview 10.

Table 3: Perception of Effectiveness of Arbitration in Achieving the Goal of Voluntary Settlement by Region of Practice (%), 2006/7

	Region of Practice	
Response*	East	West
Very effective/helpful	67%	50%
Not very effective	33%	50%
Total	100%	100%
	(76)	(26)

Notes: * Difference is not statistically significant according to Chi-square analysis: Pearson's chi-square = 2.42 ($p < 0.20$).

Confirming the hypothesis, respondents from East Asia viewed arbitration as an effective means to facilitate voluntary settlement at a higher proportion (67%) than arbitrators in the West (50%). While not statistically significant, nevertheless the direction of the findings indicate a higher regard for settlement within arbitration in the East. These variations can largely be explained by the differing approach to arbitration in these regions. While settlement discussions are a fully integrated aspects of arbitration in most East Asian countries, such discussions are largely absent from the practice of arbitration in the West. Likewise, in the West, the costs of arbitration can be quite significant in creating pressures to settle based on cost factors alone, whereas arbitration costs in East Asia remain relatively low and therefore do not exert the same pressures on the parties.

The result of this question confirms the finding that practitioners in East Asia, who on average see settlement as a goal of arbitration (82%), similarly view arbitration as an effective means of achieving settlement (67%), largely because opportunities for settlement are integrated into the arbitration proceedings, while practitioners in the West, of whom a lower proportion view settlement as a goal of arbitration (73%), do not see it as an effective means of settlement (49%). This can be explained by the fact that settlement talks are generally not integrated into arbitration proceedings in the West.

3.2.2. Frequency and Timing of Settlements

Among the most unique aspect of the East Asian approach to international arbitration is its direct integration of conciliation into the arbitration proceedings. This section examines survey results in order to presents a picture of the unique approach and preference for conciliated settlement in East Asia.

3.2.3. Overall Settlement Rate

As noted above, settlement is seen as a combination of both cultural and socio-economic factors. Cultural factors are seen to the extent that the preference for harmony in East Asia is tied to the achievement of settlement, while socio-economic factors bear on the extent to which external factors such as the costs of continuing litigation pressure parties to settle. This indicates that the settlement rate among East Asian participants in arbitration may not necessarily be higher due to lower external opportunity costs.

Table 4: Arbitrators' Perception of the Proportion of Cases that Settle Voluntarily by Region of Practice (%), 2006/7

	Region of Practice	
Response*	East	West
More than or equal to 40%	30%	48%
Less than 40%	70%	52%
Total	100%	100%
	(65)	(21)

Notes: * Difference is not statistically significant according to Chi-square analysis: Pearson's chi-square = 2.40 ($p < 0.20$).

Like the Buhring-Uhle (1996) study, survey respondents were asked to estimate the overall proportion of cases that are settled voluntarily after the initiation of arbitration. The perspectives varied quite significantly between arbitrators from a 5% to 85% settlement rate. On average, the settlement rate came to 35%. This rate represents a lower overall settlement rate than was reported in the 1992 study. In East Asia, the overall voluntary settlement rate (30%) was slightly lower than that reported in European and American regions averaging 48%.

Confirming the hypothesis that settlement is a function both of a proclivity towards harmony as well as the effect of socio-economic factors such as legal costs, according to interviewees, a significant factor explaining the rationale for settlement in the context of arbitration is the effect of mounting legal fees. A number of attorneys noted that as legal fees mount, parties are often pressured to come to a settlement amongst themselves. One Western attorney noted that after weeks of procedural skirmishing the parties "finally said "this is enough" and the case finally settled because the legal fees were getting too high."[74] In addition to the pressure of legal fees, Western arbitrators also noted the impact of prolonged dispute resolution on company profitability. One in-house attorney working for a Western telecom company in Asia noted that "any prolonged dispute resolution process presents huge opportunity costs for business and potential risks. If it is only money involved, you find that the time is better spent launching new products rather than digging up history for the $2 on the table."[75]

The survey also sought to examine the extent to which settlement options were exhausted before parties chose to go to arbitration. On average, 63% of all those surveyed reported that settlement options are not exhausted before a case goes to arbitration. These findings indicate that there is a general recognition that more efforts could be made at settlement prior to arbitration.

Table 5: Response to Question of Whether Participants See Cases Generally Going to Arbitration Only after the Parties Have Exhausted All Settlement Options by Region of Practice (%), 2006/7

	Region of Practice	
*Response**	*East*	*West*
Yes	38%	28%
No	62%	72%
Total	100%	100%
	(77)	(25)

Notes: * Difference is not statistically significant according to Chi-square analysis: Pearson's chi-square = 0.77 ($p < 1$).

East Asian arbitrators were reported to make greater efforts pre-arbitration to settle disputes. Approximately 38% of East Asian practitioners surveyed believed

[74] Western attorney working in China, Interview 20.
[75] Western in-house counsel working in Hong Kong, Interview 33.

that all settlement options were exhausted prior to initiating arbitration. In contrast, a lower proportion of Western arbitration practitioners (28%) indicated that settlement options were exhausted before the initiation of arbitration. This perception has remained relatively steady over the past 14 years. As one Chinese arbitrator noted, "the Chinese parties… will ask the parties if they want to settle in order to maintain their relationship… they are loath to go the whole way to court."[76] The same arbitrator noted that in his view, "Western parties go straight to arbitration, and use the arbitration process as leverage to get more out of the settlement. Chinese clients are becoming more aware of the leverage possibilities of arbitration, but are still reluctant to use it."[77]

3.3. Discussion

When the question of the desirability of settlement is raised as a goal of arbitration, a higher proportion of East Asian respondents share this view, but when the actual rates of settlement are examined, it is not necessarily true that East Asians will exhibit a higher settlement rate. This is largely because the opportunity costs of continuing litigation in terms of legal fees are generally not as high in East Asian countries as they are in the West. The survey and interview findings confirm this hypothesis:

- Significantly higher numbers of East Asian respondents (82%) saw the facilitation of voluntary settlement as one of the goals of arbitration, in comparison with 62% of Western respondents who held this view.
- Respondents from East Asia viewed arbitration as an effective means to facilitate voluntary settlement at a much higher proportion (67%) than arbitrators in the West (50%).
- Nearly 67% of East Asians surveyed agreed that "splitting the baby" occurs either "sometimes" or "often," in comparison with nearly 62% of European and Americans surveyed.
- East Asian arbitrators were reported to make greater efforts pre-arbitration to settle disputes. Approximately 38% of East Asian practitioners surveyed believed that all settlement options were exhausted prior to initiating arbitration. In contrast, a lower proportion of Western arbitration practitioners (28%) indicated that settlement options were exhausted before the initiation of arbitration.

For many of these findings the statistical variation is not significant, except for the initial finding indicating a statistically significantly higher proportion of East Asians viewing settlement as a goal of arbitration. Nevertheless, for findings in which statistical variation is not significant, regional variation tends to indicate cumulative support for the view that culturally based tendencies in East Asia, in particular the proclivity toward reconciling relationships, continues to influence preferences for settlement in East Asian arbitration proceedings.

3.4. Reconciling Cultural Diversity and International Conventions in the Context of International Commercial Arbitration in East Asia

The principle finding of this study —based on comparative survey data and interviews— suggests that cultural diversity and global standards simultaneously impact the practice of international commercial arbitration in East Asia. Because of the flexible structure of the international arbitration system based on a Model Law framework which allows countries to opt in or out of particular provisions, substantive variation pertaining to differing preferences for conciliatory or adjudicatory approaches to arbitration can coexist with a relatively high level of procedural uniformity across regions.

[76] Chinese arbitrator, Interview 57.
[77] Ibid.

In conformity with the hypothesis tested, international treaties and commercial practice are found to influence harmonization of perspectives ("convergence") regarding the general legal framework of arbitration. This is indicated by non-statistically significant variation in perspectives of Eastern and Western practitioners on issues such as the importance of the simultaneous attention of both parties to the dispute and information sharing between parties in promoting settlement. At the same time, the survey revealed a higher level of East/West variation ("informed divergence") in response to questions touching on cultural values regarding the role of the arbitrator in promoting settlement, the facilitation of voluntary settlement as a goal of arbitration, and efforts made pre-arbitration to settle disputes.

3.5. Implications of Study

A principle implication of the present study is that much of the structural framework of international arbitration is becoming increasingly harmonized. Therefore, when cases arise in international settings, participants can expect a certain degree of familiarity with the procedural framework of the arbitration process. At the same time, in many instances, tolerance for arbitrator-initiated involvement in settlement proceedings continues to reflect considerable variation across regions. This largely echoes Twining (2000)'s observation that as the discipline of law becomes more cosmopolitan, it needs to be underpinned by theorizing that treats generalizations across legal families, traditions, cultures, and orders as problematic. Therefore, as practitioners increasingly participate in arbitration in distant corners of the earth, they need to be open to the possibility that many of the techniques used during the course of the arbitration process will vary depending on how the arbitrator views his/her role as either a conciliator, adjudicator, or some combination of the two.

Building on this initial study, a number of future paths of research can be explored. Avenues of investigation include a greater focus on examining how the UNCITRAL Model Law system succeeds in achieving a high level of global participation and thus harmonization of legal systems of diverse countries. Such a study would provide a helpful framework for exploring models of international information sharing and exchange. An additional avenue of research would include a deeper examination of the implications of an overarching reliance on harmony as an underlying objective of dispute resolution, and similarly, the implications of a singular win/lose approach to resolution. Can harmony become a means for suppressing legitimate claims and fair treatment? Can merits-based decisions which abstract out relational issues and actual circumstances surrounding the dispute lead to imbalanced decisions? From a broader perspective, a fuller exploration of the ultimate objectives sought through the arbitration process and how particular resources within arbitration might promote conciliation would inform a more accurate assessment of current models in the East and West.

Finally, practitioners and arbitration participants alike would benefit from an examination of the relevant capabilities that go into training an effective arbitrator who works in a cross-cultural setting and effective training methods to develop those capabilities.

It is hoped that a deeper understanding of international dispute resolution practices in East Asia and the West will assist legal scholars and practitioners to interact across regions and understand their professional counterparts in an increasingly interdependent global society.

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