

Glocalization of Arbitration: Transnational Standards Struggling with Local Norms *Through the Lens of Arbitration Transplantation in China*

Fan Kun*

ABSTRACT

This article examines how arbitration, as a semi-formal dispute resolution institution, gradually took root in China and how it interacted with the Chinese non-confrontational legal tradition. Based on the experience of arbitration transplantation in China, the article argues that local culture and traditions still have a strong role to play in the process of legal globalization. On the one hand, global scripts are localized when domestic actors translate and conceptualize the borrowed concepts in accordance with local norms—‘localized globalism’; on the other hand, local ideas, practices and institutions may be globalized when they are projected to the global arena—‘globalized localism.’ The author argues that the development of transnational

* Assistant Professor, Faculty of Law, Chinese University of Hong Kong. Visiting Scholar, Harvard Yenching Institute. PhD *summa cum laude* (University of Geneva), LLM (NYU, Paris XII). The author appreciates the inputs from Prof. William Alford, Prof. Stewart Macaulay, Prof. Mavis Maclean and all participants at Harvard-Stanford International Junior Faculty Forum (2011) on another paper the author presented, which inspired the author to write this paper. The author also thanks Prof. Yu Xingzhong, Prof. Ko Hasegawa, Prof. Zhang Qi, Prof. Margaret Woo, and all participants at International Conference on Law and Society (2012), the Second Biennial Conference Comparative Legal History: Definitions and Challenges (2012), and the World Chinese Legal Philosophy Summit (2012), the Conference on Legal Transplantation: Technicalities, Language and Philosophy (2011), and the Research Seminar at the Chinese University of Hong Kong (2011) for their helpful comments on the earlier drafts of this article. The author also appreciates the editing assistance from Caitlin Jaye and Kevin Tsai of the Harvard Negotiation Law Review.

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arbitration will be a process of 'glocalization,' which reflects the combined impact of the globalization of both law and local culture and traditions.

CONTENTS

Introduction	177
I. Definition of the Concepts	178
A. Legal Transplant and Globalization of Law	178
B. Transnational Arbitration	182
C. Concepts of Glocalization	186
II. Local Traditions and the Concepts of Mediation and Arbitration	187
A. Local Traditions: The Non-Adversary Method of Dispute Resolution	187
B. The Meaning of Mediation and Arbitration in the West	192
C. The Concepts of Mediation and Arbitration in Chinese Local Norms	193
1. Official and Semi-official Records of the Practice of Mediation	193
2. Dispute Settlement within the Traditional Chinese Social Institutions.....	197
a. The Families and Clans	199
b. The Villages	201
c. The Guilds	202
D. The Differences between Chinese Local Norms and Western Concepts	205
III. Localized Globalism: Cultural Translation of the Borrowed Concept	208
IV. Globalized Localism: The Projection of Local Norms to Global Arena	215
V. Conclusion	219

"At our borders there are thousands of intelligent laws and customs, so we should transplant the fruits and trees into our garden. The transplanted fruits and trees will survive under any climate and will adapt in any soil conditions."

Voltaire

"[The politics and civil law of each nation] should be adapted in such a manner to the people for whom they are framed that it should be a great coincidence if those of one nation suit another."

Montesquieu

INTRODUCTION

In legal history, the exchange and overlapping of different normative spheres beyond the territorially-constrained state have been the norm. Established descriptions of this entanglement process in legal history include concepts like 'reception,' 'transfer,' or 'transplant.' In recent years, globalization has caused laws and institutions to be transplanted from one national context to another national context, to be exported from domestic law to global law, or to emerge directly in the global legal system. Scholars have described this phenomenon as the 'globalization of law.'¹ In this context, what is the relationship between global scripts and local norms? This article intends to illustrate the two-way interactions between globalism and localism through the development of one particular institution—arbitration.

In line with this trend of globalization, modern arbitration is also leading law and practice towards an ever-increasing global harmonization. In this movement towards legal harmonization, to what extent are local cultural divergences still present? How will local norms interact with transnational standards? To what extent can arbitration as a 'transnational institution' be readily transplantable into different societies? What are the prospects of transnational arbitration?

To address the convoluted issues of 'legal transplantation' and the 'globalization of law,' this article examines how arbitration, as a semi-formal dispute resolution mechanism, gradually took root in China and how it interacted with the Chinese non-confrontational legal tradition. Based on the experience of arbitration's transplantation in China, the article argues that local culture and tradition still play an important role in the process of legal globalization. On the one hand, global scripts are localized when domestic actors translate and conceptualize borrowed concepts according to local norms—'localized globalism;' on the other hand, local ideas, practices, and institutions may be globalized when they are projected to the global arena—'globalized localism.' The author argues that the development of transnational arbitration will be a process of 'glocalization,' which

1. See generally H. Patrick Glenn, *Cosmopolitan Legal Orders*, in *THEORISING THE GLOBAL LEGAL ORDER* 25 (Andrew Halpin & Volker Roeben eds., 2009); WILLIAM TWINING, *GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE* (2009); WILLIAM TWINING, *GLOBALISATION AND LEGAL THEORY* (William Twining & Christopher McCrudden eds., 2000) [hereinafter *GLOBALISATION AND LEGAL THEORY*]; William Twining, *Implications of 'Globalisation' for Law as a Discipline*, in *THEORISING THE GLOBAL LEGAL ORDER* 39 (Andrew Halpin & Volker Roeben eds., 2009) [hereinafter *Implications*]; Sabino Cassese, *The Globalization of Law*, 37 *N.Y.U. J. INT'L. L. & POL.* 973 (2005).

reflects the combined impact of the globalization of both law and local culture.

Part I defines the concepts and general theory of legal transplant, globalization of law, transnational arbitration, and glocalization. Part II takes a historical perspective to trace the local Chinese traditions of non-adversarial dispute resolution, and to compare the different meanings of mediation and arbitration used in Chinese and Western traditions. It explains that while the roles of settlement-facilitator and decision-maker are clearly defined in the West, there is no such distinction between the two roles in the Chinese tradition. Part III argues that the concept of arbitration took on a new meaning when it was imported to China and translated according to Chinese local norms. As a result of this cultural translation, the transplanted institution gradually adapted into a new form—the combination of mediation and arbitration. Part IV illustrates the potential influence of local norms on transnational standards, using the example of the increasing acceptance of the combination of mediation and arbitration worldwide. On the basis of the above arguments, the article concludes that legal transplantation may involve a complex process of selection, resistance, reform, and integration. Therefore, the globalization of law can be seen as an entanglement process, which combines the operations of legal, social, cultural, economic, and political elements in different societies, and creates constant interactions between local norms and global scripts.

I. DEFINITION OF THE CONCEPTS

A. *Legal Transplant and Globalization of Law*

The idea of transplanting laws or legal institutions from one system to another was raised as early as the eighteenth century by Voltaire and Montesquieu. Voltaire is probably the first to use the term 'transplant' in the legal context. In a 1745 letter, Voltaire stated as follows:

National leaders should learn from Craftsmen. When London knew a new product was fabricated in France, it was immediately counterfeited. We have succeeded in copying the Chinese porcelain, in manufacturing the good things invented by our neighbors and our neighbors also benefited from our excellent

products. Why doesn't a country import a good law from other countries?²

Voltaire continued to say that, at our borders there are thousands of intelligent laws and customs, so we should 'transplanter' (transplant) these fruits and trees into our garden. The transplanted fruits and trees will survive in any climate and will adapt to any soil conditions.³ Voltaire seems to take a universal approach, believing that laws and customs are transferable from one jurisdiction to another regardless of the 'climate' and 'soil' conditions of the recipient.

Contrary to Voltaire, in 1758 in the *Spirit of Law*, Montesquieu presented the view that the laws of each nation were so closely linked to their environment that it would be a complete coincidence if the laws of one country could serve another.⁴ Montesquieu illustrated that mankind is influenced by various causes: by the climate, by religion, by the laws, by the maxims of government, as well as precedents, morals, and customs, which form 'a general spirit of nations.'⁵ In Montesquieu's view, we can by no means take for granted that an organ of a living body fits into another, as we take for granted that parts of a mechanism are interchangeable. Montesquieu viewed legal transplantation as more similar to this organ transplant than to a mechanical replacement.⁶

The above debate raised some fundamental questions in the study of comparative law: whether the transplanted fruit could be 'adjusted' to the climate and soil conditions in the new environment

2. VOLTAIRE, *Fragment d'une lettre sur un usage très-établi en Hollande*, in OUVRES COMPLÈTES DE VOLTAIRE 216 (1785). [The English text is the author's translation.]

3. *Id.*

4. MONTESQUIEU, *DE L'ESPRIT DES LOIS* (1758), Book I, chap. III (Des lois positives).

5. See MONTESQUIEU, Book I, chap. III:

Elles [les lois] doivent être relatives au physique du pays; au climat glacé, brûlant ou tempéré; à la qualité du terrain, à sa situation, à sa grandeur; au genre de vie des peuples, laboureurs, chasseurs ou pasteurs; elles doivent se rapporter au degré de liberté que la constitution peut souffrir; à la religion des habitants, à leurs inclinations, à leurs richesses, à leur nombre, à leur commerce, à leurs mœurs, à leurs manières. Enfin elles ont des rapports entre elles; elles en ont avec leur origine, avec l'objet du législateur, avec l'ordre des choses sur lesquelles elles sont établies.

Montesquieu restated the elements of spirit of law in his famous passage in Book XIX, chap. IV. ("Plusieurs choses gouvernent les hommes: le climat, la religion, les lois, les maximes du gouvernement, les exemples des choses passées, les mœurs, les manières; d'où il se forme un esprit général qui en résulte.")

6. See Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 7 (1974).

or whether the new environment would 'reject' it? These questions on the viability of legal transplant were further debated between Alan Watson and Otto Kahn-Freund beginning in the 1970s. Their divergent views on the issue of legal transplant are based on contrary propositions about the relationship between the law and society.

Watson's theory begins with the proposition that there is no inherent relationship between law and the society in which it operates. He believes that law is largely autonomous, with a life of its own, and therefore rules or institutions are readily transplantable from one system to another.⁷ Similar to Voltaire, Watson believes that a legal rule is transplanted simply because it is a good idea.

Kahn-Freund disagrees with Watson's proposition that there is no inherent relationship between a state's law and its society. He claims that laws must not be separated from their purpose or from the circumstances in which they are made. He argues that "we cannot take for granted that rules or institutions are transplantable" and believes that "there are degrees of transferability."⁸ Kahn-Freund identified a two-step process to determine the viability of a proposed transplant. The first step is to determine the relationship between the legal rule to be transplanted and the socio-political structure of the donor state.⁹ The second step involves comparing the socio-political environment of the donor state and the receiving state.¹⁰

In the context of the globalization of law, scholars have further debated the relationship between local social conditions and global scripts. Watson takes an economic view of the interaction between global scripts and local norms by proposing that different norms compete in a 'marketplace' of ideas. In this system, he posits that global scripts generally prevail over local opposition, because they are promoted and sourced by legal elites. Watson believes there are few points of interaction between global scripts and local conditions, making legal globalization relatively easy.¹¹ Pierre Legrand, on the other hand, argues that there is so much interaction between global scripts

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

8. See Kahn-Freund, *supra* note, at 6, 27.

9. *Id.* at 11-13, 18.

10. *Id.* at 12.

11. See Alan Watson, *Comparative Law and Legal Change*, 37 CAMBRIDGE L.J. 313 (1978).

and local social conditions that legal globalization generates too much uncertainty to be readily successful.¹²

The current debate on the transferability or non-transferability of law may be too general.¹³ The degree of transferability can vary depending on the area of law being transferred. The determining factor is “the cultural embeddedness of the area of law,”¹⁴ or what I will call ‘the degree of national identity.’

In certain areas of law, where national identity or cultural embeddedness is particularly strong, legal transplantation from one country to another may be extremely difficult. Accordingly, the effects of globalization may be less obvious. For instance, family law touches on deep questions of religion and culture, so family law transfers are less likely to take place. Another example is constitutional law, which involves strong national identity. Even though globalization has led to an increasing ‘transnational engagement’ in constitutional interpretation,¹⁵ there is still not yet a substantial degree of worldwide convergence in constitutional law.¹⁶

In other areas of law of a transnational nature or which deal with overtly global issues, legal transplantation may be readily available and a worldwide convergence of the law and practice may be already emerging. Commercial law is one such area of law. René Demogue argues that although the successful unification of private law is generally subject to certain conditions, such as the similarity of economic and social development between states,¹⁷ he recognizes that commercial law may be an exception in that commercial institutions

12. See Pierre Legrand, *Comparative Legal Studies and Commitment to Theory*, 58 MOD. L. REV. 262 (1995).

13. Lawrence M. Friedman, *Access to Justice: Social and Historical Context*, in ACCESS TO JUSTICE: PROMISING INSTITUTIONS 3, 30-31 (Mauro Cappelletti & John Weisner eds., 1978).

14. Tom Ginsburg, *Lawrence M. Friedman's Comparative Law*, in *Society and History: Essays on Themes in the Legal History and Legal Sociology of Lawrence M. Friedman* 52, 55 (Robert Gordon ed., 2010).

15. VICKI JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (2010); Vicki Jackson, *Transnational Constitutional Values and Democratic Challenges*, 8 INTL. J. OF CON. L. 517 (2010).

16. The author appreciates Prof. Vicki Jackson's presentation of her work CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (2010) at the Chinese University of Hong Kong and her response to the author's question, which has inspired the author to think about the varying effects of globalization on constitutional law and commercial law due to different degrees of national identity.

17. DEMOGUE, RENÉ, L'UNIFICATION INTERNATIONALE DU DROIT PRIVÉ: LEÇONS FAITES À LA FACULTÉ DE DROIT DE L'UNIVERSITÉ DE BUENOS AYRES 121 (1927). (“Il ne faut pas tenter d'unifier le droit de tous les pays civilisés, mais de ceux qui voisins par leurs origines, leurs conditions économiques et sociales, se prêtent mieux à accepter une législation unique.”)

can be unified between people from diverse origins.¹⁸ Businessmen respond to relatively universal profit incentives embedded in markets, and commercial transactions do not touch on the core issues of personal behavior.¹⁹ Therefore, commercial law is generally more amenable to transfer across borders than family law. Similarly, the common interests of merchants have driven the convergence of the national arbitration system and the substantial harmonization of the law and practice in international arbitration.²⁰ Likewise, the World Trade Organization, which was designed to serve the common interests of merchants, has had global effects on the rules of trade between nations.

Different areas of law will be affected by globalization in different ways.²¹ Thus, there is a need for "particularistic local knowledge and a focus on detailed, specific, sharply defined issues in the study of comparative law."²² Instead of trying to develop a grand theory that could explain the global discipline of law in its entirety, this article intends to illustrate the two-way interactions between global scripts and local norms through the lens of a particular institution— commercial arbitration.

B. *Transnational Arbitration*

Arbitration is probably the oldest means of peaceful dispute resolution in human history.²³ It is said to have existed "long before law

18. *Id.* at 123. ("De façon générale, les institutions plus spécialement commerciales peuvent s'unifier entre des peuples plus divers d'origine," c'est-à-dire dans le droit des affaires.)

19. See Ginsburg, *supra* note 14 (using the example of banking law).

20. See discussions below at II.B.

21. See *Implications*, *supra* note 1.

22. *Id.* at 59.

23. For a discussion on the history of arbitration, see FRANÇOIS DE MENTHON, *LE RÔLE DE L'ARBITRAGE DANS L'ÉVOLUTION JUDICIAIRE* (1926); René David, *Arbitrage et droit comparé*, RIDC (1959), 5; René David, *Arbitrage du XIXe et arbitrage du XXe siècle*, in *MÉLANGES OFFERTS À RENÉ SAVATIER* 219-33 (1965); ANGELOS C. FOSTOUCOS, *L'ARBITRAGE-INTERNE ET INTERNATIONAL EN DROIT PRIVÉ HÉLLÉNIQUE* 3 (1978); Ottoarndt Glossner, *Arbitration - a Glance into History*, in *HOMMAGE À FRÉDÉRIC EISEMANN* 19-22, (1978); Jean-Jacques Clère, *L'Arbitrage Révolutionnaire*, 1981 REV. ARB. 3; CHARLES JARROSSON, *LA NOTION D'ARBITRAGE* 1-25 (1987); Jean-François Poudret, *Deux Aspects de l'Arbitrage dans les Pays Romands au Moyen Age: l'Arbitrabilité et le Juge-Arbitre*, 1999 REV. ARB. 3; Yves Jeanclos, *La Pratique de l'Arbitrage du XIIe au XVe Siècle. Eléments d'Analyse*, 1999 REV. ARB. 417; Serge Dauchy, *Le Recours Contre les Sentences Arbitrales en Perspective Historique. Aux Origines des Articles 1481-1491 NCPC*, 1999 REV. ARB. 763; Derek Roebuck, *Best to Reconcile: Mediation and Arbitration in the Ancient Greek World*, 66 ARB. 275, 275-87 [hereinafter *Best to Reconcile*]; Julie Velissaropoulos-Karakostas, *L'arbitrage dans la Grèce antique. Epoques archaïque et classique*, 2000 REV. ARB. 9; Sophie Lafont,

was established, or courts were organized, or judges had formulated law.”²⁴ Martin Domke found the first recorded arbitration as early as 2550 BC, and stated that “all through early history, whenever and wherever commerce reached a high degree of development, arbitration was resorted to for the settlement of disputes between buyers and sellers.”²⁵ The extra-judicial nature of arbitration and the concept of ‘private justice’ can be traced back to the eras of ancient Greece and Rome.²⁶ The Greek arbitral concepts of free will and finality of resolution, and the Roman arbitral principle of formless transactions based on parties’ consent have been retained in modern day arbitration, with generational modifications enhancing their utility and effectiveness.

In Medieval Europe, merchants began to transact beyond the political, cultural and geographical barriers of state boundaries. They transported the most favorable local trade practices to foreign markets. As the transnationality of trade expanded, the bonds of localized systems were broken to develop an international system of commercial law. This new system of law governing commercial transactions and administered by private judges drawn from commercial class became known as the *Lex Mercatoria* or the Law Merchant.²⁷ In the meantime, disputes over transactions at merchant fairs required a resolution mechanism that suited the needs of the merchant class. This paved the way for the development of arbitration. Disputes were resolved by arbitrators out of the

L'arbitrage en Mésopotamie, 2000 REV. ARB. 557; Jean Hilaire, *L'arbitrage dans la période moderne (XVIe-XVIIIe siècle)*, 2000 REV. ARB. 187; Fabrizio Marrella, *L'arbitrage à Venise (XIIe-XVIe siècles)*, 2002 REV. ARB. 263; THOMAS CLAY, *L'ARBITRE* 1-10 (2001) [hereinafter, CLAY]; DEREK ROEBUCK, *THE CHARITABLE ARBITRATOR: HOW TO MEDIATE AND ARBITRATE IN LOUIS XIV'S FRANCE* (2002); DEREK ROEBUCK, *EARLY ENGLISH ARBITRATION* (2008); DEREK ROEBUCK, *DISPUTES AND DIFFERENCES: COMPARISONS IN LAW, LANGUAGE AND HISTORY* (2002); DEREK ROEBUCK & BRUNO DE LOYNES DE FUMICHON, *ROMAN ARBITRATION* (2004).

24. FRANCIS KELLOR, *AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS* 3 (1948).

25. MARTIN DOMKE, 1 DOMKE ON COM. ARB. § 2:1 (Gabriel M. Wilner ed., 2003).

26. See *Best to Reconcile*, *supra* note 23; see generally PETER STEIN, *ROMAN LAW IN EUROPEAN HISTORY* (2002); GEORGE MOUSARAKIS, *THE HISTORICAL AND INSTITUTIONAL CONTEXT OF ROMAN LAW* (2003); DOUGLAS MACDOWELL, *THE LAW IN CLASSICAL ATHENS* (1978).

27. For a discussion on the history of Law Merchant, see generally Avner Greif, *Coordination, Commitment, and Enforcement: The Case of the Merchant Guild*, 102 J. POL. ECON. 745 (1994); AVNER GREIF, *INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY: LESSONS FROM MEDIEVAL TRADE* (2006); Paul Milgrom et al., *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 ECON. & POL. 1 (1990); Francis Burdick, *What is the Law Merchant?*, 2 COLUM. L. REV. 470 (1902).

merchant class itself. Arbitration, like the *Lex Mercatoria*, was outside the judicial system of any nation and amounted to self-regulation by the merchant class.²⁸

In some respects, it is in this tradition of the Law Merchant that international commercial arbitration has evolved into an alternative means of resolving disputes to national courts of law. It is also in this tradition that modern international commercial arbitration has purported to ground itself in expeditious, low cost, informal and speedy mercantile justice.²⁹

There is a continuous line of arbitration concepts from the Greeks to the Romans to the Law Merchant. "The emphasis on good faith, equity and practicality as the essential attributes of the Greek, Roman and Law Merchant arbitral worlds represent archetypal characteristics sought after in the practice of modern day arbitration."³⁰ An 'arbitral chain' could be found that linked the eras of the West's arbitral past with its arbitral present.³¹ In this context, some scholars have argued that arbitration is a 'universal'³² institution, which has "no boundaries of time and space."³³ Nevertheless, if we continue our historical journey to ancient China, one of the oldest civilizations of the world, the notion of private law (a reflection of market exchanges among equal persons) is absent. The Chinese approach to dispute resolution was influenced, to a great extent, by the Confucian philosophy that emphasizes harmony and conflict avoidance. Arthur Gemmell, in his search for the root of arbitration, found no 'arbitral link' in Chinese history to the modern notion of arbitration.³⁴ If that is true, then how did the modern arbitration tree grow on Chinese soil? To what extent are different legal traditions still influential in the development of modern arbitration in different societies?

In line with the globalization of law, arbitration has developed significantly in recent years as the preferred method of dispute resolution for international commerce. It is perceived as being cheaper

28. Burdick, *supra* note 27, at 472-75.

29. Leon Trackman, "Legal Traditions" and International Commercial Arbitration, 17 AM REV. INT'L ARB. 1, 6 (2006).

30. ARTHUR GEMMELL, WESTERN AND CHINESE ARBITRATION: THE ARBITRAL CHAIN 79 (2008).

31. *See id.*

32. *See, for instance, LAURENT AYNÈS, ET AL., DROIT CIVIL: LES CONTRATS SPÉCIAUX* 648-649 (2011); CLAY, *supra* note 23.

33. CLAY, *supra* note 23, at 9 (stating that "l'universalité de l'arbitrage n'étonne guère, compte tenu de sa dimension profondément humaine. Il correspond en effet à l'une des aspirations les plus naturelles de chacun et qui se retrouve à travers les siècles et les pays: le souci de justice.").

34. GEMMELL, *supra* note 30.

and less time-consuming than court proceedings, and in many states the process is more confidential. Arbitral awards are generally easier to enforce in a foreign country than court judgments, thanks to the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards of 1958 ("New York Convention"). More importantly, arbitration is now widely acknowledged to be a neutral method of settling commercial disputes between parties from different nations, allowing each of the parties to avoid the 'home' courts of their co-contractors. Finally, arbitration gives the parties substantial liberty to design their own dispute resolution mechanisms, largely free of the constraints of national law.³⁵

In this context, modern arbitration is developing towards an ever-increasing global harmonization. Starting with the New York Convention, followed by the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ("Model Law"), and a series of national laws and institutional rules, as well as soft law texts such as the International Bar Association Rules on the Taking of Evidence, different procedures have been combined to create a transnational standard.³⁶ There are many examples of the identifiable points of convergence, such as severability of the arbitration agreement, *Kompetenz-Kompetenz* (the ability for an arbitral panel to rule on its own jurisdiction), limited remedies against the award, and party autonomy. This trend has been referred to as the development of 'transnational arbitration,'³⁷ or the emergence of a 'arbitral legal order.'³⁸ Harmonization reflects the needs and expectations of the users of international arbitration: as international business becomes increasingly global and less country-specific, there is a need for a transnational mechanism for resolving disputes. In this process, how will local norms interact with transnational standards? Has international arbitration become a transnational institution with minimal national identity? What are the future prospects of transnational arbitration?

35. FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 1 (Emmanuel Gaillard & John Savage eds., 1999).

36. For discussions about the points of convergence, see Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedures*, 36 VAND. J. TRANSNAT'L L. 1313 (2003).

37. See generally Marc Blessing, *Globalization (and Harmonization?) of Arbitration*, 9 J. INT'L ARB. 79 (1992); Kaufmann-Kohler, *supra* note 36, at 1313-1333; Fali Nariman, *East Meets West: Tradition, Globalization and the Future of Arbitration*, 20 ARB. INT'L 123 (2004).

38. EMMANUEL GAILLARD, ASPECTS PHILOSOPHIQUES DU DROIT DE L'ARBITRAGE INTERNATIONAL 60-66 (2008).

C. Concepts of Glocalization

The previous legal literature on legal transplantation was based on overly simplistic assumptions.³⁹ It tended to focus narrowly on the ‘fit’ between global scripts and legal institutions in the receiving state, but overlooked the roles various domestic actors play in localizing global scripts.⁴⁰ The processes of legal transplantation are much more diverse and complex. The permeation of legal concepts, ideas, and values is not a one-way process, but rather is a mutual interactive process among different societies. It becomes even more complicated in societies where the law incorporates culturally heterogeneous factors.⁴¹ As suggested by Patrick Glenn, we need to view legal tradition through the lens of “multivalent thinking” to keep in mind the “sustainable diversity” among those traditions.⁴² This interactive process is sometimes described as the “diffusion of law,”⁴³ a ‘confluence,’⁴⁴ or a ‘creole’ situation bounded by the macro flow of normative ideas through various legal traditions.⁴⁵ It is thus necessary for us to reflect on the analytical and heuristic value of such terms and the interactions between legal tradition, legal transplantation, and the globalization of law.

This article seeks to broaden our understanding of legal globalization and transnational arbitration by focusing on the interactions between the local and the global. On the one hand, global processes are incorporated into the local setting— ‘localized globalism’ or ‘micro-globalization.’ On the other hand, local ideals, practices, and

39. GLOBALISATION AND LEGAL THEORY, *supra* note , at 52.

40. John Gillespie, *Developing a Framework for Understanding the Localisation of Global Scripts in East Asia*, in THEORISING THE GLOBAL LEGAL ORDER 209 (Andrew Halpin & Volker Roeben eds., 2009).

41. Ko Hasegawa, *Bunkateki Ishitsusei no naka no Hokeisei*, in 陳起行等主編《後繼受時代の東亞法文化:第八回東亞法哲学検討会論文集》, 元照出版公司2012年, 第31-34頁 [Ko Hasegawa, *Shaping Law in the Cultural Heterogeneity*, in EAST ASIAN LEGAL CULTURES IN THE AGE OF POST-RECEPTION, ESSAYS OF THE EIGHTH SYMPOSIUM ON EAST ASIAN PHILOSOPHY 31-34 (Qixing Chen et al. eds., 2012)]; see also Ko Hasegawa, *Incorporating Foreign Legal Ideas Through Translation*, in THEORISING THE GLOBAL LEGAL ORDER 85-106 (Andrew Halpin & Volker Roeben eds., 2009) (illustrating the epistemic and pragmatic conditions of normative translation).

42. H. Patrick Glenn, *LEGAL TRADITIONS OF THE WORLD* 378 (4th ed. 2010).

43. William Twining, *Diffusion of Law: A Global Perspective*, 1 J. COMP. L. 1 (2006).

44. H. PATRICK GLENN, *ON COMMON LAWS* 118 (2007).

45. Ko Hasegawa, “*Ho no Kureoru*” no Gainen o meguru Kisoteki Kosatsu, [Fundamental Considerations on the Concept of the “Creole” of Law], 58 HOKKAIDO L. REV. 3, at 259-65 (2007).

institutions are also projected onto global scenes— ‘globalized localism’ or ‘macro-localization.’⁴⁶ The author uses the term ‘glocalization’⁴⁷ to describe this entanglement process between ‘global scripts’⁴⁸ and ‘local norms’ in international arbitration. The transplantation of arbitration in China best illustrates the struggle between the transnational institution and local traditions. Before examining how arbitration is conceptualized by local norms, we need to first define the different norms in divergent legal traditions.

II. LOCAL TRADITIONS AND THE CONCEPTS OF MEDIATION AND ARBITRATION

A. *Local Traditions: The Non-Adversary Method of Dispute Resolution*

The non-adversarial method of dispute resolution is considered to be one of the five themes of legal values underlying both ancient and contemporary Chinese law and legal institutions.⁴⁹ This tradition has a deeply embedded philosophical basis in China. In the Era of Philosophy (starting from the sixth century B.C.), many schools of thought considered the pursuit of harmony paramount to maintaining social stability.⁵⁰ Confucianists⁵¹ were the strongest advocates for avoiding litigation in order to maintain social harmony. Legalists also took the prevention of disputes seriously, for the purpose of strengthening the state.⁵² They believed that disputes among people

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

47. Roland Robertson is one of the pioneers in the study of globalization. See Roland Robertson, *Glocalization: Time-Space and Homogeneity-Heterogeneity*, in GLOBAL MODERNITIES 25 (Michael Featherstone et al. eds., 1995).

48. The term ‘global scripts’ is defined as “the globalization of norms, standards, principles and rules.” Gillespie, *supra* note 40, at 209 n.2.

49. RANDLE EDWARDS ET AL., HUMAN RIGHTS IN CONTEMPORARY CHINA 45-47 (1986).

50. See Bobby Wong, *Traditional Chinese Philosophy and Dispute Resolution*, 30 HONG KONG L.J. 304, 307 (2000).

51. Underlying the Confucian position is a positive view of human nature, the basic virtues of which can be refined by moral persuasion, or *li*. The written legacy of Confucianism is embodied in the Confucian Five Classics, which were to become the basis for the order of traditional society. Confucius’s ideas and teachings were compiled by his students in the “Analects of Confucius” (*lunyu*). See SIMON LEYS, THE ANALECTS OF CONFUCIUS (1997).

52. The legalist’s thought (*fa*) was formulated by Han Feizi, who maintained that human nature was selfish and therefore the only way to preserve the social order was to ‘impose discipline from above’ and to enforce laws strictly. The law by which people were governed, the legalists insisted, should be the authoritative principle for the people and the basis of government. Contrary to the Confucian idea of moral persuasion,

would weaken the state. In order to win a case, disputants needed to spend time and resources. If there were too many disputes among the people, the state's productive capacity would decrease.⁵³ This common belief created a culture in traditional Chinese society in which litigation was considered the last resort because it signified the breakdown of social harmony. This culture has greatly influenced the development of dispute resolution throughout China's history.

The most influential philosophy in this regard is Confucianism. Confucius believed that moral persuasion, not the exercise of sovereign force, was the best way to guarantee the optimal resolution of most disputes:

[U]nder law, external authorities administer punishments after illegal actions, so people will try to avoid punishment but have no sense of shame; whereas with ritual, patterns of behavior and rules of duty are internalized and exert their influence before actions are taken, so people behave properly because they fear shame and want to avoid losing face.⁵⁴

Confucius maintained that to rely solely or even predominantly on law to achieve social order was not ideal. Laws backed by punishments may induce compliance in the external behavior of individuals, but they are powerless to transform the inner character of the members of society. Confucius' goal was not simply a stable political order in which everyone coexists in relative harmony and isolation from each other, with each hesitant to interfere with the other for fear of legal punishment. Rather, Confucius set his sights considerably higher. He sought to achieve a harmonious social order in which each person was able to realize his or her full potential as human being through mutually beneficial relations with others.

Confucianism advocates for the preservation of harmony between humanity and nature where the spheres of man and nature were believed to form a single continuum (*tianrengan tong*).⁵⁵ Within this system, social disharmony would lead to a violation of the whole

legalists argued that moral considerations should be rigorously excluded in the conduct of government. Legalists advocated that the ruler must rely on penal law and imposition of heavy punishments as the main instrument to govern his people.

53. Wong, *supra* note 50, at 311.

54. 《论语·为政第二》：“道之以政，齐之以刑，民免而无耻，道之以德，齐之以礼，有耻且格。 Analects of Confucius, Chapter 2 On Governance: “Lead them by political maneuvers, restrain them with punishments: the people will become cunning and shameless. Lead them by virtue, restrain them with ritual: they will develop a sense of shame and a sense of participation.” Translated in LEYS, *supra* note 51, at 6 (1997).

55. DERK BODDE & CLARENCE MORRIS, LAW IN IMPERIAL CHINA 43 (1967); 黄源盛, 《法律继受与近代中国法》, 2007年, 7-9 页 [YUANSHEG HUANG, LEGAL TRANSPLANT AND RECENT CHINESE LAW 7-9 (2007).]

cosmic order.⁵⁶ In the Confucian view, the rule of law is applied only to those who have fallen beyond the bounds of civilized behavior. Civilized people are expected to observe proper rituals. Only social outcasts must have their actions controlled by law. According to Confucianists, "the legal process was not one of the highest achievements of Chinese civilization but was, rather, a regrettable necessity."⁵⁷ Involvement in a lawsuit symbolized disruption to social harmony and thus needed to be avoided at all costs. When a dispute did occur, Confucian officials did not adjudicate it by focusing on the right or wrong of the conduct in the past, but instead attempted to balance the social and human elements to maintain the relationship at risk and social harmony. Mediation, as a means of dispute settlement, therefore, came to be seen as hand-in-glove with this ideal of social harmony.⁵⁸

Furthermore, Confucianism praises the doctrine of the middle way or moderation in all things (*zhongyong*). Confucius held that the right course of action was always some middle point between two extremes, excess (too much) and deficiency (too little). The goal of mediation is the settlement of disputes through compromise, and finding the 'middle way' is an intrinsic part of mediation. Conversely, litigation is more about entrenched positions often at extremes to one another, which runs counter to basic Chinese instincts.⁵⁹ A lawsuit implied a fall from virtue on one's own part through obstinacy, lack of moderation, or the failure to elicit an appropriate concession from another as a matter of respect for one's own 'face.' Thus, mediation took precedence over direct confrontation. The virtue of concession (*rang*) was strongly encouraged to ward off disharmony. In connection with *rang*, it was better to meet an opponent half-way than to stand on principle.

The above ideologies paved the way for the development of mediation (*tiaojie*) in China. Although mediation did not always function as smoothly and evenhandedly as idealized descriptions suggest, on the whole, extra-judicial dispute settlement by mediation offered considerable advantages to litigants and the government.

56. BODDE & MORRIS, *supra* note 55, at 43-44; SYBILLE VAN DER SPENKEL, LEGAL INSTITUTIONS IN CHINA: A SOCIOLOGICAL ANALYSIS 29 (1962); PHILLIP CHEN, LAW AND JUSTICE: THE LEGAL SYSTEM IN CHINA 2400 B.C. TO 1960 A.D. 14-15 (1973).

57. Jerome Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L. REV. 1201, 1206 (1966).

58. BEE CHEN GOH, LAW WITHOUT LAWYERS, JUSTICE WITHOUT COURTS: ON TRADITIONAL CHINESE MEDIATION 75-78 (2002).

59. Niall Lawless, *Cultural Perspectives on China Resolving Disputes Through Mediation*, 5 TRANSNAT'L DISPUTE MGMT., Jul. 2008, at 1, 7.

First, mediation afforded the parties "a method of terminating disputes that was socially acceptable in the light of Confucian ethic and group mores."⁶⁰ Because prevailing social values stressed the importance of saving face and reaching a compromise satisfactory to both parties, disputants were better able to bargain with each other during mediation than in more formal proceedings. Mediation emphasized the necessity of avoiding conflict, observing proper rules of behavior, and relying on the social group to resolve differences. It provided "auxiliary support for the dissemination of Confucian standards and values."⁶¹

Further, the perils of litigation restrained many people from bringing suit at the magistrate's court (*yamen*) and left them with few alternatives to the non-adversarial means of settling disputes.⁶² A number of ancient Chinese proverbs reflect the attitude of the Chinese people towards litigation and their general lack of confidence in the formal judicial process. Such proverbs include, "to enter a court of law is to enter a tiger's mouth;" "of ten reasons by which a magistrate may decide a case, nine are unknown to the public;" "avoid litigation, for once you resort to law there is nothing but trouble;" and "the *yamen* gate is wide open, with right but no money, don't go in."

Finally, extra-judicial mediation eased the government workload and helped avoid friction between magistrates and those persons within their jurisdiction.⁶³ Local magistrates (judges) were often praised for their 'achievement' in minimizing lawsuits by successfully persuading the general public to make concessions and avoid conflicts. The officials considered that the majority of lawsuits could be avoided and harmony could be achieved through the skillful persuasion of disputants based on moral standards and social norms.

To some extent, mediation was developed, not as an alternative, but as an essential and integral part of the dispute resolution system in Imperial China. That is not to say that civil litigation was underdeveloped throughout China's history. Recent historians on Chinese law and society has revised this overly simplistic view and argued

60. Cohen, *supra* note 57, at 1224.

61. Robert Utter, *Dispute Resolution in China*, 62 WASH. L. REV. 383, 387 (1987).

62. See, e.g., STANLEY LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* 24 (1999) [hereinafter *BIRD IN A CAGE*]; see also Guiguo Wang, *The Unification of the Dispute Resolution System in China Cultural, Economic and Legal Contributions*, 13 J. INT'L ARB. 5, 9 (1996).

63. *BIRD IN A CAGE*, *supra* note 62, at 26; Utter, *supra* note at 387.

that Chinese commoners were quite willing to engage in formal litigation. Melissa Macauley revisited the dynamic relationship between state and society in her social history of China's "litigation masters" (*songshi*). The Qing dynasty China (1644-1912) that her narrative portrays is more litigious than we previously thought.⁶⁴ Philip Huang, by analyzing 628 Qing court cases pertaining to land, debt, marriage, and inheritance (the four major types of civil cases from the three provinces) mapped out a rather sophisticated civil justice system. In the great majority of the 221 cases that developed into formal court sessions, the courts ruled according to the Qing code (the legal code of the Qing dynasty).⁶⁵ These studies present a far more complicated picture of the judicial system in China than the 'traditional' view.⁶⁶ We should bear in mind this more dynamic picture of law in Chinese society and its social and cultural implications for imperial Chinese society to conduct our further analysis.

Moreover, as the Chinese saying goes, "we may sleep in the same bed but dream different dreams." Even when the same term is used,

64. MELISSA MACAULEY, *SOCIAL POWER AND LEGAL CULTURE: LITIGATION MASTERS IN LATE IMPERIAL CHINA* (1998).

65. Phillip Huang, *Between Informal Mediation and Formal Adjudication: The Third Realm of Qing Civil Justice*, 19 MOD. CHINA 251, 270-272 (1993); PHILLIP HUANG, *CIVIL JUSTICE IN CHINA REPRESENTATION AND PRACTICE IN THE QING* 23 (1996) (In 170 of the cases (76.9%) the courts found outright for one or the other party; in twenty two other cases (10%), they adjudged that there was no clear-cut violation of the law by either party; and in another ten cases (5%), they ordered further investigation. Only a small minority of court rulings for one or the other party (a total of 6.4%) were accompanied by compromises in the interest of maintaining kin or community harmony. In no case did the court engage in compromise—working through persuasion and moral education to obtain the supposedly voluntary agreement of the litigants.).

66. See e.g., (日) 夫马进, 《明清时期的讼师与诉讼制度》, 载滋贺秀三[日], 《明清时期的民事审判与民间契约》 [Fu Majin (Japan), *The Litigation Masters and Litigation System in Ming and Qing Dynasties*, in しが・しゅうぞう THE CIVIL TRIAL AND SOCIAL CONTRACT DURING THE MING AND QING PERIOD (Shuzo Shiga ed., 1998)]; 侯欣一, 《清代江南地区民间的健讼问题—以地方志为中心的考察》, 《法学研究》第4辑, 2006年 [Xinyi Hou, *The Litigation Propensity in the South of Yangtze River Area in Qing Dynasty? An Investigation Focused on Local Gazetteers*, LEGAL STUDIES, no. 4, 2006]; 刘馨琚, 《明镜高悬: 南宋县衙的狱讼》(2007), [XINJUN LIU, *A Just Trial by an Honest Official: Litigation at the Yamen in South Song Dynasty* (2007)]; 尤陈俊, 《清代简约型司法体制下的健讼问题研究—从财政制约的角度切入》, 《法商研究》第2辑, 2012年 [Chenjun You, *The Problem of Litigation Propensity under the Simple Legal System of Qing Dynasty? From the Perspective of the Financial Restrictions*, LEGAL AND COMMERCIAL STUDIES, no. 2, 2012]; 邓建鹏, 《讼师秘本与清代诉状的风格以"黄岩诉讼档案"为考察中心》, 《浙江社会科学》第4辑, 2005年 [Jianpeng Deng, *The Secret Book of Litigation Masters and the Style of Qing Litigation Complaint? An Investigation Focused on the Huangyan Litigation Archive*, ZHEJIANG SOCIAL SCIENCE, no. 4, 2005].

the connotations, the perceptions, conceptions and management of dispute resolution may vary significantly, due to the divergent cultural background and legal traditions in different societies. As Donald Clarke remarked, "what is called mediation in China is very different from what is called mediation in the ADR literature, to the point where it would be seriously misleading to simply use the English word without further explanation."⁶⁷ Therefore, it is important to take a deeper look at the meaning and nature of the terms 'mediation' and 'arbitration' in various contexts.

B. *The Meaning of Mediation and Arbitration in the West*

Generally speaking, the concept of arbitration and the concept of mediation are clearly distinguishable, the former is an adjudicatory process and the latter is not.

Mediation is commonly understood as "a process in which a third-party neutral, the mediator, assists disputing parties in reaching a mutually agreeable resolution."⁶⁸ Mediators aim to facilitate information exchange, promote understanding among the parties, and encourage the exploration of creative solutions. Neither party is required to accept any proposal of the mediator. Mediation is a contractual process and the result has no judicial effects.⁶⁹

On the other hand, arbitration is generally considered to be "a process by which a private third-party neutral, the arbitrator, renders a binding determination of an issue in dispute,"⁷⁰ or "an institution through which a third-party neutral resolves the differences between two or more parties by exercising a judicial function conferred to him by the parties."⁷¹ Arbitration starts based on an arbitration agreement concluded by the parties and terminates with a

67. Donald Clarke, *Dispute Resolution in China*, in CONTRACT, GUANXI, AND DISPUTE RESOLUTION IN CHINA 369, 418 (1997).

68. Kimberlee Kovach, *Mediation*, in THE HANDBOOK OF DISPUTE RESOLUTION 304, 304 (Michael Moffitt & Robert Bordone eds., 2005).

69. See ROBERT BUSH & JOSEPH FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT (2005); JAY FOLBERG & ALISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION (1984); CHRISTOPHER MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT (3d ed. 1987).

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

71. JARROSSON, *supra* note 23, at 372.

decision that has the same effect as a judgment, which can be enforced by national courts. The arbitration process has both a contractual and judicial nature.⁷² The contractual aspect of arbitration is reflected by the fact that arbitration is a mode of dispute resolution based on the consent of the parties. There can be no arbitration without a valid arbitration agreement, which confers jurisdiction to arbitrators and defines the scope of the arbitrators' power.⁷³ In the meantime, arbitration also carries a judicial nature in the sense that arbitrators render a decision (award) similar to the decision rendered by state judges and produces the same effect as a judgment (with the effect of *res judicata* and legal enforceability). Arbitrators exercise the same function as judges and render a decision that has the same effect. The difference lies in the source of their power: the source of the judge's power is exclusively judicial, whereas the source of arbitrators' power is contractual. Arbitrators, however, are not part of the judicial organization of a state. Unlike judges, arbitrators are not appointed by law, but chosen directly or indirectly by the parties.⁷⁴

From the above chart we can see that there is an unequivocal distinction between arbitration and mediation: the former is an adjudicatory process and the latter is not. The role of an arbitrator and the role of a mediator are clearly defined and can be easily distinguished. How was the concept of arbitration and mediation perceived in China? Does Chinese local tradition share the same degree of clarity and distinction between the two concepts?

C. *The Concepts of Mediation and Arbitration in Chinese Local Norms*

1. *Official and Semi-official Records of the Practice of Mediation*

To trace the formation and use of mediation and arbitration in ancient China, we will first refer to the official and semi-official

72. FERNAND SURVILLE, *COURS ÉLÉMENTAIRE DE DROIT INTERNATIONAL PRIVÉ* 700 ¶ 442 (7th ed. 1925); HENRI MOTULSKY, *ETUDES ET NOTES SUR L'ARBITRAGE* 9 (1974); JACQUELINE RUBELLIN-DEVICHI, *L'ARBITRAGE, NATURE JURIDIQUE* 307 (1965).

73. On the contractual nature of arbitration, see GAILLARD & SAVAGE, *supra* note , ¶ 1101 et seq.; Charles Jarrosson, *Le rôle respectif de l'institution, de l'arbitre et es parties dan l'instance arbitrale*, 1990 REV. ARB. 381; CLAY, *supra* note 23, ¶ 764 et seq.; JULIAN LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* ¶ 5-16 et seq. (2003); MARTIN HUNTER ET AL., *REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION* 315 (2009)

74. On the judicial nature of arbitration, see LEW, *supra* note 73, ¶ 55-1; GAILLARD & SAVAGE, *supra* note 35, ¶ 12; HUNTER, *supra* note 73, ¶ 5.01. JARROSSON, *supra* note 73, ¶ 785; CLAY, *supra* note 23, ¶ 60.

CHART 1: DISTINCTIONS BETWEEN ARBITRATION AND MEDIATION

	Arbitration	Mediation
Definition	A third party, chosen by the disputants either before or after the dispute arises, renders a binding decision on the parties.	A third party who attempts to bring the parties to a voluntary agreement. Neither party is required to accept any proposal of the mediator.
Nature	Contractual and Judicial: arbitration starts based on an arbitration agreement concluded by the parties and terminates with a decision that can be enforced by national courts.	Purely contractual: the result has no judicial effects.
Characteristics	An adjudicatory process: unilateral decision-making by an authoritative third party.	A non-adjudicatory process: joint decision-making by the parties themselves.
Voluntariness	Voluntary only as to the process, not the outcome.	Voluntary as to the process and outcome.
Third party	A neutral selected by the parties, directly or indirectly, who <i>renders a decision</i> .	A neutral selected by the parties who <i>facilitates</i> the parties <i>reaching a mutually acceptable result</i> .
Procedure	Procedural flexibility. But certain procedural rules must be observed. Essentially a rule based process.	No formal procedure. Not a rule based process.
Result	Arbitrators determine.	Parties determine.
Binding force	The result is binding and enforceable. No appeal.	Not binding. Enforceable only as a contract.
Focus	Past events. Decision based on proven facts according to applicable law.	Future interests. A solution that is acceptable for both parties.

records, such as Laws, *shu pan* (judges' decisions), Emperor's Sacred Edicts, *zhengshu* (Handbooks for Government), *an du* (official correspondences), *shilu* (Veritable Records of Emperors), and public notices issued by local officials.⁷⁵ Within these historical records, there is no explicit use of the term 'mediation system,' but there are descriptions of *tiaoren*, village elders or community leaders who were charged with the duty to amicably resolve the disputes outside the

75. These official documents reveal local officials' responsibilities and the social life of ancient times. For a comprehensive reference, see Xianyi Zeng, *Mediation in China? Past and Present*, 17 ASIA PAC. L. REV. (2009).

court and to restore harmony. These practices are often considered equivalent to the Western practice of 'mediation.' However, the role of the Chinese dispute resolver differs significantly from the Western conceptions of the mediator.

The earliest record of the use of mediation can be traced back to China's pre-state tribes and clans. *The Book of Hanfeizi* described the aspirational practice during the Yao and Shun periods as follows using the example of the semi-mythical figure King Shun:

When farmers in Lishan encroached on each other's land, King Shun went there to farm with them. A year later, no one crossed the land boundaries. When fishermen fought to fish upstream, Shun went there to fish with them. A year later, the fishermen gave up the upstream to the elderly. When potters in Dongyi made shoddy pottery, Shun went there to work with them. A year later, potters made sturdy pottery.⁷⁶

To interpret such practice with modern terminology, King Shun, as a dispute resolver, was not just a settlement facilitator, but he made himself a role model of benevolence and sincerity in order to convince the disputants to resolve their conflicts and make concessions to each other.

In the Western Zhou dynasty (1027BC-771BC), the role of *tiaoren* was an officially recognized position. According to the *Rites of Zhou*, "*tiaoren* were persons responsible for investigating and resolving the people's grievances to restore peace and harmony."⁷⁷

Based on this description, it seems that the role of *tiaoren* was essentially that of a mediator who aimed to resolve grievances and restore harmony. In addition, they also played the role of an investigator, and even to some extent an adjudicator, who could impose punishment on the party who "cause[d] further trouble."⁷⁸ Furthermore, different from consensual mediation, adherence to the final outcome of the *tiaoren*'s efforts does not seem to have been voluntary: if the

76. 韩非,《韩非子·卷十五·难一第三十六》,第795页(上海:中華書局 1931)
[FEI HAN, HAN FEIZI: VOL. 15, NAN YI, vol. 36, 795 (reprinted by Shanghai Zhonghua Shuju, 1931)]

(原文载:“歷山之農者侵畔,舜往耕焉,佩年,刈畝正。河濱之漁者爭坻,舜往漁焉,佩年,而讓長。東夷之陶者器苦窳,舜往陶焉,佩年而器牢。仲尼歎曰:“耕、漁與陶,非舜官也,而舜往為之者,所以救敗也。舜其信仁乎!乃躬藉處苦而民從之,故曰:聖人之德化乎!”)

77. 《周礼·地官司徒》,载《断句十三经经文》,上海开明书店,1934年,第21页
[*Rites of Zhou: Mediator*, reprinted in DUAN JU SHISAN JING 21 (Shanghai Kaiming Press, 1934)].

78. *Id.*

parties did not accept a mediated outcome, they would not have any other recourse for their disputes.

Legal historians generally believe that "despite long history of mediation practice in ancient China, "mediation rules were 'codified' (*ru lü*) and held legal significance only during the Yuan Dynasty (1271-1368)."⁷⁹ Examples of such records can be found in Li Min's article *Clauses and Paragraphs of the Unified System of Yuan*, which reads as follows:

for complaints about marriage, family property, farmland, home and debts that are not major violations of the law, disputing parties shall listen to their community leader's reasoning for clarification and resolution, to avoid hindering or neglecting farm work, or disturbing the government.⁸⁰

During the Ming dynasty (1368-1644), a specialized institution called the *shenmingting* (pavilion for extending clarity) was established. According to the Ming Code, "A Pavilion for Extending Clarity shall be established in every village (*zhou*) and county (*xian*). Village elders shall be permitted to mediate and settle minor affairs. This is the system for extending clarity and admonition."⁸¹ According to the Veritable Records of the Emperor Taizu, government officials were ordered to select village elders and charge them with the duty of handling complaints in the village community.⁸² Gu Yanwu's (1613-1682) *Record of Daily Study* discussed this practice in detail, with reference to the Veritable Records of the Emperor Taizu.⁸³ The function of the elders was also made known to the public via the Announcement for Educating the General Public issued in the period of Hongwu (1388), which reads:

disputes of trivial matters concerning family affairs and marriage, land and housing shall not be filed with the county magistrate, but must be first decided (*duanjue*) by the village elders. Serious matters such as theft, fraud and manslaughter can be reported to the officials. Those who bypass the elders to sue will

79. Zeng, *supra* note 75, at 4.

80. 《通制條格•卷第十六•田令•理民》，浙江古籍出版社1986年，第184页 [CLAUSES AND PARAGRAPHS OF THE UNIFIED SYSTEM OF YUAN, VOL. 16, EDICTS ON LAND, EDICTS ON THE PEOPLE 184 (reprinted by Zhenjiang Classics Press, 1986)].

81. 《大明律集解附例卷之二十六•刑律•杂犯》，学生书局1974年，第五卷，第1863页 [THE GREAT MING CODE VOL. 26, CRIMINAL CODE, MISCELLANEOUS CRIMES, vol. 5, 1863 (reprinted by Students Book Press, 1974).]

82. 《明實錄•八•太祖實錄•卷二三二》，中央研究院歷史語言研究所校，勘 1966年，第3396页。[TAI ZU, THE VERITABLE RECORDS OF MING EMPEROR, vol. 232, 3396 (reprinted by Academia Sinica Historical and Linguistic Research Institute, 1966)].

83. 顾炎武，《日知录•卷十一•鄉亭之職》，明伦出版社印行1971年版，第232页 [YANWU GU, RECORD OF DAILY STUDY, THE FUNCTION OF ELDERS, VOL. 11, 232 (1971)].

be caned 60 strokes and sent back to the elders for judgment (*li duan*).⁸⁴

Dispute resolution practices at the pavilion for extending clarity were maintained through the Qing dynasty (1644-1911) as evidenced in the Qing Code.⁸⁵

The government, particularly under the Ming and Qing dynasties, frequently demanded that the populace settle their disputes without calling on the official magistrates. A reply from Emperor Kang-xi to a memorial drawn by the Cantons against country tribunals reflected this attitude:

The Emperor. . . is of the opinion that lawsuits would tend to increase, to a frightful amount, if people were not afraid of the tribunals, and if they felt confident of always finding in them ready and perfect justice . . . I desire, therefore, that those who have recourse to the tribunals should be treated without any pity, and in such a manner that they shall be disgusted with law, and tremble to appear before a magistrate. In this manner the evil will be cut up by the roots; the good citizens, who may have difficulty between themselves, will settle them like brothers, by referring to the arbitration of some old man, or the mayor of the commune. As for those who are troublesome, obstinate, and quarrelsome, let them be ruined in the law-courts—that is the justice that is due to them.⁸⁶

2. *Dispute Settlement within the Traditional Chinese Social Institutions*

To understand the traditional legal culture in China, it is important to bear in mind that the basic unit in imperial Chinese society was not the individual, but the social group.⁸⁷ The most basic of

84. 张鹑(编)·《皇明制书·卷九》·《教民榜文》·《续修四库全书》影印本,上海古籍出版社1999年版,第352-53页 [VERITABLE RECORDS OF THE EMPERORS, VOL. 9, ANNOUNCEMENT FOR EDUCATING THE GENERAL PUBLIC, 352-53 (reprinted by Shanghai Ancient Works Press, Lu Zhang ed., 1999)].

85. 《大清律例卷三十四·杂犯第三百七十六·拆毁申明亭·条例》·天津古籍出版社1993年影印,第560页 [THE QING CODE, VOL. 34, MISCELLANEOUS CRIMES NO. 376, DESTRUCTION OF THE PAVILION FOR CLARITY AND ADMONITION, THE ANNOTATION, 560 (reprinted by Tianjin Classics Press, 1993)].

86. Cited in THOMAS JERNIGAN, CHINA IN LAW AND COMMERCE 191-192 (1905); SPRENKEL, *supra* note 56, at 77; but see JOHN WATT, THE DISTRICT MAGISTRATE IN LATE IMPERIAL CHINA 305 n.7 (1972) (suggesting the Emperor was probably more flexible and more opposed to severity than the passage suggests).

87. See Cohen, *supra* note 57, at 1207; Stanley Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CALIF. L. REV. 1284, 1291-95 (1967); HSIEN CHIN HU, THE COMMON DESCENT GROUP IN CHINA AND ITS FUNCTIONS (1948); Hui-chen Wang Liu, *An Analysis of Chinese Clan Rules: Confucian Theories*

these groups in traditional Chinese society was the family, where rules of customary behavior emphasized the authority of the elder generations over the younger ones. Families themselves were organized into clans, which instructed members on Confucian morality and settled disputes among members. Yet another collective grouping was the guild, which was an organization of merchants or artisans in the same trade or craft. The guilds regulated prices, competition, training, and admission to practice the trade or craft.

These social groups controlled the individual. Implicit in the Confucian model is the notion of hierarchy between individuals and certain obligations inherent in those hierarchical structures.⁸⁸ Local groups generally attempted to avoid involving government officials in settling quarrels between their members. Recourse to the magistrate without prior attempts to settle disputes within groups was actively discouraged and sometimes, as in the case of clans and the guilds, prohibited by the group's internal regulations.⁸⁹

The existing social institutions—the family, clan, village, and guild—played a significant role in dispute resolution in traditional Chinese society and frequently outweighed the role of the formal courts of law.⁹⁰ Such institutions held ‘informal sway’ in the ordinary person's life and “helped to smooth the inevitable frictions in Chinese society by inculcating moral precepts upon their members, mediating disputes, or, if need arose, imposing disciplinary sanctions and penalties.”⁹¹ Therefore, apart from official resources, we may further trace the actual practice of resolving disputes within the social groups in traditional Chinese society by searching for the rules within the families, clans, villages, and guilds which guided the conduct of their members. The descriptions given by nineteenth and twentieth century Chinese based on their personal experiences, and anthropological studies of twentieth century village communities in China and Taiwan can provide us with further evidence for illustration.⁹² These

in Action, in *CONFUCIANISM IN ACTION* (David S. Nivison & Arthur F. Wright eds., 1959), 63-96; *BIRD IN A CAGE*, *supra* note 62, at 24.

88. Cohen, *supra* note 57, at 1207-1208; Lubman, *supra* note 87, at 1291-95.

89. Lubman, *supra* note 87, at 1297; Cohen, *supra* note 57, at 1223 (“The magistrate, overburdened with the duties of administering the country and of disposing of homicide, theft and other cases in which the government had a vital interest, often cooperated in enforcing this requirement by sending back to the village, clan or guild minor disputes that had not been processed by it.”).

90. See, e.g., Cohen, *supra* note 57; Lubman, *supra* note 87; SPRENKEL, *supra* note 56; CHEN, *supra* note , at 70.

91. BODDE & MORRIS, *supra* note 55, at 5-6.

92. See, e.g. Geoffrey MacCormack, *Assistance in Conflict Resolution: Imperial China*, in *ASSISTANCE IN CONFLICT RESOLUTION* 109, 116 (Transactions of the Jean

sources directly evidence the practice of dispute resolution in the nineteenth and twentieth century and "it is likely that they reflect 'traditional' methods for the settlement of disputes practiced over many centuries."⁹³

a. *The Families and Clans*

The family was the basic unit of the traditional Chinese society. Within the family itself, the head of the family— father or grandfather (*jiazhang*)— controlled and supervised the general family matters. Conflicts within the family were frequently decided by the head of the family, whose authority was said to be absolute. Yet it is believed that the head of the family also sought to reconcile the disputes.⁹⁴ Such a conciliatory role was more common when filled by persons who lived outside the household. In such cases the outside mediator was normally "a senior disinterested person who enjoyed the confidence of the family, such as a maternal uncle, an elder within the circle of mourning relatives, the head of the clan or of the clan subdivision, or some other recognized community leader."⁹⁵ As the Chinese saying goes, "family scandals cannot be exposed to outsiders"; most disputes among the family members were resolved internally.

The clan (*tsu* or *zu*) can be considered as extended family. Generally one of the principle objectives of clan rules was the promotion of cooperation and harmony between clan members. The primary duty of the clan heads was to preserve social harmony within the clan itself,⁹⁶ essentially a mediator role. For instance, the rules of the Hsu clan in Kiangsu described the role of the head of the clan was to settle matters to avoid lawsuits:

Bodin Society for Comparative Institutional History ed., 1996); KUNG-CHUAN HSIAO, *COMPROMISE IN IMPERIAL CHINA* (1979);

瞿同祖, 《中国法律与中国社会》, 商务印书馆1981年 [TONGZU QU, *CHINESE LAW AND CHINESE SOCIETY* (1981)]; Liu, *supra* note ; HU, *supra* note ; BURTON PASTERNAK, *KINSHIP AND COMMUNITY IN TWO CHINESE VILLAGES* 95-127 (1972); Jack M. Potter, *Land and Lineage in Traditional China*, in *FAMILY AND KINSHIP IN CHINESE SOCIETY* (Maurice Freedman ed. 1970)]; MAURICE FREEDMAN, *LINEAGE ORGANIZATION IN SOUTH-EASTERN CHINA* (1958); Myron L. Cohen, *Lineage Organization in North China*, 49 J. ASIAN STUD. 509 (1990).

93. MacCormack, *supra* note 92, at 116.

94. See Cohen, *supra* note 57, at 1216-17.

95. *Id.* at 1216.

96. See *id.*; Lubman, *supra* note 87, at 1295; SPRENKEL, *supra* note 56 (emphasizing in her study of Qing legal institutions the great extent to which conflicts were resolved through informal, nonjudicial mediation in the family clan, craft or merchant guild).

If there should occur in the *tsu* any attempts at oppression of the young by relying on one's age, at bullying the weak by relying on one's strength, or, worse, should quarrels and fights take place, these cases should be brought before the head of the *tsu*. He is to convene the whole *tsu* to discuss the matter publicly and to settle the matter so that the injuries between 'bond and flesh' (near relatives) or lawsuits that ruin the family may be avoided.⁹⁷

The clan head also acted as decision maker, and was regarded as the supreme authority within his clan.⁹⁸ Certain clan rules used the term 'arbitrate,' but this expression should probably be taken as encompassing the term 'mediate' as well. For instance, the rule of the Wang clan from Kiangsu reads as follows:

When quarrels arise in the *tsu* out of small resentment and disputes about landed property and money debts, the parties are to go to the ancestral hall and hand in a petition. (Then) the matter is to be brought to clarity and resolved in peace. Only when the decision is difficult is it permitted to bring a complaint before the authorities, so that they may examine and decide the case. . . Throughout the *tsu* it is forbidden to stir up litigations. When people are angry with each other for a time, it rests with the mediators to arbitrate and bring about a conciliation.⁹⁹

Similarly, the rules of Ch'u clan from Kiangsi provided:

Some *szu-wen* [educated men, or "gentlemen"], who do not have a large family, are fond of arbitrating and consequently have developed considerable dexterity in such matters, and hence are often called upon in quarrels within or without the *tsu*. They feel that such an invitation increases their prestige, and will exert their ability to bring about a solution satisfactory to all parties concerned.¹⁰⁰

Instead of making a decision based on the rights and obligations of the parties, the heads of the clans were supposed "to bring about a solution satisfactory to all parties concerned." Their role was not strictly that of arbitrators, but mediators as well. Based on mixed use of the terms 'mediate' and 'arbitrate' in the clan rules in similar contexts, there seems to be no clear line between the function of a mediator and the function of an arbitrator. The heads of the clans could fill both roles. A mediation attempt could be made before a conflict was brought to the clan heads. The clan heads could have tried

97. Hu, *supra* note 87, at 133.

98. Qu, *supra* note 92, at 18-19.

99. Hu, *supra* note 87, at 132.

100. *Id.* at 115.

to mediate to bring a satisfactory result to all parties concerned. If such an attempt failed, they could have then rendered a decision, which was not strictly enforceable by law but often respected by the disputants.

One may be further convinced that the clan heads could function as both mediators and arbitrators by reading the recollections of persons who had personal experience of clan life as insiders. For instance, the late Qing scholar Liang Ch'i-ch'ao stated the way of life in the village occupied by his clan was as follows:

Whenever a dispute arose between clansmen, an attempt at settlement was made by elderly relatives of the parties. If the disputing parties were not satisfied with the decision, they might appeal to the *fen-tz'u* (branch ancestral hall) of the *fang* (branch) to which they belonged. And if they were still unsatisfied, they might then petition to the council of elders which was a sort of supreme court for the clan. Beyond this, the only resort was litigation before the local magistrate. As, however, it was considered highly improper for any clansman to disobey the elders, litigation seldom occurred.¹⁰¹

b. *The Villages*

In villages,¹⁰² disputes were resolved by the village heads or other informal leaders who were respected because of their age, knowledge, or reputation. These village officials were "usually eager to settle disputes outside the magistrate's *yamen*, because the magistrate held them responsible for lack of harmony within the village and they knew that he did not want to be bothered with a large volume of petty litigation."¹⁰³

Martin Yang portrayed the traditional dispute resolution process in his native village of Taitou in Shantung Province as follows:

First, the invited or self-appointed village leaders come to the involved parties to find out the real issues at stake, and also to collect opinions from other villagers concerning the background of the matter. Then they evaluate the case according to their past experience and propose a solution. In bringing the two parties to accept the proposal, the peacemakers have to go back and forth until the opponents are willing to meet halfway. Then a

101. KUNG-CHUAN HSIAO, *RURAL CHINA: IMPERIAL CONTROL IN THE NINETEENTH CENTURY* 346 (1967).

102. The village unit often consisted of only the family with one surname, i.e., from the same clan. Therefore, the village leadership and lineage structure were connected. SPRENKEL, *supra* note 56, at 18-20.

103. Cohen, *supra* note 57, at 1219.

formal party is held either in the village or in the market town, to which are invited the mediators, the village leaders, clan heads, and the heads of the two disputing families. The main feature of such a party is a feast. While it is in progress, the talk may concern anything except the conflict. The expenses of the feast will either be equally shared by the disputing parties or borne entirely by one of them. If the controversy is settled in a form of 'negotiated peace,' that is, if both parties admit their mistakes, the expenses will be equally shared. If the settlement reached shows that only one party was at fault, the expenses are paid by the guilty family. If one party chooses voluntarily, or is forced, to concede to the other. . . it will assume the entire cost. When the heads or representatives of the disputing families are ushered to the feast, they greet each other and exchange a few words. After a little while they will ask to be excused and depart. Thus, the conflict is settled. . .¹⁰⁴

Again, the village leaders seemed to assume both an adjudicatory role— in evaluating the case and proposing a solution, and a conciliatory role— in going back and forth until the opponents were willing to meet halfway. Within this traditional Chinese dispute resolution system, the concepts of 'mediation' and 'arbitration' were not clearly distinguishable.

c. *The Guilds*

In tracing concepts of mediation and arbitration throughout Chinese history, one must not forget to review the system by which Chinese merchants organized themselves. To protect their common interests, Chinese merchants began to organize themselves into collective merchant associations (*hanggui*),¹⁰⁵ often translated generically as 'guild'— "an association of people for mutual aid or the pursuit of a common goal."¹⁰⁶ When these trade associations first appeared, they were identified as *huiguan*, meaning literally 'club-houses,' formed by merchants whose native place was different and

104. MARTIN YANG, A CHINESE VILLAGE: TAITOU, SHANTUNG PROVINCE 165-166 (1945).

105. For a discussion on the guilds in ancient China, see 全汉升, 《中国行会制度史》, 百花文艺出版社, 2007年 [HANSHENG QUAN, HISTORY OF THE GUILD SYSTEM IN CHINA (2007)]; 史景星, 《行业协会概论》, 复旦大学出版社1989年 [JINGXING SHI, THE OVERVIEW OF THE CHINESE GUILDS (1989)]; and 彭泽益 (主编), 《中国工商行会史料集》 (全二册), 中华书局1995年 [A COLLECTION OF HISTORICAL MATERIALS ON CHINESE INDUSTRIAL AND COMMERCIAL GUILDS (Zeyi Peng ed., 1995)].

106. CONCISE OXFORD ENGLISH DICTIONARY 633 (11th ed. 2008).

usually far away from the city in which they were residing. In this respect, *huiguan* resembled more of the *Landsmannschaft* of medieval Europe— commercial associations based on common geographical location.¹⁰⁷ Broadly speaking, three types of guilds existed in traditional China: (i) craft guilds— associations organized by craftsmen in the same industry; (ii) trade guilds— associations organized by merchants in the same industry, such as fish guilds, fruit guilds, meat guilds; and (iii) professional guilds— other associations, which were neither purely commercial, nor based on the craft skills.¹⁰⁸ In earlier times, the craft and trade guilds were similar in many ways, and both began in the Sui Dynasty (581-617).¹⁰⁹

One should bear in mind that the guilds in Imperial China were of a form and nature different from the merchant guilds in the medieval Europe. In medieval Europe, merchant guilds formed to provide protection to foreign merchants away from their homes, and to protect “local merchants against fly-by-night foreign merchants who might never be seen again.”¹¹⁰ As merchants began to transact beyond local political, cultural, and geographical barriers, they transported the local trade practices to foreign markets. The bonds of the localized system were broken to develop an international system of commercial law— the *Lex Mercatoria* or Law Merchant.¹¹¹ By the end of the eleventh century, the *Lex Mercatoria* came to govern most commercial transactions in Europe, providing a uniform set of standards across a large number of locations. In Imperial China, however, rules of the merchant guilds never reached such a level of consistency and transparency. The merchant manuals, apart from providing advice on commercial success and social respectability, addressed the spiritual and ethical needs of people pursuing commercial professions. They advocated moral values, such as sincerity, seriousness, trustworthiness, reciprocity, and an enlightened self-interest, in line with Confucianism.¹¹² Furthermore, the Chinese guilds were organized on a personal level, not a systemic organizational level. They “had to

107. The term *Landsmannschaft* was first used to describe Chinese guilds by D.J. MacGowan. Kwang-Ching Liu, *Chinese Merchant Guilds: An Historical Inquiry*, 57 HIST. PAC. REV. 1, 9 n.20 (noting MacGowan first used the term in *Chinese Guilds or Chambers of Commerce and Trade Unions*, XXI J. N. CHINA BRANCH ROYAL ASIATIC SOC'Y (1888-1889)).

108. See QUAN, *supra* note 105.

109. See *id.*

110. Milgrom et al., *supra* note 27, at 4.

111. *Id.*

112. RICHARD JOHN LUFRANO, HONORABLE MERCHANTS: COMMERCE AND SELF-CULTIVATION IN LATE IMPERIAL CHINA 2-3 (1997).

rely on social networks and government support.”¹¹³ Traditionally, Chinese businesses were part of social networks based on family and geographical affiliation.¹¹⁴ Social networks and connections can bring about private business agreements underpinned by inter-personal customs, in lieu of economic transactions with cost-based contracts.¹¹⁵ In this sense, “the institutional entrenchment that can arise from such a structure may cause managers to subscribe to moralities that keep the networks in harmony, but which might not be helpful to achieve economic efficiency.”¹¹⁶

It was agreed that the purpose of the guilds was to enhance the friendly relations between the members, not to litigate or adjudicate disputes. If the disputes between members could not be settled by friends, witnesses of a transaction, or middlemen, they were sometimes heard in the guild hall by a group of guild officers. On occasions like these, parties and witnesses would give testimony, and then guild officers would render a decision. The rules of the guilds provided for the settlement of disputes among their members in manners like the following:

It is agreed that members having disputes about money matters with each other shall submit their cases to arbitration at a meeting of the guild, where the utmost will be done to arrive at a satisfactory settlement of the dispute. If it prove[s] impossible to arrive at an understanding, appeal may be made to the authorities, but if the complainant [has] recourse to the official direct, without first referring to the guild, he shall be subjected to a public reprimand.¹¹⁷

By now, we can summarize our surveys of the dispute resolution processes within the existing social institutions in ancient China as follows: a family dispute would probably be settled within the family by the family head. A dispute within the clan would be resolved by the clan leaders. Village disputes would be resolved by kinsmen, friends, neighbors, the gentry, other respected village personalities, and even by the government-appointed headmen. Disputes within the guilds would be handled by the guild officers. Local groups actively encouraged, and in the case of clans and guilds required, the parties to exhaust their remedies within the group before looking to

113. Chenxia Shi, *Commercial Development and Regulation in Late Imperial China: An Historical Review*, 35 HONG KONG L. J. 481, 488 (2005).

114. *Id.* at 488-89.

115. *Id.* at 490 n.56, quoting *THE FIRM AS A NEXUS OF TREATIES* (Masahiko Aoki, Bo Gustafsson, and Oliver E. Williamson eds., 1990).

116. Shi, *supra* note 113, at 490.

117. JERNIGAN, *supra* note 86, at 209.

the magistrate for relief. The magistrate, "overburdened with the duties of administering the country and of disposing of homicide, theft and other cases in which the government had a vital interest, often cooperated in enforcing this requirement by sending back to the village, clan or guild minor disputes that had not been processed by it."¹¹⁸

D. *The Differences between Chinese Local Norms and Western Concepts*

Based on the above descriptions in the official and non-official records, we can see that the concept of 'mediation' in ancient China did not have the same connotations as the term 'mediation' when defined in the West— a voluntary process in which the mediator assists disputing parties in reaching a mutually agreeable resolution without coercion. First, in the traditional Chinese system, the start of the mediation process was not voluntary: disputants were required to submit 'trivial' affairs to elders or community leaders before resorting to formal means of resolution. Failure to do so could result in corporal punishment. Second, the elders and community leaders performed an official function by handling minor disputes within the community. They were charged with a facilitative role to 'mediate and settle' minor affairs, but at the same time an adjudicatory role to 'decide' the matters. Third, the enforcement of the outcome of the process was not voluntary. The elders or community leaders were able to impose a decision by their seniority and respect in the community. Such a decision, although not directly enforceable as a judgment, was often 'listened to' by the disputing parties.

The term 'arbitration' found in clan and guild rules also differs in important ways from the meaning of 'arbitration' in the West— a process by which an arbitrator renders a binding determination of an issue in dispute. First, the process was not voluntary. Submitting the dispute to a so-called 'arbitration' proceeding was a precondition for the disputants to resort to formal means of resolution. Second, the clan leaders or guild leaders' primary role was not that of a decision maker, but to bring the parties to compromise and a satisfactory settlement. Third, the result of the process was not final and binding. The complainant could still file an appeal to the authorities if unsatisfied with the outcome.

118. Cohen, *supra* note 57, at 1223.

In fact, it is not easy to classify the precise role of the family heads, clan heads, village leaders, guild leaders, *tiaoren*, or other elders in the settlement of disputes within the meaning of terms like 'mediation' and 'arbitration.' The function of the dispute resolver in traditional Chinese society was equivalent to neither that of a mediator nor an arbitrator defined in the Western context. Sometimes their role resembled that of an arbitrator, who heard the arguments of the parties, looked into the evidence, and then handed down a decision. Although not directly enforceable as a judgment, such decisions were often respected by the disputing parties, as it was considered dishonorable to disobey the elders. In the closely-knit context of social life, social pressure largely supplanted legal coercion as a method of settling disputes. However, before the dispute reached the stage of decision making, the family heads, clan heads, village leaders, or guild leaders often first adopted a conciliatory role and suggested ways in which the disputants could come to a compromise or suggested possible solutions satisfactory to both disputing parties. In that sense, their role may be comparable to that of a mediator, who assists the parties to arrive at a satisfactory settlement.

The above practice in Imperial China might be described as mediation followed by arbitration. Before the dispute reached the stage of arbitration, various attempts were made to settle it. Different people would intervene to help "the parties to reach some kind of compromise and to prevent the dispute going further."¹¹⁹ If such attempts failed, then elders or community leaders would render a decision, which the parties were under strong pressure to accept.

Such a blurring in the role of the dispute resolver can be explained using the model of two paradigms of internal and external resolution argued by Donald Clarke.¹²⁰ In external resolution, the third party "has no distinct relationship with the parties other than a specialized function as a dispute resolver. External resolution is the dominant paradigm in writings about dispute resolution in Western societies."¹²¹ In internal resolution, the dispute resolver has authority not because of his specialized function as a dispute resolver "but because of some other distinct relationship with the parties."¹²² The above model of two paradigms in dispute resolution is a useful tool to distinguish the dispute resolution mechanisms in the Western tradition and in Imperial China.

119. MacCormack, *supra* note 92, at 111.

120. CLARKE, *supra* note 67, 372-77.

121. *Id.* at 248.

122. *Id.*

According to Western norms, a mediator or arbitrator is generally a neutral third party who is unconnected with the disputing parties and who has no personal interest in the outcome of the disputes. Third-party neutrals are not supposed to have personal connections with any of the disputing parties, which may cause a suspicion of bias. Instead, they are often complete strangers to the parties and their issues, to ensure their neutrality.¹²³ The process thus falls into the paradigm of 'external resolution.' In contrast, the dispute resolvers in Imperial China were usually persons known personally to the disputants. Indeed, this was often seen as a desired attribute. They could apply personal knowledge of the parties, their circumstances, and their relationships to resolve the conflict. As the Chinese dispute resolvers could educate the disputants with moral values, their integrity was unquestioned and the disputants should not have perceived bias or prejudice to make disputants doubt the resolver's neutrality.¹²⁴ Therefore, this process falls into the paradigm of 'internal resolution.'

The two paradigms can differ markedly in their procedures and outcomes. Procedurally, the internal resolution system blurs the lines between mediation, arbitration, and litigation. Because of his special relationship with the parties, the dispute resolver is in a position to impose an outcome no matter what mode is used. Furthermore, the dispute resolvers were expected not only to resolve the conflicts between the parties, but also to promote important socio-political values in the community. The notions of settlement facilitation and decision making were historically blurred in the Chinese minds. This tendency can be explained by the different standards applied in Chinese dispute resolution. In internal resolution, the standard is likely to be one which is good for the community in which the parties and the resolver are members (*i.e.* the family, the clan, the village, the guild, or the society as a whole). Thus, promoting social harmony is the primary goal in the dispute resolution process. In external resolution, the focus is on the legal rights and obligations of the individual parties. Even a mediated settlement is formed in the shadow of the norms that the parties believe would apply if the dispute went to adjudication.

123. SHARYN L. ROACH ANLEU, *LAW AND SOCIAL CHANGE* 146 (2d ed. 2010).

124. CHEN, *supra* note 58, at 15-16.

III. LOCALIZED GLOBALISM: CULTURAL TRANSLATION OF THE BORROWED CONCEPT

Our journey into history explored features of dispute resolution in Imperial China. The root of Western arbitration— private law such as the *jus civile* in ancient Rome and the *Lex Mercatoria* in medieval Europe— seems to be lacking on Chinese soil. Even though there was reference to the term ‘arbitration’ within the historical Chinese literature, it was, in fact, a method of internal resolution within the social institutions, rather than a semi-formal institution to resolve disputes by a third-party neutral, based on the principles of freewill and the concept of ‘private justice.’ No similar historical link and substantial degree of continuity from Roman arbitration to modern day arbitration could be found in Chinese history.

This being so, legal culture is not static and must be understood in the context of the changes in society. The introduction of Western civilization into China during the eighteenth and nineteenth centuries resulted in significant changes to China’s political, economic and social structures. The pre-existing social order was destroyed by several major political upheavals and the legal tradition that was part of that social order was greatly challenged by the new values, ideologies, and norms imported from the West. This marked the ‘modernization’ process of the Chinese legal system.¹²⁵

Modern legal reform, which started alongside China’s Reform and Opening in 1978, has led to drastic changes to the Chinese legal regime. In line with the robust development of commercial law and the increasing recognition of private rights, the dispute resolution regime has also evolved to resolve increasing numbers of disputes and to protect parties’ lawful rights under Chinese laws and regulations. “As Chinese economic philosophy adopts a more pragmatic perspective and as the Chinese increase foreign trade, the cultural, historical, and ideological factors fueling their reluctance to arbitrate will subside.”¹²⁶ On May 6, 1954, the PRC Government Administration

125. The modernization process of Chinese legal system can be divided into four stages. Firstly, the process of ‘Employing things Western to serve Chinese needs’ (*zhongti xi yong*), starting from the Opium War in 1840 to 1919. Secondly, the process of ‘Westernization’, starting from the ‘New Culture Movement’ in 1919 to the establishment of the People’s Republic of China in 1949. Thirdly, the process of ‘learning from the Soviet’ from 1949 to the end of the Cultural Revolution in 1976. Lastly, the process of modern legal reforms, taking into account both Chinese and Western ideas, which started from the reform and opening up in 1978. See HUANG, *supra* note 55, 18-20.

126. George Burke Hinman, *China, Modernization, and Sino-United States Trade: Will China Submit to Arbitration*, 10 CAL W. INT’L L. J. 53, 91 (1980).

Council (presently the State Council) issued a decision to establish the Foreign Trade Arbitration Commission, which would arbitrate disputes that “arise from contracts and transactions in foreign trade, particularly disputes between foreign firms, companies, or other economic organizations.”¹²⁷ On December 2, 1986, the Standing Committee of the National People’s Congress decided to ratify the New York Convention.¹²⁸ On August 31, 1994, arbitration was legitimized by the promulgation of the Arbitration Law.¹²⁹ In line with the movement of harmonization of law and practice, the Chinese arbitration legislation also incorporated a number of internationally recognized principles, such as party autonomy, finality of awards, and independence of arbitration.¹³⁰ China’s participation in more Western style arbitration today is seen as “a logical extension of her new economic, political, and legal philosophies and her increased participation in the international business community.”¹³¹

What is the role of legal tradition in China’s process of legal modernization? How did the borrowed semi-formal dispute resolution institution interact with China’s native system of non-confrontational legal culture? How did the notion of dispute resolution in traditional Chinese culture influence the understanding of this borrowed concept? To answer these questions, it is useful to trace back the historical background when the Western model of arbitration was first introduced in China in the late-Qing and early Republican period.

In 1904, the first chamber of commerce— a modern merchants’ association— came into being, which paved the way for the emergence of commercial arbitration. The chambers of commerce were granted the right and duty to mediate and arbitrate the commercial disputes between Chinese merchants, as well as commercial disputes

127. *Decision of the Government Administration Council of the Central People’s Government Concerning the Establishment of the Foreign Trade Arbitration Commission within the China Council for the Promotion of International Trade*, MINISTRY OF COMMERCE PEOPLE’S REPUBLIC OF CHINA (May 6, 1954), <http://english.mofcom.gov.cn/aarticle/lawsdata/chineselaw/200211/20021100053385.html>.

128. *Decision of the Standing Committee of the National People’s Congress on China Joining the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, STANDING COMMITTEE OF THE NATIONAL PEOPLE’S CONGRESS (promulgated Dec. 2, 1986, effective Apr. 22, 1987), available in Chinese at <http://www.people.com.cn/zixun/flfgk/item/dwjf/falv/9/9-1-7-1.html> (last visited Apr. 25, 2013).

129. *Arbitration Law of the P.R.C.*, STANDING COMMITTEE OF THE NATIONAL PEOPLE’S CONGRESS (promulgated Aug. 31, 1994, effective Sept. 1, 1995), available at http://www.law-lib.com/law/law_view.asp?id=10684 (last visited Apr. 25, 2013).

130. See *id.*, at arts. 4, 6, 9, 14, 31.

131. Hinman, *supra* note 126, at 91.

between Chinese and foreign merchants.¹³² Shortly after the establishment of the chambers of commerce, there were discussions of setting up specialized commercial arbitration institutions. The Western model of commercial arbitration was introduced in the Official Journal of Commerce in 1906.¹³³ However, when the Western notion of 'arbitration' was imported to China, there was much discussion on the use of terminology.

The chambers of commerce proposed to adopt the term 'adjudication' (*caipan*). In 1907, the first institution established by the Chengdu Chamber of Commerce was named the 'commercial adjudicatory institute' (*shangshicaipansuo*).¹³⁴

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

In 1912, the Ministry of Justice defined the scope of authority of the newly established commercial arbitral bodies in a reply to the Ministry of Industry and Commerce as follows:

The commercial arbitral bodies are to 'arbitrate,' and their functions should be distinguished from the national courts. Those commercial bodies are empowered to mediate commercial disputes between the merchants. When they exercise the power to arbitrate, the decision must be accepted by both parties to be binding, and there should not be a compulsory element. If one

132. 《奏定商会简明章程二十六条》，载《东方杂志》，第一年，第一至三期，上海书店出版社，1904年，第207页 [Twenty Six Rules of Simplified Articles of Association for the Chambers of Commerce, 1-3 E. MAG, 1904, at 207].

133. 杨志洵，《商业机关释》，《商务官报》第25期，光绪三十二年十一月初五日，第6页 [Zhizun Yang, *Explanation of Commercial Bodies*, 25 OFFICIAL J. COM. 6 (1906)].

134. 《四川成都商会商事裁判所规则》，《华商联合报》第17期，1910年，“海内外公牍”，第1页 [Rules of the Commercial Adjudicatory Institute of Sichuan Chengdu Chamber of Commerce, 17 UNITED J. CHINESE MERCHANTS 1 (1910)].

party does not agree with the result of arbitration, he may bring the matter to the courts.¹³⁵

The authority of commercial arbitral bodies was further clarified in their Articles of Association in 1913, which provides that “the result of arbitration must be accepted by both parties to be binding;” if one party is not satisfied with the result, he could appeal.¹³⁶

In the transplantation process, we can see that the borrowed concept was severely challenged by the Chinese native legal culture. The extra-judicial nature of arbitration— a semi-formal institution with an adjudicatory function which produces a binding result— was incompatible with Chinese local soil conditions. The existing local institutions that resolved disputes outside state courts were part of the internal resolution mechanism. The decisions by the dispute resolver, even though they were often respected by the disputants voluntarily as a result of social pressure, were not legally enforceable before the state courts. Adjudicatory functions were reserved for the state courts. The notion of private justice was historically foreign to the Chinese mind and was challenged by the native culture, which emphasized group interests and social harmony.

When the Western model of arbitration was first imported in China, the relevant authorities in the Qing government were reluctant to recognize an important feature of arbitration— the adjudicatory function and the finality of the result. The transplanted institutions (so-called ‘commercial arbitral bodies’) were transformed to mirror local traditions, in that they did not have adjudicatory functions and their decisions were not binding unless both parties accepted. After a complex process of selection, resistance, reform, and integration, the binding effects of the arbitral decision were finally recognized in 1923 in the Arbitration Act.¹³⁷ This process demonstrates the complex interplay among the state actors (*i.e.* the Ministry of Finance and the Ministry of Industry and Commerce) and non-state actors (*i.e.* chambers of commerce) and the active role they play

135. 《司法部咨工商部商事公断处准援案设立如有一造不服仍应受法庭审判之》，《政府公报》，1912年7月10日，第71号“公文” [Heping Yu, *The Construction of Commercial Arbitration System in Late-Qing and Early-Republican China*, 4 ACAD. MONTHLY 90 (2004) (citing *A Reply from the Ministry of Justice Concerning the Jurisdiction of the Court if One Party Disagrees with the Arbitration Result*, OFFICIAL GAZETTE (July 10, 1912)].

136. 《商事公断处章程》1913年，载《日用百科全书》，商务印书馆1925年，第十七，十八條，第53页 [ARTICLES OF ASSOCIATION OF THE COMMERCIAL ARBITRAL BODIES, art. 17 & 18 (1913), reprinted in 18 ENCYCLOPEDIA 53 (Shangwu Yinshuguan 1925)].

137. 《公断法草案》第二十一条，载修订法律馆编《法律草案汇编》，京城印书局 1926年 [DRAFT ARBITRATION ACT, ARTICLE 21, reprinted in COLLECTIONS OF DRAFT ACTS (Beijing Printing Bureau, Revising Law Office ed., 1926)].

in conceptualizing the borrowed institution. It also demonstrates how transplanted institutions are brought into harmony with local traditions.

Furthermore, as discussed above, Chinese culture does not clearly draw a line between the role of a mediator and that of an arbitrator. The family heads, clan heads, village leaders, guild officials, or other dispute resolvers often attempted to facilitate the parties to settle their disputes with a result satisfactory to both. If a settlement was not reached, the same person would play a more authoritative role and render a decision. In the constant struggle between the borrowed institution and deeply embedded local traditions, the concept of arbitration was translated from its native language, and given a new meaning. As a result of this 'cultural translation,' the native tradition of mediation was integrated into the Western notion of arbitration. A new form of institution or process gradually came into being—the integration of mediation and arbitration (which is often referred to as 'arb-med' or 'med-arb' depending on which process starts first). This practice remains one of the main features of the contemporary arbitration regime in today's China.

This new mechanism for dispute resolution (med-arb or arb-med) features *the same person* acting as both an arbitrator and a mediator in *the same* proceeding. There has been much academic debate on the admissibility and appropriateness of arbitrators acting as settlement facilitators. The supporters believe the arbitrators' mission is to ensure that arbitration in general provides the parties a menu of processes that may assist the parties in resolving their disputes in the most effective way, which includes assisting the parties in reaching a fair resolution of their differences at the earliest practical time. Hence, the arbitrators' role will include the facilitation of settlement.¹³⁸ Another justification for the arbitrators to facilitate settlement is based on the parties' freedom of choice.¹³⁹ If the parties want the arbitrators to carry out a conciliatory role, to use caucusing in

138. See PIETER SANDERS, *The 1996 Alexander Lecture, Cross-Border Arbitration? A View on the Future*, 62 ARB. 168, 173 (1996); KLAUS-PETER BERGER, *Integration of Mediation Elements into Arbitration: 'Hybrid' Procedures and 'Intuitive' Mediation by International Arbitrators*, 19 ARB. INT'L 387, 402-403 (2003); Michael E. Schneider, *Combining Arbitration with Conciliation*, in 8 ICCA CONG. SERIES 57, 76 (Albert Jan van den Berg ed., 1996).

139. See, e.g., Houzhi Tang, *Is There an Expanding Culture that Favors Combining Arbitration with Conciliation or Other ADR Procedures?*, in 8 ICCA CONG. SERIES 101, 113 (Albert Jan van den Berg ed., 1996); BERGER, *supra* note 138; Julian Lew, *Multi-Institutional Conciliation and the Reconciliation of Different Legal Cultures*, in 12 ICCA CONG. SERIES 421 (Albert Jan van den Berg ed., 2005).

mediation, and to shift their hat back as arbitrators if the mediation fails, such a voluntary agreement should be respected. Furthermore, settlement facilitation by arbitrators can be a useful tool to enhance the efficiency of arbitration and improve the administration of justice.¹⁴⁰

The opponents of this combination believe the role of arbitrators is solely to assure that the arbitral process results in an *enforceable* award arrived at in a fair way. Thus, promoting settlement would fall beyond the mission of the arbitrators.¹⁴¹ The main argument against the arbitrators facilitating settlement is the risk of a breach of due process and natural justice. Fundamental to the notion of natural justice is the right to know and be able to answer an opponent's case. The rule of due process governing fair hearing of disputes on the merits forbids ex-parte communications with the decision maker. However, the process of mediation often presupposes the separate meeting with the parties (caucusing). During these caucuses, information communicated confidentially to the mediator is not known to the opposing party, and is not subject to response or clarification by the opposing party. As a consequence, the other party may be deprived of their due process right to rebut those facts.¹⁴² Another drawback to the combined approach is the fear that, in the event that the settlement fails and the arbitration continues, the impartiality of the mediator-turned-arbitrator may be affected because of the confidential information he or she obtained during the mediation phase that is not part of the record. There are also concerns that if the parties anticipate that the mediator may revert to being an arbitrator and decide the case if the mediation fails, they might be less candid than they would be with a 'pure' mediator. This may weaken the effectiveness of the mediation process.¹⁴³

Due to the divergent perceptions on the mission of arbitrators in different legal traditions, whether arbitrators can facilitate settlement is one of the few issues in modern arbitration that has not yet reached a transnational consensus, despite the general trend of harmonization. Generally speaking, in civil law jurisdictions, especially

140. Gabrielle Kaufmann-Kohler, *When Arbitrators Facilitate Settlement: Towards a Transnational Standard*, 25 ARB. INT'L 187, 205 (2009).

141. See, e.g., Michael Collins, *Do International Arbitral Tribunals Have Any Obligations to Encourage Settlement of the Disputes Before Them?*, 19 ARB. INT'L 333 (2003).

142. See Kaufmann-Kohler, *supra* note 140, at 197-98; Emilia Onyema, *The Use of Med-Arb in International Commercial Dispute Resolution*, 12 AM. REV. INT'L ARB. 411, 415 (2001).

143. See, e.g., Hunter, *supra* note 73, at 48.

jurisdictions where the judges traditionally promote settlement (e.g. Germany and Switzerland) the combination of mediation and arbitration is more acceptable whereas common law jurisdictions (e.g. United States, United Kingdom) are more reluctant to allow the functions of settlement facilitator and adjudicator to be assumed by the same person.¹⁴⁴

In China, as the local tradition did not clearly distinguish the two processes of mediation and arbitration, the line between the role of arbitrator and that of the mediator was historically blurred. Such a historical blurring is still influencing Chinese minds today. The Chinese view the typical arbitrator as an individual 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. Consistent with the Chinese tradition, the role of a settlement facilitator and that of a decision maker is blurred and can be combined in contemporary arbitration in China. As a result, the combination of mediation and arbitration is recognized and widely practiced in China's modern dispute resolution regime.¹⁴⁵

The Arbitration Law provides that the arbitral tribunal may carry out mediation prior to rendering an arbitral award. If the parties request mediation, the arbitral tribunal shall carry out the mediation proceedings.¹⁴⁶ In practice, mediation is frequently accepted by the parties in an arbitration proceeding and enjoys a high degree of success.¹⁴⁷ According to an online survey conducted in November 2011 and April 2012 with Chinese arbitrators on the combination of

144. For a survey of the law and practice of the combination of mediation and arbitration in different jurisdictions, see generally, Kaufmann-Kohler, *supra* note 140; FAN KUN, *ARBITRATION IN CHINA: A LEGAL AND CULTURAL ANALYSIS* 144-55 (2013).

145. There may be other reasons that can explain the emphasis of mediation in contemporary China, such as the authoritarian response motivated by social stability concerns. This article will not enter into detailed discussions on that aspect. For a discussion, see generally Fu Hualing, *Access to Justice in China: Potentials, Limits and Alternatives*, SOCIAL SCIENCE RESEARCH NETWORK (Sept. 15, 2009), <http://ssrn.com/abstract=1474073>; Fu Hualing & Richard Cullen, *From Mediator to Adjudicatory Justice*, in *CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CHINA* (Margaret Woo and Mary Gallagher, eds., 2011), available at <http://ssrn.com/abstract=1306800>; Haitian Lu, *State Channeling of Social Grievances: Theory and Evidence from China*, 41 HONG KONG L.J. 231 (2011); Carl Minzner, *China's Turn Against Law*, 59 AM. J. COMP. L. 935 (2011).

146. *Arbitration Law of the P.R.C.*, *supra* note 129, at art. 51.

147. For a discussion on the Chinese practice of combining mediation with arbitration see Gabrielle Kaufmann-Kohler & Kun Fan, *Integrating Mediation into Arbitration: Why It Works In China*, 25 J. INT'L ARB. 479, 486 (2008);

王生长, 《仲裁与调解相结合的理论与实务》, 2001年 [SHENGCHANG WANG, *THE COMBINATION OF ARBITRATION AND MEDIATION: THEORY AND PRACTICE* (2001)].

mediation and arbitration in China,¹⁴⁸ 88.9% of the respondents considered that it is appropriate for arbitrators to facilitate settlement. In actual practice, a majority of the arbitrators have attempted mediation during arbitration proceedings. 50% of the respondents have proposed mediation to the parties in over 90% of the cases where they act as arbitrators. The mean response was 66.24% and the median response was 87.5%. The survey also shows that the Chinese arbitrators consider the combination of mediation and arbitration as reflective of traditional values, among which “the pursuit of harmony,” “avoiding litigation,” and the “moderation in all things” were viewed as the most relevant. This may be a sign of the continuity of the traditional Chinese legal culture and its impact on the contemporary dispute resolution pattern.

The Chinese cultural mentality towards a new concept or institution is to look for something we are familiar with and adapt it. This mentality has dominated China’s modernization process. As a result, the emerging new form of med-arb institution retains some features of traditional means of dispute resolution, but also has injections of foreign ideas. To use a metaphor, it is like grafting an apple branch to a pear root stock. The grafted fruit tree produces both pears and apples. The transplanted institution was repackaged to fit local norms—the blurring in notions and processes between mediation and arbitration. Or in other words, new wine was put into old bottles.

IV. GLOBALIZED LOCALISM: THE PROJECTION OF LOCAL NORMS TO GLOBAL ARENA

The Chinese local norms in emphasizing the pursuit of social harmony and seeking to resolve the disputes in amicable ways may be of value for other parts of the world. This is true particularly in the context of the ADR movements in the West in response to the overburdened judiciary. The Chinese practice of integrating mediation into arbitral and judicial proceedings may offer some valuable

148. Between November 2011 and April 2012, the questionnaires were distributed to more than 100 arbitrators, 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 have been received. After filtering out two incomplete responses, the analysis is based on thirty-six complete responses. See Kun Fan, *Can You Leave Your Hat On? An Empirical Study on Arbitrators Facilitating Settlement in China*, paper presented at the Journal of Empirical Legal Studies Conference on Asian Empirical Scholarship held on 4 June 2012 (conference paper available on request from the author).

insights to the West, to further improve efficiency in the administration of justice.

Indeed, it already appears that objections to such a combined approach are weaker now, and that opponents are beginning to see the merits of the combination, in terms of saving cost and time. With the growth of international arbitration cases in China, it may be expected that Western arbitrators, whilst sitting on the same arbitral tribunals, will learn from their Chinese colleagues about the advantages of the combined approach. As Tang Houzhi concluded at the International Council for the International Arbitration conference in Seoul in 1996,

Yes, there is an expanding culture that favors combining arbitration with mediation in the world. This culture has been existing in the East for a long time and is now expanding to the West and other parts of the world in one way or another.¹⁴⁹

Some case examples may illustrate this trend. In one case, an English arbitrator reported his arb-med experience acting as the presiding arbitrator in an arbitration at Hong Kong International Arbitration Center, which involved a dispute between a Chinese party and a foreign party. At the hearing, both parties asked him to mediate. They subsequently agreed to a 'standstill' in the arbitration pending the outcome of mediation, that the mediator could meet with the parties separately or together, that everything said or done for the purpose of mediation could not be referred to in the arbitration, and that the mediator would continue to act as the chairman of the arbitration if mediation failed. After spending some hours meeting with the parties separately trying to draw their attention to the wider commercial interests that made a settlement desirable, a settlement was eventually reached. Through the successful use of arb-med, a hearing scheduled to last three weeks with an estimated arbitrators' fee of some HK\$1.5 million was avoided. The arbitrator further stated he did not think that anything he said or witnessed during his discussions with the parties would have inhibited him from continuing with the arbitration if it had gone ahead.¹⁵⁰

The author of this article has also personally observed a successful arb-med in an ICC arbitration, conducted by a tribunal consisting of an American chairman with Chinese and German co-arbitrators, for disputes between Chinese and German parties. Before the first

149. Tang, *supra* note 139, at 101.

150. Michael Hwang, *The Role of Arbitrators as Settlement-facilitators? Commentary*, in ICCA CONGRESS SERIES NO.12, 579-90, ANNEX I (Albert Jan van den Berg ed., 2005).

hearing, the parties agreed that the tribunal would conduct mediation on the first day, and that, if no settlement was reached, the arbitrators would resume their role and the arbitration hearing would start on the second day. During the mediation day, the tribunal first explained to the parties the procedure and reconfirmed the parties' consent. They then verified the participants' authority to settle. When meeting the parties separately, the tribunal tried to convey to each of them the strengths and weaknesses of their cases. At the end of the mediation day, no settlement was reached, as the claimant's final offer did not reach the maximum at which the respondent was authorized to settle. However, the differences were substantially narrowed. The next day, the arbitration hearing started, and the tribunal emphasized that they were "shifting their hat back as arbitrators" and repeated that what they had heard during the mediation proceeding the day before could not be used in the arbitration proceedings. The hearing lasted one whole day, and then the parties were invited to exchange further submissions. Interestingly, during the dinner after the hearing (all of the parties and the arbitral tribunal stayed in the hotel where the hearing was held) the parties voluntarily sat at the same table. It is conceivable that some negotiation discussions continued during dinner. A few months later, a settlement was eventually reached between the parties themselves and the arbitration claims were withdrawn.

These practices and the general movement towards less formal dispute resolution mechanisms is further exerting influence on legal systems that do not traditionally accept that an arbitrator may act as a settlement facilitator. A good example can be seen in the Commission on Settlement in International Arbitration (CEDR Commission) in London, which studies settlement facilitation in arbitration with a view to drafting a set of best practices. England strictly distinguishes between the role of the adjudicator, who renders a binding decision, and that of the conciliator or mediator, who lacks such power. Having considered the different approaches currently adopted for the promotion of settlement by international arbitrators, including the Chinese practice, the CEDR Commission published a number of recommendations and the CEDR Rules for the Facilitation of Settlement in International Arbitration in its November 2009 Final Report.¹⁵¹

151. The Final Report of the CEDR Commission on Settlement in International Arbitration, November 2009 [hereinafter, CEDR Final Report], *available at* www.cedr.com/about_us/arbitration_commission/Arbitration_Commission_Doc_Final.pdf.

The CEDR Commission also proposed a number of safeguards for arbitrators who use private meetings with each party as a means of facilitating settlement.¹⁵²

If we follow the general evolution of dispute resolution processes in human history, the Chinese tradition of seeking informal and amicable resolutions may well converge with the global scripts with the ongoing two-way exchange between 'formalism' and 'informalism.'¹⁵³ Arbitration was developed in reaction to the excessive formalism of the courts. As a result of parties' constant demand for new procedural rights, arbitration is now criticized as having become too expensive, too slow, too proceduralized, and judicialized, more similar to court procedures (in their classical formal form).¹⁵⁴ This excessive formalization of arbitration will inevitably lead to the development of new forms of dispute resolution (which may include combinations of different methods), featuring informalism, de-proceduralization, and flexibility, focusing more on the parties' interests, and re-establishing peace between the parties, rather than sending them home with a winner and a loser.¹⁵⁵ The Chinese approach of combining mediation with arbitration is relationship-focused and features informalism and flexibility. It appears to be in line with the trend of general legal evolution. Therefore, such local ideas and practices may be projected onto the global arena to form a globalized localism.

This process of 'globalized localism' may occur in two forms. One form occurs when local Chinese traditions are directly exported to the wider arbitration world, as illustrated by the above case examples and the initiatives of the CEDR. Another form is a less direct process where different forms of arbitration slowly converge through general circulation among the international arbitration community. Such a convergence is inevitable in light of the general evolution of dispute resolution process.

152. When making these proposals, the CEDR Commission "has considered the different approaches currently adopted for the encouragement of settlement within arbitration proceedings", including 'the use by arbitrators in China and in Hong Kong of mediation techniques.' See CEDR Final Report ¶ 2.2. Members of the Commission also include experts from China.

153. See SIMON ROBERTS & MICHAEL PALMER, *DISPUTE PROCESSES: ADR AND THE PRIMARY FORMS OF DECISION-MAKING* 9 (2d ed. 2005). For an illustration of the constant alternation between formal and informal dispute resolution methods and the development of arbitration, see Kaufmann-Kohler, *supra* note 140, at 203-4.

154. BRUNO OPPETIT, *THÉORIE DE L'ARBITRAGE* 27-34 (1998); see also Pierre Lalive, *Arbitration-The Civilized Solution?*, 16 ASA BULLETIN (1998); CLAY, *supra* note 23, at 169-170.

155. Kaufmann-Kohler, *supra* note 140, at 205.

V. CONCLUSION

Where there is society, there is law. Where there is law, there is society (*ubi societas ibi jus, ubi jus ibi societas*). No legal systems exist independently of a particular social and cultural context. Therefore, when law and legal institutions of a society are transplanted into another society, there will be a constant struggle between the imported rules, institutions, and ideas and the deeply embedded local culture. In this sense, legal transplantation may be closer to the model of an organic transplant or vegetable transplant than to a mechanical replacement. It may involve a complex process of selection, resistance, reform, and integration. From the experience of the transplantation of arbitration in China, we can see that that local tradition and culture still play a significant role in accepting and reshaping borrowed legal institutions, despite the general inevitable trend towards globalization of law. In this process, various state and non-state actors played an active role in conceptualizing global scripts with local norms.

The globalization of law can be seen as an entanglement process, with combining the operations of legal, social, cultural, economic, and political elements in different societies. There is a necessary interaction between local norms and global scripts. On the one hand, globalization is localized when domestic actors translate and conceptualize the borrowed concepts by referring to the local notions; on the other hand, local norms may be globalized when they are expanded beyond territorially-constrained statehood and projected to the global arena. The trend towards harmonization in the law and practice of arbitration will not lead to the 'universality of arbitration,' erasing all differences. Rather, the development of transnational arbitration will continue as a process of 'glocalization,' which reflects the combined impacts of the globalization of law and local culture and traditions.

