

## The cultural sensitivity in harmonisation of international arbitration: lessons from China

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# The Cultural Sensitivity in Harmonisation of International Arbitration: Lessons from China

## Introduction

Cultures shape the instincts and expectations of stakeholders in the international arbitral process. Such a variable may psychologically influence an arbitrator's performance. Although arbitration has emerged as a credible means of resolution of cross-border disputes involving parties from variant cultures, the understanding of cultural ramifications remains limited. China has a distinct cultural approach to international arbitration, which is uniquely shaped by its preference over non-confrontational methods of conflict resolution. In the rapidly expanding field of international arbitration, however, the cultural effect should not be overread given the increasing convergence in both rules and norms, which is arguably perceived to result from economic rather than cultural factors. This study seeks to fill a gap by providing an in-depth critic of the cultural role in cross-border arbitration.

The paper starts from a brief discussion about intersection of arbitration and culture. It is essential for stakeholder to be aware of cultural sensitivities during the international arbitral process. This part looks at conciliatory and adversary modes on the ground of confrontation and harmony approaches. It then examines the epistemology of determining facts in various legal cultures, which are manifested in complicating effects of culture in legal proceedings. An inquiry arises as to whether an international arbitration culture could exist. The second part moves to a hybrid model with mediation and arbitration combined. Both Chinese statutes and the institutional building are integrated into the system. This part seeks to account for some systematic implication influenced by China's top-down implementation of the hybrid model. The third part considers the globalisation of arbitration theoretically, which is focused on a two-way interaction between globalisation and localisation. Some barriers are not limited to mere diverse norms, but potential incompatibility that inhibits inherent transplantation. To address the above challenges, the fourth part lays more weight on theoretic critics on the classic "path dependence" theory. This part ascertains further whether culture still serves the mother of all path dependencies among other variables, such as politico-economic factors and other judicial settings. It is argued that a rational choice made by an arbitration party depends largely upon a sophisticated benefit-cost analysis. The fifth part challenges the global arbitration culture from the perspectives of procedural convergences *vis-à-vis* cultural syncretism.

The conceptual critics of international arbitration culture suggest that stakeholder strike a balance between oversimplifying and generalising the relations between cultural variables and international arbitration. At stake is to transform the findings into behavioural changes. Based on the above findings, it is concluded that it is essential to harmonise the differing cultural approaches to enhancing credibility in international arbitration. It is suggested that the procedural convergence is not necessarily reflective of an emergent international arbitration culture. Notably, further research is needed since it is short of a more appropriate methodology to quantify and qualify the causal link between the cultural effect and designed outcomes.

## A. The Intersection of Arbitration and Culture

Arbitration typically consists of a three-person panel operating under rules that are often modelled on the arbitration rules of the UN Commission on International Trade Law (UNCITRAL).<sup>1</sup> When arbitration becomes transnational, the resulting fusion of different legal cultures gives rise to a multiplicity of perceptions affecting each component of the arbitration proceedings.<sup>2</sup> Notably, legal cultures do not exist in an intellectual vacuum. Rather they are the products of some fundamental values of a society, based on the perceptions of justice and social norms.<sup>3</sup> Deeply influenced by the Confucianism in pursuit of harmony, Chinese parties resort to informal procedures of dispute settlement instead of recourse to confrontation. Due to the divergent conceptions on the role of arbitrators in different cultures, the appropriateness of arbitrators to facilitate settlement is one of the most hotly-debated issues.<sup>4</sup>

### 1. Culture Influences

Culture has influenced the development of dispute resolution, with which it determines what goals and values are associated. Some cultural issues should be explored to improve the process of resolving cross-cultural conflicts.<sup>5</sup> In China, it represents a growing area of dispute resolution because of its desire to participate in the world economy and the traditional low-keyed role of its judiciary.<sup>6</sup> The Chinese traditional legal culture has had enduring influence upon contemporary arbitration practice.<sup>7</sup> This tradition of harmony has a deeply-embedded philosophical basis in China, which is considered paramount to maintaining social stability.<sup>8</sup> Chinese generally prefer negotiation between two sides with the assistance of a third party to reach a settlement. They relatively dislike direct confrontation with each other and being judged by third parties, as it symbolises disruption of harmony. Given this cultural propensity to avoid confrontation, the parties are unlikely to resort to judicial intervention.<sup>9</sup>

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<sup>1</sup> The Model Law was adopted by the UNCITRAL on 21 June 1985, at the 18<sup>th</sup> Session of the Commission. It was amended by UNCITRAL on 7 July 2006 at the 39<sup>th</sup> Session of the Commission. The UNCITRAL Model Law on International Commercial Arbitration, U.N. Sales No. E.08.V.4 (UN Commission on International Trade Law, 2006)

<sup>2</sup> Bernardo Cremades, 'Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration' (1998) 14 *Arbitration International* 164

<sup>3</sup> William Slate, 'Paying Attention to 'Culture' in International Commercial Arbitration' (2004) 59 (3) *Dispute Resolution Journal* 96, 101

<sup>4</sup> Gabrielle Kaufmann-Kohler, 'When Arbitrators Facilitate Settlement: Towards a Transnational Standard' (2009) 25 *Arbitration International* 1897

<sup>5</sup> Katie Shonk, 'How to Resolve Cultural Conflict: Overcoming Cultural Barriers at the Negotiation Table' (Harvard Law School, Programme on Negotiation, 10 September 2019) <<https://www.pon.harvard.edu/daily/conflict-resolution/a-cross-cultural-negotiation-example-how-to-overcome-cultural-barriers/>>

<sup>6</sup> Sam Blay, 'Party Autonomy in Chinese International Arbitration: A Comment on Recent Developments' (1997) 8 *American Review International Arbitration* 331, 339

<sup>7</sup> Kun Fan, *Arbitration in China: A Legal and Cultural Analysis* (Oxford, Hart, 2013) 200-202

<sup>8</sup> (2016) 11 Kun Fan, 'Glocalisation' of International Arbitration-Rethinking Tradition: Modernity and East-West Binaries Through Examples of China and Japan' (2016) 11 (2) *University of Pennsylvania East Asia Law Review* 244, 292

<sup>9</sup> Tony Cole, 'Commercial Arbitration in Japan: Contributions to the Debate on Japanese 'Non-Litigiousness'' (2007) 40 *New York University Journal of International Law and Politics* 29, 114

(a) *Awareness of Cultural Sensitivities-Confucianism: Harmony vis-à-vis Confrontation*

Legal cultures consist of attitudes and values enshrined in society with regard to the Chinese law and its legal system.<sup>10</sup> Chinese culture prefers non-confrontational methods of conflict resolution.<sup>11</sup> These values in this scenario may be expressed as a preference for mediation over litigation.<sup>12</sup> For instance, Western legal system is generally labelled with litigious culture, while Chinese is characterised by preference on harmony and conciliation. In China, the concept of personal relations (*guanxi*) plays an important role, and maintaining harmony of relations in proceedings is given greater weight than legal rights.<sup>13</sup> Chinese are more likely to avoid conflict than Western people. They are so unaccustomed to the concept of Western-style litigation that they do not necessarily even think of court as a realistic possibility. There is considerable cultural pressure to resolve most disputes without going to court. There is a strong social consensus to promote amicable settlement of disputes and to suppress litigation.<sup>14</sup> Such a tradition is deeply embedded in the people's mind and forms the dispute resolution culture. As a result, Chinese people do not readily resort to their courts to resolve disputes.<sup>15</sup> The non-adversarial method of dispute resolution is considered as one of the five themes of legal values underlying Chinese law and legal institutions.<sup>16</sup>

Furthermore, the UNCITRAL is silent on a subtle matter of confidentiality. While Western culture prefers open proceedings, a Chinese party will prefer to keep proceedings and most information confidential. More specifically, the Chinese Arbitration Law provides that: "an arbitration shall not be conducted in public unless the parties stipulate otherwise."<sup>17</sup> Additionally, the 2015 CIETAC Rules provides that:

"the parties and their representatives, the arbitrators, the witnesses, the interpreters, the experts consulted by the arbitral tribunal, the appraisers appointed by the arbitral tribunal and other relevant persons shall not disclose to any outsider any substantive or procedural matters relating to the case."<sup>18</sup>

These differences influence how the proceeding will be conducted despite the lack of sophisticated norms about it in most International Commercial Arbitration contracts.

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<sup>10</sup> Lawrence M. Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation, 1975) 193-268

<sup>11</sup> Phillip McConaughay, 'The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration' (1999) 93 *Northwestern University Law Review* 453

<sup>12</sup> Tao Li and Zuoli Jiang, 'Human Rights, Justice, and Courts in IEL: A Critical Examination of Petersmann's Constitutionalisation Theory' (2018) 21 (1) *Journal of International Economic Law* 193, 211

<sup>13</sup> Scott Wilson, *Remade in China: Foreign Investors and Institutional Change in China* (Oxford, Oxford University Press, 2009) 45-122

<sup>14</sup> Gabrielle Kaufmann-Kohler and Fan Kun, 'Integrating Mediation into Arbitration: Why It Works in China' (2008) 25 (4) *Journal of International Arbitration* 479, 492

<sup>15</sup> Fiona D'Souza, 'The Recognition and Enforcement of Commercial Arbitral Awards in the People's Republic of China' (2006) 3 (4) *Fordham International Law Journal* 1318, 1359

<sup>16</sup> R. Randle Edwards, Louis Henkin, and Andrew Nathan (eds.) *Human Rights in Contemporary China* (New York, Columbia University Press, 1988) 45-47

<sup>17</sup> PRC Arbitration Law Article 40

<sup>18</sup> The CIETAC Rules 2015 Article 38

### *(b) Conciliatory Mode vis-à-vis Adversary Mode*

The preferred pursuit of harmony in Confucianism leads to a long-standing anti-litigation mindset in modern Chinese society.<sup>19</sup> China's wariness of international dispute resolution is partly informed by Chinese culture and tradition, which is more inclined towards negotiation than towards the confrontation involved in litigation.<sup>20</sup> The Western and Chinese cultures are based on a diametrically opposed ideology. The former is embedded in a concept of right as an absolute entitlement, while the latter may influence how people approach arbitration in substance as well as in procedure.<sup>21</sup> Given different cultural traditions, the dispute resolution mechanism is viewed as a conciliatory mode, contrasted to the adversary mode between China and the West.<sup>22</sup>

The concepts of conciliation and arbitration are traditionally not so distinct in China.<sup>23</sup> Arbitration is understood to be closer to conciliation than litigation in Chinese culture. It is argued that the reluctance of the Chinese to litigate can be attributed to its culture's emphasis on harmony in social relations.<sup>24</sup> The arbitral tribunal may conciliate if they so choose.<sup>25</sup> Adversarial enforcement actions in the West do not have such negative connotations, and have not been subject to strong cultural influences to settle consensually.<sup>26</sup> Chinese may misinterpret Western aggressiveness as hostility, while latter may misinterpret the former conflict-avoidance as not caring.<sup>27</sup> The conciliation culture plays the role of conduit for the Western principle of the rule of law to Chinese society, and acts as a buffer or cushion for conflicts between modern law and traditional values.<sup>28</sup>

## **2. Arbitration in the Chinese Cultural Context**

The hybridity of Confucian and civil law traditions has rendered a Chinese legal system that has a tendency to avoid the courts in favour of informal dispute resolution.<sup>29</sup> Arbitration, as an alternative dispute-settlement mechanism based on mutual and free will conciliation

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<sup>19</sup> Tao Li and Zuoli Jiang, 'Human Rights, Justice, and Courts in IEL: A Critical Examination of Petersmann's Constitutionalisation Theory' (2018) 21 (1) *Journal of International Economic Law* 193, 211

<sup>20</sup> Harriet Moynihan, 'China's Evolving Approach to International Dispute Settlement' *Chatham House Briefing* (The Royal Institute of International Affairs, March 2017)

<sup>21</sup> Simon Greenberg, Christopher Kee and J. Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge, Cambridge University Press 2011) 33-53

<sup>22</sup> Anne Judith Farina, 'Talking Disputes into Harmony' China Approaches International Commercial Arbitration' (2011) 4 (1) *American University International Law Review* 137, 171

<sup>23</sup> Kun Fan, 'Glocalisation' of International Arbitration-Rethinking Tradition: Modernity and East-West Binaries Through Examples of China and Japan' (2016) 11 (2) *University of Pennsylvania East Asia Law Review* 244, 292

<sup>24</sup> Carlos De Vera, 'Arbitrating Harmony: 'Med-Arb' and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China' (2004) 18 (1) *Columbia Journal of Asian Law* 149, 194

<sup>25</sup> CIETAC Arbitration Rules 1998 §46

<sup>26</sup> Carlos de Vera, 'Arbitrating Harmony: "Med-Arb" and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China' (2004) 18 (1) *Columbia Journal of Asian Law* 149, 194

<sup>27</sup> Anne Judith Farina, "'Talking Disputes into Harmony' China Approaches International Commercial Arbitration' (1989) 4 (1) *American University International Law Review* 137, 171

<sup>28</sup> Yasunobu Sato, *Commercial Dispute Processing and Japan* (Kluwer Law International B.V., 2001) 1-11

<sup>29</sup> Scott Wilson, 'Law Guanxi: MNCs, State Actors, and Legal Reform in China' (2008) 17 (54) *Journal of Contemporary China* 25, 51

between the disputants under the assistance of a neutral third party, plays an important role in Chinese judiciary practice. Compared with formal adjudication, arbitration has its merits in saving cost and time. In addition, arbitration parties can choose the applicable law, the seat of arbitration, and the arbitration institutions in their contract. In China, arbitration is generally considered a method of internal resolution within the social institutions, rather than a semi-formal institution to resolve disputes by a binding decision made by a neutral third party.<sup>30</sup> Moreover, its result can be easily implemented due to its voluntary acceptance by the disputants. This alternative dispute resolution (ADR) serves to mitigate negative effect on the parties' future cooperation. Chinese parties favour diversified dispute settlement mechanisms partly because of the preference for negotiated solutions.

### 3. Diverse Cultural Background *vis-à-vis* Harmonised Arbitration

The differences in culture influence the arbitral process. Despite harmonisation of procedural rules in international arbitration, expectations of the process differ on the basis of cultural background of parties or arbitrators.<sup>31</sup> Unsurprisingly, an ordinarily Chinese judge would understand Chinese witnesses better than his counterparts because of the cultural proximity. Overly confrontational behaviour may lead a Chinese arbitrator to draw different inferences from a Western arbitrator.<sup>32</sup> Plausibly likely, but it is against the arbitration spirit, since it was designed to be an adjudicatory process by which a private third-party neutral, the arbitrator, renders a binding determination of an issue in dispute.<sup>33</sup> From another perspective, it implies that such a possibility reflects the influence of legal culture on international commercial arbitration.<sup>34</sup>

## B. The Hybrid Model: The Product of Cultural Pluralism

Mediation, as a natural extension of Confucian ethics, is the most pervasive form of dispute resolution in China.<sup>35</sup> It is no wonder a common practice that the arbitrator and the mediator to be the same person. Such a hybridity, i.e. the combination of mediation and arbitration, is reflective of China's traditional culture.<sup>36</sup> Institutionally, the China International Economic and Trade Arbitration Commission (CIETAC) offers an option for consenting parties to blend mediation and arbitration in a unique manner.<sup>37</sup> CIETAC's promotion of blending conciliation

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<sup>30</sup> Carrie Menkel-Meadow, 'Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the 'Semi-Formal'' in Felix Steffek, Hannes Unberath, Hazel Genn (eds.) *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (Oxford, Hart Publishing, 2013) 419-454

<sup>31</sup> Tom Ginsburg, 'The Culture of Arbitration' (2003) 36 (4) *Vanderbilt Journal of Transnational Law* 1335, 1345

<sup>32</sup> Kun Fan, 'An Empirical Study of Arbitrators Acting as Mediators in China' (2016) 15 *Cardozo Journal of Conflict Resolution* 777, 811

<sup>33</sup> Ellen E. Deason, 'Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review' (2013) 5 *Yearbook on Arbitration and Mediation* 219, 249

<sup>34</sup> Leon Trakman, 'Legal Traditions' and International Commercial Arbitration' (2007) 17 *American Review of International Arbitration* 1, 43

<sup>35</sup>

William Slate, 'Paying Attention to 'Culture' in International Commercial Arbitration' (2004) 59 (3) *Dispute Resolution Journal* 96, 101

<sup>36</sup> Pitman B. Potter, *The Chinese Legal System: Globalisation and Local Legal Culture* (Routledge, 2005) 33-37

<sup>37</sup> Carlos De Vera, 'Arbitrating Harmony: 'Med-Arb' and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China' (2004) 18 (1) *Columbia Journal of Asian Law* 149, 194

and arbitration sparks new interest in international arbitration innovation, especially for legal cultures that have more rigid methods. At a macro level, emphasis is given to determining the extent to which arbitration is the product of cultural pluralism derived from a blend of civil and common-law traditions, and the degree to which that blend is itself evolving in the global environment.<sup>38</sup>

### 1. The Hybrid System: Mixed Mediation/Arbitration

One of the most striking aspects of dispute resolution in China is the importance of mediation.<sup>39</sup> China is in frequent use of the combination of mediation with arbitration.<sup>40</sup> Med-arb style procedures, where arbitrators act both as conciliator and adjudicator, are rooted in the Chinese culture and philosophy.<sup>41</sup> It is widely accepted that mediation is appropriate for arbitrators to facilitate settlement.<sup>42</sup> The line between mediation and arbitration is blurred in Chinese mindsets. Chinese parties may be more inclined to accept an arbitrator acting as a mediator and less concerned about due process and natural justice objections raised by the opponents of the combination.<sup>43</sup> In this regard, arbitration should not be separated from the circumstances in which it operates. Initially, the hybrid model emerges informally through cultural influence over arbitration practices. Then, the cultural influences arise formally by incorporating those traditions directly into arbitration.

#### (a) Hybridity in Statutes

Globalisation requires a new system of commercial dispute resolution that reflects global standards and calls for reforms of China's arbitration law.<sup>44</sup> The determining factor is the cultural embeddedness of the area of law.<sup>45</sup> The legal framework for Chinese arbitration is governed by the Civil Procedure Law (CPL) and the Arbitration Law, which was adopted in 1994.<sup>46</sup> These traditions have led to a modern system of court and arbitration related

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<sup>38</sup> Leon Trakman, 'Legal Traditions' and International Commercial Arbitration' (2007) 17 *American Review of International Arbitration* 1, 43

<sup>39</sup> William Slate, 'Paying Attention to 'Culture' in International Commercial Arbitration' (2004) 59 (3) *Dispute Resolution Journal* 96, 101

<sup>40</sup> Mediation is better known in China as "conciliation". Thus, the two terms are interchangeably used in this study. Gabrielle Kaufmann-Kohler and Fan Kun, 'Integrating Mediation into Arbitration: Why It Works in China' (2008) 25 (4) *Journal of International Arbitration* 479, 492

<sup>41</sup> Emilia Onyema, 'The Use of Med-Arb in International Commercial Dispute Resolution' (2001) 12 *American Review of International Arbitration* 411, 415

<sup>42</sup> Kun Fan, 'Glocalisation' of International Arbitration-Rethinking Tradition: Modernity and East-West Binaries Through Examples of China and Japan' (2016) 11 (2) *University of Pennsylvania East Asia Law Review* 244, 292

<sup>43</sup> Gabrielle Kaufmann-Kohler, 'When Arbitrators Facilitate Settlement: Towards a Transnational Standard' (2009) 25 *Arbitration International* 1897

<sup>44</sup> The Arbitration Law of People's Republic of China became effective on 1 September 1995, and was followed by interpretations of Supreme People's Court (SPC). For instance, the *Interpretation of the Supreme People's Court concerning Some Issues on Application of the Arbitration law of the PRC* (2006 Interpretation), which came into effect on 8 September 2006.

<sup>45</sup> Tom Ginsburg, 'Lawrence M. Friedman's Comparative Law' in Robert Gordon, Morton Horwitz (eds.) *Law, Society, and History: Themes in the Legal Sociology and Legal History of Lawrence M. Friedman* (Cambridge University Press, 2011) 52-68

<sup>46</sup> PRC Arbitration Law was adopted by the 9<sup>th</sup> Meeting of the Standing Committee of the 8<sup>th</sup> National People's Congress on 31 October 1994 and promulgated by the Decree No.31 of the president of the People's Republic of China on 31 October 1994. Articles 63, which matches CPL 2012 Article 237; and Articles 70 and 71 match CPL 2012 Article 274.

conciliation provided for in the PRC CPL, Arbitration Law and the CIETAC arbitration rules.<sup>47</sup> Such an approach has been reflected in the New Rules, which provides that instead of the arbitral tribunal conducting any mediation, CIETAC may, with the parties' agreement, step in to "assist the parties to conciliate the dispute in a manner and procedure it considers appropriate".<sup>48</sup>

*(b) Hybrid in Institution-Building*

China has shown an increasing interest in ADR, such as arbitration, which provides a non-adversarial alternative to the court's adversarial model.<sup>49</sup> The country has strengthened its institutional building, bringing domestic legal institutions into compliance with international legal standards, especially in the area of international commercial arbitration.<sup>50</sup> Incorporated within this change is the transformation of arbitration itself to accommodate a changing political-economic landscape,<sup>51</sup> such as the significant role now played by CIETAC. CIETAC is the sole organisation authorised to hear non-maritime commercial arbitrations between Chinese and foreign parties. CIETAC is also one of the most active international commercial arbitration centres in the world. It is worthy to note that CIETAC arbitration still differs from generally accepted international standards.<sup>52</sup>

China has undertaken significant legal reform. For instance, CIETAC has modernised its rules and procedures to accommodate the needs and interests of a stratified global business community.<sup>53</sup> However, negative stereotypes are often unduly attenuated,<sup>54</sup> despite the traditional criticism that CIETAC subsumed international arbitration within its domestic political and legal system.<sup>55</sup> In response, it has modified its rules and procedures specifically in order to comply with international arbitration standards. CIETAC has subscribed to the New York Convention governing the recognition and enforcement of foreign arbitral awards. It has also revised its arbitration rules to redress conflicts of interest among arbitrators. Moreover, as Jones contended, Chinese culture is compatible with capitalist development.<sup>56</sup> To accommodate the need of China's economic transformation and the construction of the "One Belt and One Road", in May 2017 CIETAC established an arbitration centre specially to handle

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<sup>47</sup> Article 40 of the Existing Rules and Article 45 of the New Rules

<sup>48</sup> Article 45.8 of the New Rules

<sup>49</sup> Gabrielle Kaufmann-Kohler and Fan Kun, 'Integrating Mediation into Arbitration: Why It Works in China' (2008) 25 (4) *Journal of International Arbitration* 479, 492

<sup>50</sup> James Feinerman, 'Chinese Participation in the International Legal Order: Rogue Elephant or Team Player?' (1995) 142 *The China Quarterly* 186, 210

<sup>51</sup> Leon Trakman, 'Legal Traditions' and International Commercial Arbitration' (2007) 17 *American Review of International Arbitration* 1, 43

<sup>52</sup> Kun Fan, *Arbitration in China: A Legal and Cultural Analysis* (Oxford, Hart, 2013) 235–239

<sup>53</sup> Marianne Rose, 'The Tarnished Brand of CIETAC: Understanding the 2012 CIETAC Dispute' (2014) 31 (2) *Journal of International Arbitration* 139, 181

<sup>54</sup> Leon Trakman, 'Legal Traditions' and International Commercial Arbitration' (2007) 17 *American Review of International Arbitration* 1, 43

<sup>55</sup> Jeff Miller, 'International Commercial Arbitration in China: Locating the Development of CIETAC in the Context of International and Domestic Factors' (2013) 22 *Dalhousie Journal of Legal Studies* 76, 100

<sup>56</sup> Carol Jones, 'Capitalism, Globalisation and Rule of Law: An Alternative Trajectory of Legal Change in China' (1994) 3 *Social and Legal Studies* 195, 220

disputes arising from public private partnership (PPP) projects.<sup>57</sup> It is expected that there will be more PPP disputes to be resolved through arbitration in the future.

## 2. The Top-Down Implementation

Court-sponsored mediation has been locus of government interference.<sup>58</sup> The incorporation of mediation in arbitration is attributable to a top-down campaign to promote mediation as the key to resolving all disputes in accordance with the Chinese Communist Party (CCP)'s "harmonious society" political doctrine.<sup>59</sup> For instance, the Supreme People's Court (SPC) designed an outline of judicial reform from 2014 to 2018.<sup>60</sup> One of the strategies is to promote diversified dispute settlement mechanisms. Such an approach is motivated by social stability concerns under the guise of the Chinese traditional culture.<sup>61</sup> It is thus implemented in the People's Court that emphasises shifting its priority from judiciary to mediatory justice.<sup>62</sup> As a result of the CCP's state commitment to a "socialist harmonious society", the mediation ratio is closely linked with the judges' salary and career development.<sup>63</sup> After all, local courts remain dependent on municipal funding and local government officials control the appointment of judges and operating expenses.<sup>64</sup> In contrast to the judges, arbitrators do not have such incentives as the salary or career development linked to the mediation ratio. An arbitrator is even paid less if the parties reach a settlement and withdraw the arbitration proceeding than if the matter results in a final award.<sup>65</sup> The only variable behind the phenomena should only be the culturally-oriented driving force.<sup>66</sup>

## 3. Implications

China's philosophical traditions promoting social harmony renders the long-standing mediation traditions melded with modern arbitration practices. The role of the arbitrator here is not just as an adjudicator, but also a settlement facilitator.<sup>67</sup> Having the arbitrator serve as

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<sup>57</sup> 'China's Belt and Road Initiative: Challenges for Arbitration in Asia' (2018) 13 University of Pennsylvania Asian Law Review 72, 101

<sup>58</sup> Deborah R. Hensler, 'Court-Ordered Arbitration: An Alternative View' (1990) 1 University of Chicago Legal Forum 399, 420

<sup>59</sup> Kun Fan, 'Glocalisation' of International Arbitration-Rethinking Tradition: Modernity and East-West Binaries Through Examples of China and Japan' (2016) 11 (2) University of Pennsylvania East Asia Law Review 243, 292

<sup>60</sup> The Supreme People's Court of China, 'Opinions on Comprehensively Enhancing the Reform of People's Courts' <<http://www.court.gov.cn/fabu-xiangqing-13520.html>>

<sup>61</sup> Carl Minzner, 'China's Turn Against Law' (2011) 59 American Journal of Comparative Law 935, 939

<sup>62</sup> Hualing Fu and Richard Cullen, 'From Mediator to Adjudicator: The Limits of Civil Justice Reform in China', in Margaret Woo and Mary Gallagher, *Chinese Justice Civil Dispute Resolution in Contemporary China* (Cambridge, Cambridge University Press, 2013) 25-57

<sup>63</sup> Michael Palmer, 'Compromising Courts and Harmonising Ideologies: Mediation in the Administrative Chambers of the People's Courts in the People's Republic of China' in Andrew Harding & Penelope Nicholson (eds.) *New Courts in Asia* (New York, Routledge, 2010) 251

<sup>64</sup> Donald Clarke, 'Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments' (1996) 10 (1) Columbia Journal of Asian Law 1, 91

<sup>65</sup> Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (London, Thomson Sweet & Maxwell, 2004) 268-276

<sup>66</sup> Susan D. Franck, 'The Diversity Challenge: Exploring the 'Invisible College' of International Arbitration' (2015) 53 Columbia Journal of Transnational Law 429, 506

<sup>67</sup> Ellen E. Deason, 'Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review' (2013) 5 Yearbook on Arbitration and Mediation 219, 249

the mediator is, to some extent, highly efficient in terms of time and costs in certain circumstances.<sup>68</sup> Even when the Chinese parties agree to incorporate an arbitration clause into their contract, they are likely to seek for an agreeable solution when a dispute actually arises. Notably, international commercial arbitration consists of a variable amalgam of legal cultures.<sup>69</sup> The hybridity of mediation-arbitration retains some features of traditional means of dispute resolution, which is also characterised with some internationally-recognised norms.<sup>70</sup> The disjunction exists between arbitration as a formalistic mechanism and the deeply rooted informal relational traditions in China.<sup>71</sup> In this vein, it is *ex aequo et bono* that affects the parties' manner of interaction in a dispute resolution forum. As such, the Western parties may assume that the dual roles are incompatible.<sup>72</sup> In this regard, deep awareness of this differences would enable arbitration parties to adjust the process to vitiate misunderstandings.

## C. Theory of Globalisation of Arbitration

Culture shapes the way the forces of globalisation operate and their ability to affect change in each of the other areas of economic, political and legal reform. Arbitral proceedings are increasingly conducted in a uniform manner regardless of the place of arbitration and any governing national law.<sup>73</sup> Culture has a strong role to play in the process of legal globalisation.<sup>74</sup> International norms are localised with adaptations to accord more closely with local cultures.<sup>75</sup> As a part of the two-way process, the Chinese practices constitute added-value to the international norms. *Visa versa*, it is worth examining whether the globalisation reshapes China's long-standing promotion of amicable settlement of disputes and the suppressing of litigation.

### 1. International Instruments of Arbitration

International standards primarily refer to arbitration laws of the New York Convention<sup>76</sup> and the 1985 United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration,<sup>77</sup> with Amendments, as adopted in 2006. The member states should recognise and enforce awards made in arbitrations that are within the scope of the Convention, unless the award is exempted by one of the exhaustive grounds listed in

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<sup>68</sup> Gabrielle Kaufmann-Kohler and Fan Kun, 'Integrating Mediation into Arbitration: Why It Works in China' (2008) 25 (4) *Journal of International Arbitration* 479, 492

<sup>69</sup> Leon Trakman, 'Legal Traditions and International Commercial Arbitration' (2007) 17 *American Review of International Arbitration* 1

<sup>70</sup> Ellen E. Deason, 'Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review' (2013) 5 *Yearbook on Arbitration and Mediation* 219,249

<sup>71</sup> Kun Fan, 'Salient Issues in International Commercial Arbitration in East Asia: A Comparative Study of China and Japan' (2016) 5 (3) *American University Business Law Review* 448-483

<sup>72</sup> Gabrielle Kaufmann-Kohler and Fan Kun, 'Integrating Mediation into Arbitration: Why It Works in China' (2008) 25 (4) *Journal of International Arbitration* 479, 492

<sup>73</sup> Anne-Marie Loong, 'Steps Toward an International Arbitration Culture? A Dissenting View from the People's Republic of China' (2007) 1 (5) *World Arbitration and Mediation Review* 665, 692

<sup>74</sup> Tom Ginsburg, 'The Culture of Arbitration' (2003) 36 (4) *Vanderbilt Journal of Transnational Law* 1335, 1345

<sup>75</sup> Leon Trakman, 'Domestic Courts Declining to Recognize and Enforce Foreign Arbitral Awards: A Comparative Reflection' (2018) 6 (2) *The Chinese Journal of Comparative Law* 174, 227

<sup>76</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968)

<sup>77</sup> UNCITRAL Arbitration Rules, UN Doc. A/RES/31/98; 15 ILM 701 (1976)

Article V of the Convention.<sup>78</sup> Adopted by UNCITRAL on 24 June 2002, the Model Law provides uniform rules in respect of the conciliation process to encourage the use of conciliation and ensure greater predictability and certainty in its use. The instruments have been driving toward the unification of cross-border arbitration law rules.<sup>79</sup> The UNCITRAL Arbitration Rules amended in 2010 is an example of internationally recognised uniform rules.<sup>80</sup> The UNCITRAL has made an essential contribution to the process of legal harmonisation.<sup>81</sup> Conceptually, a general trend towards increasing global harmonisation has resulted in transnational arbitration.<sup>82</sup>

## 2. Legal Transplantation

The Western development in arbitration contributes to globalisation of the ADR. Watson even provided substantial empirical evidence of the ease and inevitability of legal transfers.<sup>83</sup> Even so, it is worthy to note that globalisation does not necessarily mean a “Western discursive orthodoxy”.<sup>84</sup> Local cultures play an inherent role in the process of legal transplantation. In particular, local difference and particularity still play a significant part in creating unique cultural constellations.<sup>85</sup> Shalakany observed that:

“The ‘American law firm model’ is characterised with ‘a more aggressive and confrontational style of litigation, displacing the earlier Continental model of the pipe-smoking professor/arbitrator with his ‘oracle of the law’ mode of producing courtroom legitimacy’.”<sup>86</sup>

This has every relevance to the complex penetration and interaction between local and alien cultures. When law and regulation are transplanted into another society, there will be a constant struggle between the imported rules and institutions and the deeply embedded local culture.<sup>87</sup> One cannot take for granted that rules or institutions are transplantable, at least, in terms of the extent of transferability.<sup>88</sup>

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<sup>78</sup> New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 21 U.S.T. 2517, 330 U.N.T.S. 38 (1958) Article 4

<sup>79</sup> Kun Fan, ‘Glocalisation’ of International Arbitration-Rethinking Tradition: Modernity and East-West Binaries Through Examples of China and Japan’ (2016) 11 (2) University of Pennsylvania East Asia Law Review 244, 292

<sup>80</sup> UNCITRAL Arbitration Rules (As Revised in 2010); It came into effect on 15 August 2010.

<<http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rulesrevised-2010-e.pdf>>

<sup>81</sup> The Model Law was adopted by the UNCITRAL on 21 June 1985, at the 18<sup>th</sup> Session of the Commission. It was amended by UNCITRAL on 7 July 2006 at the 39<sup>th</sup> Session of the Commission. The UNCITRAL Model Law on International Commercial Arbitration, U.N. Sales No. E.08.V.4 (UN Commission on International Trade Law, 2006)

<sup>82</sup> Gabrielle Kaufmann-Kohler, ‘Globalisation of Arbitral Procedures’ (2003) 36 (4) Vanderbilt Journal of Transnational Law 1313, 1334

<sup>83</sup> Alan Watson, ‘Comparative Law and Legal Change’ (1978) 37 (2) Cambridge Law Journal 313, 336

<sup>84</sup> Erik Swyngedouw, ‘Globalisation or ‘Glocalisation’? Networks, Territories and Rescaling’ (2004) 17 (1) Cambridge Review of International Affairs 25, 48

<sup>85</sup> Manfred B. Steger, *Globalisation: A Very Short Introduction* (4<sup>th</sup> ed. Oxford, OUP, 2017) §1: Globalisation: A Contested Concept

<sup>86</sup> Amr Shalakany, ‘Arbitration and the Third World. A Plea for Reassessing Bias Under the Specter of Neoliberalism’ (2000) 41 Harvard International Law Journal 419, 435

<sup>87</sup> Kun Fan, ‘Glocalisation of Arbitration: Transnational Standards Struggling with Local Norms Through the Lens of Arbitration Transplantation in China (2013) 18 Harvard Negotiation Law Review 175, 219

<sup>88</sup> Otto Kahn-Freund, ‘On Uses and Misuses of Comparative Law’ (1974) 37 Modern Law Review 1, 27

Rules or institutions may not be readily transplantable from one system to another.<sup>89</sup> During the process of resistance and penetration, the stronger a national culture is embedded, the more difficult to implement legal transplantation. It rests largely with the extent to which the local is modified to accommodate the global.<sup>90</sup> The transplantation of laws and institutions from one country to another is not viable without an adequate adaptation based on an understanding of the indigenous culture and the local setting of the receiver.<sup>91</sup> China serves as an excellent example of resistance, adaptation and hybridity in the process of legal transplant.<sup>92</sup> It remains a long-standing debate about whether the notion of international arbitration culture can take root in China,<sup>93</sup> where harmonious culture prevails. The transplanted institution is expected to be repackaged to fit local norms, combining concepts and processes from both mediation and arbitration.<sup>94</sup> From this perspective, at most, globalisation catalyses the change of local autonomy by an internationally recognised values and institutions.<sup>95</sup>

### 3. Interaction between the Global and Local: Shared Norms

The evolution of arbitration in China seems to be a hybrid blended and creolised process of globalisation.<sup>96</sup> The development of transnational arbitration will continue, which reflects combined impacts of globalisation of law and local culture and traditions.<sup>97</sup> A blend between domestic and international rules and procedures and the influence of local custom on the enforcement of arbitral awards, are prevalent.<sup>98</sup> This may further shed light on the interactions between the legal globalisation and cultural diversity at a national level. The discourse of China illustrates the interactions between globalisation of arbitration and divergence of local cultures.<sup>99</sup> It remains to be seen whether globalisation and the cross-national interactions in arbitration eventually drive to the emergence of an international arbitration culture.<sup>100</sup>

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<sup>89</sup> Alan Watson, 'From Legal Transplants to Legal Formants' (1995) 43 (3) *American Journal of Comparative Law* 469, 476

<sup>90</sup> Julian Lew, 'Does National Court Involvement Undermine the International Arbitration Processes?' (2009) 24 (3) *American University International Law Review* 489, 537

<sup>91</sup> John Gillespie, 'Towards a Discursive Analysis of Legal Transfers into Developing East Asia' (2008) 40 *New York University Journal of International Law and Politics* 657, 721

<sup>92</sup> Catherine A. Rogers, 'Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct' (2005) 41 *Stanford Journal of International Law* 53, 121

<sup>93</sup> Leon Trakman, 'Domestic Courts Declining to Recognize and Enforce Foreign Arbitral Awards: A Comparative Reflection' (2018) 6 (2) *The Chinese Journal of Comparative Law* 174, 227

<sup>94</sup> Kun Fan, 'Glocalisation of Arbitration: Transnational Standards Struggling with Local Norms Through the Lens of Arbitration Transplantation in China (2013) 18 *Harvard Negotiation Law Review* 175, 219

<sup>95</sup> C.J.W. Baaij, 'Hiding in Plain Sight: The Power of Public Governance in International Arbitration' (2019) 60 (1) *Harvard International Law Journal* 135, 180

<sup>96</sup> Kun Fan, 'Glocalisation' of International Arbitration-Rethinking Tradition: Modernity and East-West Binaries Through Examples of China and Japan' (2016) 11 (2) *University of Pennsylvania East Asia Law Review* 244, 292

<sup>97</sup> Kun Fan, 'Glocalisation of Arbitration: Transnational Standards Struggling with Local Norms Through the Lens of Arbitration Transplantation in China (2013) 18 *Harvard Negotiation Law Review* 175, 219

<sup>98</sup> Leon Trakman, 'Legal Traditions' and International Commercial Arbitration' (2007) 17 *American Review of International Arbitration* 1, 43

<sup>99</sup> Geoffrey Swenson, 'Legal Pluralism in Theory and Practice' (2018) 20 (3) *International Studies Review* 438, 462

<sup>100</sup> Stavros Brekoulakis, 'International Arbitration Scholarship and the Concept of Arbitration Law' (2013) 36 (4) *Fordham International Law Journal* 745,787

### (a) Globalisation to Localisation

Global norms are localised with adaptations to accord more closely with local cultures.<sup>101</sup> Fan put forward a concept of diffusion of cultures that refers to the prospects of the emergence of a common international arbitration culture, crossing national and geographical boundaries.<sup>102</sup> Such an argument raises inquiries as to whether globalisation causes institutional convergence and what role the Chinese culture plays in the adoption of international legal norms.<sup>103</sup> China is increasingly prepared to subject disputes to international arbitration.<sup>104</sup> Its attitude towards international dispute settlement is evolving towards greater acceptance and engagement.<sup>105</sup> Institutionally, it is shaped by divergent models drawn from China's own experience and by models based on the Western experience.

Global norms are localised when domestic actors translate and conceptualise the borrowed concepts by referring to local notions.<sup>106</sup> The imported concept of arbitration, which is confrontational and replaces the court trial with a private person's decision to finalise disputes, was incompatible with the native Chinese culture of conciliation, a consensus and harmony-oriented process.<sup>107</sup> Although the Western concept of arbitration was initially rejected by the local authorities during the transplantation process, it subsequently developed in China but was injected with local elements.<sup>108</sup> As part of a two-way process, China's legal culture likewise shapes the evolution of transnational arbitration.<sup>109</sup> A driving force is that a normative commitment to establishing international arbitration as a global system of governance for cross-border commercial relationships.<sup>110</sup>

### (b) Localisation to Globalisation

The globalisation leads to convergence of the national arbitration system and the substantial harmonisation of the law and practice in international arbitration.<sup>111</sup> As such, it is significant

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<sup>101</sup> Lisbeth Zimmermann, *Global Norms with a Local Face Rule-of-Law Promotion and Norm Translation* (Cambridge, Cambridge University Press, 2017) 1-22

<sup>102</sup> Kun Fan, 'Glocalisation' of International Arbitration-Rethinking Tradition: Modernity and East-West Binaries Through Examples of China and Japan' (2016) 11 (2) University of Pennsylvania East Asia Law Review 244, 292

<sup>103</sup> Chiann Bao, 'International Arbitration in Asia on the Rise: Cause & Effect' (2014) 4 The Arbitration Brief 31, 51

<sup>104</sup> Harriet Moynihan, 'China's Evolving Approach to International Dispute Settlement' (London, Chatham House, 29 March 2017)

<<https://www.chathamhouse.org/publication/chinas-evolving-approach-international-dispute-settlement>>

<sup>105</sup> Michael J. Mazarr, Timothy R. Heath and Astrid Stuth Cevallos, 'China and International Order' (RAND Corporation, 2018)

<[https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR2400/RR2423/RAND\\_RR2423.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR2400/RR2423/RAND_RR2423.pdf)>

<sup>106</sup> Kun Fan, *Arbitration in China: A Legal and Cultural Analysis* (Oxford, Hart Publishing, 2013) 244

<sup>107</sup> Kun Fan, 'Glocalisation' of International Arbitration-Rethinking Tradition: Modernity and East-West Binaries Through Examples of China and Japan' (2016) 11 (2) University of Pennsylvania East Asia Law Review 244, 292

<sup>108</sup> Susan D. Franck, 'The Diversity Challenge: Exploring the 'Invisible College' of International Arbitration' (2015) 53 Columbia Journal of Transnational Law 429, 506

<sup>109</sup> Kun Fan, *Arbitration in China: A Legal and Cultural Analysis* (Oxford, Hart Publishing, 2013) 243

<sup>110</sup> Joshua Karton, 'International Arbitration Culture and Global Governance' in Walter Mattli and Thomas Dietz (eds.) *International Arbitration and Global Governance Contending Theories and Evidence* (Oxford, Oxford University Press, 2014) 1-45

<sup>111</sup> Pierrick Le Golf, 'Global Law: A Legal Phenomenon Emerging from the Process of Globalization' (2007) 14 (1) Indiana Journal of Global Legal Studies 119, 145

in light of the need for predictability in cross-cultural dispute processing.<sup>112</sup> International arbitral practice has evolved as a set of procedural practice norms independent of national court rules.<sup>113</sup> However, internationalism means a 'point of view that reflects a dedication to subordinating national perspectives and distinctions in favour of a transnational or global ideal'.<sup>114</sup> China's legal culture could shape the evolution of transnational arbitration.<sup>115</sup> Because conciliation and its tenets have been used for so long, international arbitrators often encourage the parties to an arbitration involving one or more Chinese parties to mediate.<sup>116</sup>

Chinese are depicted as litigation and conflict-averse while dealing with relationships. Given their *guanxi*-based rule of relationships, cultural factors reflecting an emphasis on relationships cannot be an adequate substitute for a rule of law.<sup>117</sup> These are obstacles to enforcement that the proposed relation-based alternative to the rule of law would merely exacerbate.<sup>118</sup> In this sense, the most effective remedy is a greater emphasis on the rule of law including, but not limited to, institutional changes to strengthen the legal system.<sup>119</sup> At this stage, it is worth exploring further the intersection between global standards and local norms in international arbitration, and whether Chinese legal institutions are converging on international standards for rule of law.<sup>120</sup>

#### D. The Reassessment of Cultural Influence: Theoretical Critics

Neutrals need to be able to adjust the cultural impact of arbitration and mediation by offering a more dynamic process tailored to the parties in cross-cultural disputes.<sup>121</sup> Having culturally informed decision-makers would not only give the parties confidence in international arbitration, it would enhance the prospects for the enforcement of arbitral awards by national courts.<sup>122</sup> In certain circumstance, an international arbitration needs to be adjusted or refined

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<sup>112</sup> Kun Fan, 'Glocalisation' of International Arbitration-Rethinking Tradition: Modernity and East-West Binaries Through Examples of China and Japan' (2016) 11 (2) University of Pennsylvania East Asia Law Review 244, 292

<sup>113</sup> Gary Born, 'The Law Governing International Arbitration Agreements: An International Perspective' (2014) 26 Singapore Academy of Law Journal 815, 848

<sup>114</sup> James H. Carter, 'Book Review of *The Culture of International Arbitration and the Evolution of Contract Law*' by Joshua Karton (Oxford University Press, 2013) (2013) 29 (3) Arbitration International 539, 542

<sup>115</sup> Joshua Karton, 'Beyond the "Harmonious Confucian": International Commercial Arbitration and the Impact of Chinese Cultural Values' in Chang-fa Lo et al (eds), *Legal Thoughts between the East and the West in the Multilevel Legal Order: Liber Amicorum in Honor of Professor Herbert Han-pao Ma* (Springer, 2016) 519-542

<sup>116</sup> American Arbitration Association, *AAA Handbook on International Arbitration Practice* (Juris Publishing, Inc., 2010) 21-28

<sup>117</sup> Micaela Tucker, "'Guanxi!' - 'Gesundheit!' An Alternative View on the "Rule of Law" Panacea in China' (2011) 35 Vermont Law Review 689, 715

<sup>118</sup> Fiona D'Souza, 'The Recognition and Enforcement of Commercial Arbitral Awards in the People's Republic of China' (2006) 30 (4) Fordham International Law Journal 1318, 1359

<sup>119</sup> Randall Peerenboom, 'Seek Truth from Facts: An Empirical Study of Enforcement Arbitral Awards in the P.R. C.' (2001) 49 American Journal of Comparative Law 249, 259

<sup>120</sup> Pitman B. Potter, 'Review: Legal Reform in China: Institutions, Culture, and Selective Adaptation' (2004) 29 (2) Law & Social Inquiry 465, 495

<sup>121</sup> American Arbitration Association, *AAA Handbook on International Arbitration Practice* (Juris Publishing, Inc., 2010) 21-28

<sup>122</sup>

William Slate, 'Paying Attention to "Culture" in International Commercial Arbitration' (2004) 59 (3) Dispute Resolution Journal 96, 101

to bridge cultural gaps.<sup>123</sup> This perception is based on a theory that culture is mother of all path dependency.<sup>124</sup> However, the economic and rational choice theory provides a different route in understanding the cultural influence in stark contrast.<sup>125</sup> The longstanding debate still remains in such a controversial area.

## 1. Theory of Path Dependence

Path dependency theory holds that institutional distinctions remain, in part, because of ideological and cultural differences across countries.<sup>126</sup> Arbitral institutions should be culturally conscious. In this regard, the theory of path dependence applies appropriately to the development of CIETAC and role of culture in China's legal context. Furthermore, it remains to be explored as to whether the culture surrounding international arbitration potentially exclusionary of other cultures, if so, how such exclusion can be evaluated and, even remedied.<sup>127</sup>

### (a) Reevaluate the Cultural Role in International Arbitration

Informal mechanisms that are a part of legal culture have proved resilient to alteration.<sup>128</sup> The success of the Hong Kong and Singapore Arbitration Centres exemplify the theory of Path Dependence, which means that institutions are self-reinforcing.<sup>129</sup> Their successes attribute to that the two arbitration centres blend Chinese and Western-style legal systems and because they better understand the cultural context of the parties who bring their disputes there.<sup>130</sup> These examples of culture shaping the contours of dispute resolution illustrate the importance of learning about cultural differences so that, at the very least, arbitrators and mediators can make conscious, informed and transparent choices that do not trample on parties who are different from each other.

The role that each Chinese and Western culture plays in the process of dispute resolution may need to be re-evaluated. As mother of path dependence, culture implies values and patterns that influence attitudes and behavioural change.<sup>131</sup> It is considered "a powerful, inescapable

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<sup>123</sup> Bart L. Smit Duijzentkunst and Sophia L.R. Dawkins, 'Arbitrary Peace? Consent Management in International Arbitration' (2015) 26 (1) *European Journal of International Law* 139, 168

<sup>124</sup> Orlando Patterson, 'Culture and continuity: causal structures in socio-cultural persistence' in Roger Friedland and John Mohr (eds.) *Matters of Culture Cultural Sociology in Practice* (Cambridge, Cambridge University Press, 2004) 71-109

<sup>125</sup> Bruce Chapman, 'The Rational and the Reasonable: Social Choice Theory and Adjudication' (1994) 61 *The University of Chicago Law Review* 41, 122

<sup>126</sup> Randall Peerenboom, 'Globalisation, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China' (2001) 19 (2) *Berkeley Journal of International Law* 161, 264

<sup>127</sup> Javier Rubinstein, 'International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions' (2004) 5 (1) *Chicago Journal of International Law* 303, 310

<sup>128</sup> Scott Wilson, 'Law Guanxi: MNCs, State Actors, and Legal Reform in China' (2008) 17 (54) *Journal of Contemporary China* 25, 51

<sup>129</sup> Jenna Bednar and Scott E Page, 'When Order Affects Performance: Culture, Behavioural Spillovers and Institutional Path Dependence' (2018) 112 (1) *American Political Science Review* 82, 98

<sup>130</sup> Carlos de Vera, 'Arbitrating Harmony: "Med-Arb" and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China' (2004) 18 (1) *Columbia Journal of Asian Law* 149, 194

<sup>131</sup> Amir Licht, 'The Mother of All Path Dependencies: Toward a Cross-Cultural Theory of Corporate Governance Systems' (2001) 26 (1) *Delaware Journal of Corporate Law* 147, 205

force shaping all aspects of human conduct, including adjudication.”<sup>132</sup> Karton argued that culture may not necessarily be a primary driving force of behaviour,<sup>133</sup> however, the concept is still enlightening as a means of understanding aspects of legal action, in particular, behind some official statutes, judicial and arbitral practices.<sup>134</sup> Ginsburg observed that legal culture refers to those aspects of national culture that “find expression in the legal system”.<sup>135</sup> It consists of “shared norms and expectations produced by legal actors”.<sup>136</sup> The notion “points to differences in the way features of law are themselves embedded in larger frameworks of social structure and culture which constitute and reveal the place of law in society.”<sup>137</sup>

Cultural backgrounds influence how people approach arbitration and what they expect of it in substance as well as in procedure.<sup>138</sup> For instance, Chinese may expect that a conciliatory approach be taken by the arbitral panel and all parties involved. However, institutional change poses a challenge for path dependence theory.<sup>139</sup> Another more plausible inquiry is to what extent the legal culture is governing international commercial arbitration in nature.<sup>140</sup> It seems impossible to identify “direct causal relationships between specific social norms and corresponding behaviours” or to “separate entirely the effects of culture from other factors”.<sup>141</sup>

## 2. Economic and Rational Choice Theory: Rational-Choice Institutionalism

Culture is considered shaping beliefs and behaviour.<sup>142</sup> Consistently, no formal dispute resolution system will be widely used where it does not conform to the social relations it is allegedly resolving.<sup>143</sup> However, path dependency theorists reject functionalists’ claims that institutional change reflects rationalisation.<sup>144</sup> A functionalist theory of institutions provides that actors design institutions to serve their interests or to solve societal problems, which has

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<sup>132</sup> Joshua Karton, ‘International Arbitration Culture and Global Governance’ in Walter Mattli and Thomas Dietz (eds.) *International Arbitration and Global Governance Contending Theories and Evidence* (Oxford, Oxford University Press, 2014) 11

<sup>133</sup> Joshua Karton, ‘International Arbitration Culture and Global Governance’ in Walter Mattli and Thomas Dietz (eds.) *International Arbitration and Global Governance Contending Theories and Evidence* (Oxford, Oxford University Press, 2014) 74-116

<sup>134</sup> Susan Silbey, ‘Legal Culture and Cultures of Legality’ in John R. Hall, Laura Grindstaff, and Ming-Cheng Lo. (eds.) *Handbook of Cultural Sociology* (London, Routledge, 2011) 470-479

<sup>135</sup> Tom Ginsburg, ‘The Culture of Arbitration’ (2003) 36 (4) *Vanderbilt Journal of Transnational Law* 1335, 1345

<sup>136</sup> Tom Ginsburg, ‘The Culture of Arbitration’ (2003) 36 (4) *Vanderbilt Journal of Transnational Law* 1335, 1345

<sup>137</sup> David Nelken, ‘Towards a Sociology of Legal Adaptation’ in David Nelken, Johannes Feest (eds.) *Adapting Legal Cultures* (Oxford, Hart Publishing, 2001) 25

<sup>138</sup> Lara Pair, ‘Cross-Cultural Arbitration: Do the Differences Between Cultures Still Influence International Commercial Arbitration Despite Harmonization?’ (2002) 9 *ILSA Journal of International & Comparative Law* 57, 74

<sup>139</sup> Mariana Prado and Michael Trebilcock, ‘Path Dependence, Development, and the Dynamics of Institutional Reform’ (2009) 59 (3) *The University of Toronto Law Journal* 341, 379

<sup>140</sup> Tom Ginsburg, ‘The Culture of Arbitration’ (2003) 36 (4) *Vanderbilt Journal of Transnational Law* 1335, 1345

<sup>141</sup> Joshua Karton, ‘International Arbitration Culture and Global Governance’ in Walter Mattli and Thomas Dietz (eds.) *International Arbitration and Global Governance Contending Theories and Evidence* (Oxford, Oxford University Press, 2014) 11

<sup>142</sup> Won L. Kidane, *The Culture of International Arbitration* (Oxford, Oxford University Press, 2017) 10-50

<sup>143</sup> Kun Fan, ‘Glocalisation’ of International Arbitration-Rethinking Tradition: Modernity and East-West Binaries Through Examples of China and Japan’ (2016) 11 (2) *University of Pennsylvania East Asia Law Review* 244, 292

<sup>144</sup> Julio Faundez, ‘Douglass North’s Theory of Institutions: Lessons for Law and Development’ (2016) 8 *Hague Journal on the Rule of Law* volume 373, 419

been further refined by an economic and rational choice theory where institutions emerge and change to promote rational behaviour.<sup>145</sup>

International commercial arbitration is developed by businessmen to resolve conflicts between them. Economic factors may thus be more influential than other factors.<sup>146</sup> Institutionally, China's low litigation rates is due to the structural impediments to litigation that are built into the Chinese legal system, such as the lack of juridical independence and unestablished rule of law.<sup>147</sup> Given that standardised arbitration rules reduce the cost of interactive behaviour, procedural harmonisation should not be characterised as a convergence in shared expectations, but better understood as a result of rational cost and benefit analysis.<sup>148</sup> In this vein, it rests primarily with a delicate calculation of benefit and costs in terms of which avenue that the parties will resort.<sup>149</sup> Following such a reasoning, cultural differences play a secondary role.<sup>150</sup>

Another approach to procedural convergence in international arbitration law is to understand the phenomenon in terms of a theory of network benefits.<sup>151</sup> Ogus observed that networks are 'systems in which users are linked', and the resulting network effects are markets in which the value increases as the number of network users increases.<sup>152</sup> Simply, the value of participation in a network increases exponentially with the size of the network.<sup>153</sup> Thus, he further considered legal culture as a combination of procedures and concepts that "constitute a 'network' which, because of the commonality of usage, reduces the costs of interactive behaviour".<sup>154</sup> Likewise, convergence in international commercial arbitration can be considered as a combination of concepts and procedures that constitute a network which reduces the cost of interactive behaviour.<sup>155</sup>

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<sup>145</sup> Paul Pierson, *Politics in Time-History, Institutions, and Social Analysis* (Princeton, Princeton University Press, 2004) 105

<sup>146</sup> Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25 (2) *European Journal of International Law*, 387, 424

<sup>147</sup> Carl Minzner, 'China's Turn Against Law' (2011) 59 (4) *The American Journal of Comparative Law* 935, 984

<sup>148</sup> Anne-Marie Loong, 'Steps Toward an International Arbitration Culture? A Dissenting View from the People's Republic of China' (2007) 1 (5) *World Arbitration and Mediation Review* 665, 692

<sup>149</sup> Tom Ginsburg, 'The Culture of Arbitration' (2003) 36 (4) *Vanderbilt Journal of Transnational Law* 1335, 1345

<sup>150</sup> Giorgio Bernini, 'Cultural Neutrality: A Prerequisite to Arbitral Justice' (1989) 10 (1) *Michigan Journal of International Law* 39, 56

<sup>151</sup> Anne-Marie Loong, 'Steps Toward an International Arbitration Culture? A Dissenting View from the People's Republic of China' (2007) 1 (5) *World Arbitration and Mediation Review* 665, 692

<sup>152</sup> Anthony Ogus, 'The Economic Basis' of Legal Culture: Networks and Monopolisation' (2002) 22 *Oxford Journal of Legal Studies* 419, 422

<sup>153</sup> Mark Lemley and David McGowan, 'Legal Implications of Network Economic Effects' (1998) 86 *California Law Review* 479, 484

<sup>154</sup> Anthony Ogus, 'The Economic Basis of Legal Culture: Networks and Monopolization' (2002) 22 *Oxford Journal of Legal Studies* 419, 422

<sup>155</sup> Anthony Ogus, 'The Economic Basis' of Legal Culture: Networks and Monopolisation' (2002) 22 *Oxford Journal of Legal Studies* 419, 422

## **E. Hypothetical Inquiry vis-à-vis Conceptual Critics: The Challenge of Conceptualising Global Arbitration Culture**

The concept of an international arbitration culture typically refers to the gradual convergence in norms, procedures, and expectations of participants in the arbitral process.<sup>156</sup> Nevertheless, globalisation of culture is difficult to capture, and the cultural adjustment will not take place overnight. A longstanding inquiry arises as to whether interactions across jurisdictions will result in a convergence of the participants' own national legal cultures and eventually lead to the emergence of a common international arbitration culture.<sup>157</sup>

### **1. Avoid Over-Generalisation/Simplification**

International arbitration provides a meeting point for different legal cultures, a place of convergence and interchange wherein practitioners from different backgrounds create new practices.<sup>158</sup> It however has not been able to bridge the cultural gaps between Western and Chinese norms.<sup>159</sup> Part of the problem lies in the failure of international arbitration properly to accommodate legal traditions and cultures that diverge from its own pre-existing cultural norms.<sup>160</sup> The concept of Western arbitration, such as the *jus civile* in ancient Rome and the *lex mercatoria* in medieval Europe cannot find root in China.<sup>161</sup> An adversarial approach would not be surprising among the Western parties, while Chinese parties may expect a conciliatory approach.<sup>162</sup>

The notion of global arbitration culture is readily sliding into an oversimplification or generalisation of the conceptualisation of cultural effects.<sup>163</sup> Cultural generalisation may overstate the effects of traditional cultural notions on issues pertaining to how cross-cultural interaction manifests itself in modern-day circumstances, and what expectations culture creates for legal relationships.<sup>164</sup> To some extent, generalisations are inevitable when one compares distinct cultures or beliefs, however they are erroneous when cultural stereotypes become the basis for individual interactions.<sup>165</sup> They may fail to recognise the complex array of cultural influences that are exerted upon it.<sup>166</sup> Generalisation can lead to an erroneous

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<sup>156</sup> Kun Fan, 'Globalisation of Arbitration: Transnational Standards Struggling with Local Norms Through the Lens of Arbitration Transplantation in China' (2013) 18 *Harvard Negotiation Law Review* 175, 219,

<sup>157</sup> Thomas Carbonneau, 'Arbitral Law-Making' (2004) 25 (4) *Michigan Journal of International Law* 1183, 1208

<sup>158</sup> Tom Ginsburg, 'The Culture of Arbitration' (2003) 36 (4) *Vanderbilt Journal of Transnational Law* 1335, 1345

<sup>159</sup> William Slate, 'Paying Attention to 'Culture' in International Commercial Arbitration' (2004) 59 (3) *Dispute Resolution Journal* 96, 101

<sup>160</sup> Leon Trakman, 'Legal Traditions' and International Commercial Arbitration' (2007) 17 *American Review of International Arbitration* 1, 43

<sup>161</sup> Michael Mustill, 'Arbitration: History and Background' (1989) 6 (2) *Journal of International Arbitration* 43, 56

<sup>162</sup> Carlos De Vera, 'Arbitrating Harmony: 'Med-Arb' and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China' (2004) 18 (1) *Columbia Journal of Asian Law* 149, 194

<sup>163</sup> Leon Trakman, 'Legal Traditions' and International Commercial Arbitration' (2007) 17 *American Review of International Arbitration* 1, 43

<sup>164</sup> Bernardo Crenades, 'Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration' (1998) 14 *Arbitration International* 160, 164

<sup>165</sup> William Slate, 'Paying Attention to 'Culture' in International Commercial Arbitration' (2004) 59 (3) *Dispute Resolution Journal* 96, 101

<sup>166</sup> Javier Rubinstein, 'International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions' (2004) 5 (1) *Chicago Journal of International Law* 303, 310

conclusion that all people from a certain culture possesses certain beliefs and attributes. Any effort to comprehend its nature may lead to over-simplification of cultural influences on arbitration proceedings.<sup>167</sup> As discussed above, the international arbitration process based in Hong Kong and Singapore may exemplify the theory, despite that the both are deeply rooted in a traditional Chinese culture.

## 2. Procedural Convergence *vis-à-vis* Cultural Syncretism

Legal culture is described as “an essential intervening variable in the process of producing legal stasis or change”.<sup>168</sup> Underneath the struggle for composing the tribunal “right” in international arbitration always lurks the desire to gain the cultural upper-hand because the cultural composition of the tribunal sets the invisible balance of power in the arena making one party more understood, more acceptable, and more comfortable than the other.<sup>169</sup> It appears that Chinese culture continues to dictate its preferred method of dispute resolution, i.e. mediation, though its effect on the notion of a clash of legal cultures in arbitration may be overstated.<sup>170</sup>

### (a) *Conceptualise Global Arbitration Culture*

Procedural harmonisation does not equate the cultural syncretism.<sup>171</sup> Likewise, procedural harmonisation should not be characterised as a convergence in shared expectation.<sup>172</sup> The conceptualisation of global arbitration culture refers to the gradual convergence in norms, procedures, and expectations of participants in the arbitral process.<sup>173</sup> It is hardly commonly agreed that such a conceptual approach means an element of culture. International arbitration culture could be defined as a desire to preserve the integrity of the arbitral process, to honour commitments and to carry out obligations in good faith.<sup>174</sup> However, such a notion, as a Western innovation, is purely a hypothetic conceptual creation, pertaining to a convergence in the expectation of participants in the arbitral process.<sup>175</sup> The practice of arbitration itself is not a tradition with established roots in any particular part of the world

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<sup>167</sup> Leon Trakman, ‘Legal Traditions and International Commercial Arbitration’ (2007) 17 *American Review of International Arbitration* 1, 43

<sup>168</sup> Lawrence Friedman, ‘The Concept of Culture: A Reply’ in David Nelken (ed.) *Comparing Legal Cultures* (Ashgate Dartmouth, 1997) 33-39

<sup>169</sup> Won Kidane, ‘Does Cultural Diversity Improve or Hinder the Quality of Arbitral Justice?’ *Kluwer Arbitration Blog* (31 March 2017)

<sup>170</sup> Gabrielle Kaufmann-Kohler and Fan Kun, ‘Integrating Mediation into Arbitration: Why It Works in China’ (2008) 25 (4) *Journal of International Arbitration* 479, 492

<sup>171</sup> John Gillespie, ‘Towards a Discursive Analysis of Legal Transfers into Developing East Asia’ (2008) 40 *New York University Journal of International Law and Politics* 657, 721

<sup>172</sup> Anne-Marie Loong, ‘Steps Toward an International Arbitration Culture? A Dissenting View from the People’s Republic of China’ (2007) 1 (5) *World Arbitration and Mediation Review* 665, 692

<sup>173</sup> Bernardo M Cremades, ‘Introductory Remarks: International Dispute Resolution - Towards an International Arbitration Culture, in Albert Jan van den Berg (ed.) *Dispute Resolution: Towards an International Arbitration Culture* (ICCA Congress No. 8, 1996) 13-20

<sup>174</sup> Anne-Marie Loong, ‘Steps Toward an International Arbitration Culture? A Dissenting View from the People’s Republic of China’ (2007) 1 (5) *World Arbitration and Mediation Review* 665, 692

<sup>175</sup> Anne-Marie Loong, ‘Steps Toward an International Arbitration Culture? A Dissenting View from the People’s Republic of China’ (2007) 1 (5) *World Arbitration and Mediation Review* 665, 692

nor is it embedded in the social fabric of any particular country.<sup>176</sup> Instead, arbitration is a system that is short of any underlying ideology and, in most countries, it exists alongside litigation and conciliation practice.<sup>177</sup> Actually, it is more like litigation because binding decision-making predominates, which also involves certain adversarial and confrontational proceedings.<sup>178</sup> After all, arbitration must apply rules of substantive law in resolving a dispute. It remains to be seen whether it could resonate with the experiences of Western and non-Western respective arbitral practices.<sup>179</sup>

### *(b) Functionism*

Functionalism provides logic for convergence of institutions. But, in practice, parties can also choose from an increasing number of national and regional arbitration centres that accommodate different legal traditions and respond differently to disparate legal cultures.<sup>180</sup> Realistically, international commercial arbitration may adjust culturally to meet the future needs of a new economic and political world order.<sup>181</sup> An effective arbitrator can overcome the cultural and psychological barriers that exist between two parties.<sup>182</sup> Furthermore, while the Chinese procedural law has adopted norms that suggest China is participating in the harmonisation of procedural arbitration law, rule of law problems still hinder the development of shared norms or expectations.<sup>183</sup>

### *(c) Metrics and Measuring of Cultural Impact on Arbitration*

Identifying a legal culture involves an analysis of the parameters of the nature, source and operation of that culture.<sup>184</sup> However much international commercial arbitration transcends or resists discrete cultural difference, arbitration is unavoidably affected by disparate legal culture.<sup>185</sup> The influence occurs when the arbitration is grounded in distinct legal cultures. Nevertheless, despite the attempt to measure the impact of different legal cultures upon international commercial arbitration, the operation of a culture is difficult to measure in a

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<sup>176</sup> Yasuhei Taniguchi, 'Is There a Growing International Arbitration Culture?: An Observation from Asia' in Albert Jan van den Berg (ed.) *Dispute Resolution: Towards an International Arbitration Culture* (ICCA Congress No. 8, 1996) 31-40

<sup>177</sup> Bernardom Cremades, 'Introductory Remarks: International Dispute Resolution - Towards an International Arbitration Culture', in Albert Jan van den Berg (ed.) *Dispute Resolution: Towards an International Arbitration Culture* (ICCA Congress No. 8, 1996) 13-20

<sup>178</sup> Tony Cole, 'Commercial Arbitration in Japan: Contributions to the Debate on Japanese "Non-Litigiousness"' (2007) 40 *New York University Journal of International Law and Politics* 29, 114

<sup>179</sup> Carlos De Vera, 'Arbitrating Harmony: 'Med-Arb' and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China' (2004) 18 (1) *Columbia Journal of Asian Law* 149, 194

<sup>180</sup> Kyriaki Noussia, *Confidentiality in International Commercial Arbitration: A Comparative Analysis of the Position under English, US, German and French Law* (Springer, 2010) 161-179

<sup>181</sup> Samson L. Sempasa, 'Obstacles to International Commercial Arbitration in African Countries' (1992) 41 (2) *The International and Comparative Law Quarterly* 387, 413

<sup>182</sup> Jean-Claude Goldsmith, Arnold Ingen-Housz and Gerald H. Pointon, *ADR in Business: Practice and Issues Across Countries and Cultures* (Kluwer Law International B.V., 2011) 391-398

<sup>183</sup> Gabrielle Kaufmann-Kohler, 'Globalisation of Arbitral Procedure' (2003) 36 *Vanderbilt Journal of Transnational Law* 1313, 1319

<sup>184</sup> Alan Watson, 'Legal Change: Sources of Law and Legal Culture' (1982) 131 *University of Pennsylvania Law Review* 1121

<sup>185</sup> Leon Trakman, 'Legal Traditions' and International Commercial Arbitration' (2007) 17 *American Review of International Arbitration* 1, 43

global cultural environment.<sup>186</sup> It also lacks comprehensive empirical data that supports the notion of an international arbitration culture.<sup>187</sup> This influence of the cultural attributes of parties is often implicit.<sup>188</sup> It is difficult to quantify or qualify the extent the rules and practice of arbitration are influenced by certain cultures, that is, the effects of culture on the efficiency and legitimacy of international arbitration remains uncertain.<sup>189</sup> This is largely due to the lack of quantitative measure methods to support such a hypothetical causal link between the cultural influences and behavioural changes.<sup>190</sup> As such, it is hardly well-justified that the emergence of an international arbitration culture will predominantly reflect Western values and dispute resolution styles.<sup>191</sup>

### 3. Arbitration's Flexibility: Convert Findings into Behavioural Changes

Legal cultures deriving international arbitration is expanding to accommodate parties with different cultural roots, which have grown both more diffuse and more complicated in operation.<sup>192</sup> Strong forces of cultural diversity lead to the divergences in the concept and conduct of arbitration.<sup>193</sup> The cultural context influences the performance of arbitration as well as laws.<sup>194</sup> This highlights significance of ascertaining the extent to which cultures shape participants' behaviour as well as arbitral proceedings, given that the extent of the cultural influence on the process may differ. On the one hand, it is argued that expectations of the process differ based on cultural background of parties or arbitrators. On the other hand, it remains uncertain whether there is a real cultural shock issue or purely a hypothetical one in hindering the arbitral process. If the second argument holds, it further considers how cultural shock affects the legitimacy in arbitration due to arbitrators' diverse background in culture.

It is not advisable to ignore the cultural role in shaping institutional design and its influence on the process and even on the outcome of the arbitration.<sup>195</sup> Seeking diversity for its own sake is a legitimate objective but it is even more compelling if it is sought for the sake of improving justice.<sup>196</sup> As such, one should understand the differences and use them innovatively to overcome cultural barriers. Otherwise, the party would suffer the

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<sup>186</sup> Leon Trakman, 'Legal Traditions' and International Commercial Arbitration' (2007) 17 *American Review of International Arbitration* 1, 43

<sup>187</sup> Anne-Marie Loong, 'Steps Toward an International Arbitration Culture? A Dissenting View from the People's Republic of China' (2007) 1 (5) *World Arbitration and Mediation Review* 665, 692

<sup>188</sup> William W. Park, 'Arbitrators and Accuracy' (2010) 1 (1) *Journal of International Dispute Settlement* 25, 53

<sup>189</sup> Won L. Kidane, *The Culture of International Arbitration* (Oxford, Oxford University Press, 2017) 10-50

<sup>190</sup> Cecilia Cheng, Feixue Wang and Debra L. Golden, 'Unpacking Cultural Differences in Interpersonal Flexibility: Role of Culture-Related Personality and Situational Factors' (2011) 42 (3) *Journal of Cross-Cultural Psychology* 425, 444

<sup>191</sup> Carlos De Vera, 'Arbitrating Harmony: 'Med-Arb' and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China' (2004) 18 (1) *Columbia Journal of Asian Law* 149, 194

<sup>192</sup> Leon Trakman, 'Legal Traditions' and International Commercial Arbitration' (2007) 17 *American Review of International Arbitration* 1, 43

<sup>193</sup> Tom Ginsburg, 'The Culture of Arbitration' (2003) 36 (4) *Vanderbilt Journal of Transnational Law* 1335, 1345

<sup>194</sup> Jenna Bednar and Scott E. Page, 'When Order Affects Performance: Culture, Behavioural Spill-overs, and Institutional Path Dependence' (2018) 112 (1) *American Political Science Review* 82, 98

<sup>195</sup> Kun Fan, 'Glocalisation' of International Arbitration-Rethinking Tradition: Modernity and East-West Binaries Through Examples of China and Japan' (2016) 11 (2) *University of Pennsylvania East Asia Law Review* 244, 292

<sup>196</sup> Won Kidane, 'Does Cultural Diversity Improve or Hinder the Quality of Arbitral Justice?' *Kluwer Arbitration Blog* (31 March 2017)

consequences of the inevitable cultural incommensurability.<sup>197</sup> It is preferable to rely on documentary evidence, being neutral and less susceptible to cultural discriminations. Some institutional changes could be made to improve a situation where cultural bias may exist. Meanwhile, cultural arguments should not be read too widely, although legal culture and social context should be duly respected.

## Conclusion

The cultural element represents a powerful force that influences the development of transnational arbitration, in parallel with the forces of globalisation. To achieve a fair and just result in international arbitration, more than intellectual rigour is required, it is also necessary for the parties to consider that they have been understood in their cultural context. Chinese culture prefers more sense to legislation in adjusting the relationship among people, which ultimate purpose is causing the people to be averse to litigations. Thus, Chinese people favour negotiated, rather than adversarial, approaches for dispute solutions, considering confrontation as the last resort. China's legal realm displays a dichotomy of formal legal institutions that approximate international norms and the persistence of informal local institutions nourished by culture. The driving force of globalisation has succeeded in achieving a high level of global participation in arbitration and the harmonisation of arbitration laws and institutional rules. It might be hypothetically true that the global arbitration culture could be nurtured across countries. In International arbitration institutions could adopt measures to raise arbitrators' awareness of the danger of imputed bias in cases involving parties from vastly different cultural backgrounds in order to minimise the impact of any imputed cultural bias on case outcomes. In reality, it does not seem that viable in the near future. The theory of procedural convergence is not necessarily reflective of an emergent international arbitration culture. Culture is an effect rather than a cause in the perspective of dynamism of culture. Arguably, the phenomenon of convergence is not driven primarily by cultural factors, but a rational cost-benefit calculation, given harmonisation of rules governing international arbitration and perforation of information across jurisdictions. The future of international arbitration will continue be influenced by the combined forces of globalism and localism.

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<sup>197</sup> Won Kidane, 'Does Cultural Diversity Improve or Hinder the Quality of Arbitral Justice?' *Kluwer Arbitration Blog* (31 March 2017)