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BARRICADES AND CHECKERED FLAGS: AN EMPIRICAL EXAMINATION OF THE PERCEPTIONS OF ROADBLOCKS AND FACILITATORS OF SETTLEMENT AMONG ARBITRATION PRACTITIONERS IN EAST ASIA AND THE WEST

SHAHLA F. ALI[†]

Abstract: Contemporary research on roadblocks and facilitators of settlement has thus far been framed by standard economic modeling and distributive bargaining theories. Each of these frameworks provides helpful insights into those elements that assist or hinder the settlement process. However, each of these models has thus far not examined how particular roadblocks and facilitators of settlement operate in the context of international commercial arbitration proceedings from a comparative cross-cultural perspective. How diverse regions approach roadblocks and facilitators of settlement in the context of the integration of global markets is a new arena for research and practice. To date, most research on international arbitration has focused exclusively on Western models of arbitration as practiced in Europe and North America. While such studies accurately reflected the geographic foci of international arbitration practice in the mid-20th century, in recent years, the number of international arbitrations conducted in East Asia has grown steadily and on par with growth in Western regions. This article presents a cross-cultural examination of how international arbitrators in East Asian and Western countries view the particular factors that help or hinder the settlement process in international arbitration. The result of a 115-person survey and 64 follow up interviews shed light on the underlying cultural attitudes and approaches to perceived roadblocks and facilitators of settlement in international arbitration. The findings indicate that arbitration practitioner's perceptions of the factors influencing the achievement of settlement as well as specific barriers to settlement demonstrate a high degree of convergence across regions. At the same time, regional and socio-economic distinctions are reflected in varying arbitrator perceptions regarding arbitrator proclivity towards making the first move towards settlement in arbitration, the degree of focus on past facts and legal rights as opposed to exploring creative solutions and orientation toward adversarial procedures.

I. INTRODUCTION

This article examines how distinct roadblocks and facilitators of settlement operate in the context of international commercial arbitration

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proceedings from a comparative cross-cultural perspective. Following an introduction, Part II of this article explores the relevance of the study of the roadblocks and facilitators of settlement to the field of the globalization of international legal practice. Current research from the fields of economic modeling, distributive bargaining, and psychology will be explored as they pertain to current findings regarding roadblocks and facilitators of settlement. The forces of “harmonization” and “legal diversity,” as described by Anne Marie Slaughter, are examined as a possible explanatory theory for the impact of globalization on attitudes toward factors that facilitate or hinder settlement in international arbitration in East Asia and the West.¹ A general overview of the survey research is presented.

Part III delves further into the forces of “harmonization” and “legal diversity” by viewing both the impact of the United Nations Commission on International Trade Law on harmonizing procedural aspects of international arbitration practice as well as the diversity of arbitration and dispute resolution practices in East Asia and the West. This section examines how the historic prominence of conciliation or litigation has impacted the current structure and rules of contemporary arbitral institutions in these regions. This background provides a context for viewing survey findings regarding East Asian and Western arbitrator perceptions of roadblocks and facilitators of settlement.

Drawing on both the globalizing impact of United Nations Model Laws as well as the historic context of diverse dispute resolution preferences in East Asian and Western countries, Part IV presents survey findings regarding how international arbitrators in these regions view the particular elements that constitute roadblocks and facilitators of settlement in international arbitration. The results of a 115-person survey and 64 follow up interviews shed light on the underlying cultural attitudes and approaches to international arbitration as practiced in diverse regions. The findings indicate that arbitration practitioners’ perceptions of the factors that facilitate international arbitration, such as the simultaneous attention of both parties to the dispute, and the fact that both parties become more realistic about their prospects for winning, demonstrate a high degree of convergence across regions. At the same time, regional and socio-economic distinctions are reflected in varying arbitrator perceptions regarding the barriers to settlement. In particular, greater proclivity toward making the first move

¹ “Harmonization” is understood to mean the convergence or coordination of rules and policies. According to Anne Marie Slaughter, “harmonization networks exist primarily to create compliance.” At the same time legal diversity or “legitimate difference” allows for legal and regulatory diversity “within certain boundaries.” See ANNE MARIE SLAUGHTER, *A NEW WORLD ORDER* 11 (2004).

toward settlement and a more forward looking approach to arbitration is regarded as having greater importance among arbitrators working in East Asia as compared with perceptions of counterparts working in the West.²

II. OVERVIEW OF RELEVANCE OF THE STUDY OF ROADBLOCKS AND FACILITATORS OF SETTLEMENT TO GLOBALIZATION OF LAW LITERATURE

A. *Roadblocks and Facilitators of Settlement*

Contemporary research on roadblocks and facilitators of settlement has thus far been framed by standard economic modeling, distributive bargaining theories, and psychological explanations. Each of these frameworks provides helpful insights into those elements that assist or hinder the settlement process. However, contemporary research has thus far not examined how particular roadblocks and facilitators of settlement operate in the context of international commercial arbitration proceedings from a comparative perspective.

Economic models describing roadblocks and facilitators of settlement suggest that given a choice between trial and settlement, litigants form rational estimates of the economic consequences of both trial and out-of-court settlement, compare the two, and act solely on the basis of that information. George Priest and Benjamin Klein outline this standard economic model in their work on the Selection of Disputes for Litigation.³ The Priest & Klein model asserts that a given plaintiff and defendant estimate their chances of success in court, the level of damages likely to be awarded, the costs of trial, and the costs of settlement before deciding whether to settle the dispute out of court.⁴ So long as the costs of trial are

² As a general matter, regional concepts such as the “West” and “East Asia” are inherently limited. Such concepts do not capture the significant degree of variation within each region. The “West” is comprised of many subgroups—North America, and countries in Europe, all of which have had widely differing experiences with respect to common and civil law approaches to adversarial or inquisitorial legal practices. East Asia likewise is comprised of a number of diverse regions all of which have distinct legal structures and institutions. Increasingly, observers affirm that culture itself is “relatively fluid and variable between populations and across generations, as opposed to phenomena that are biologically inherited or determined and therefore relatively fixed.” See MICHAEL KARLBERG, *BEYOND THE CULTURE OF CONTEST* 1 (2004). For purposes of this research, arbitration practitioners were classified according to their primary region of practice rather than their cultural ethnicity. Therefore, for example, an arbitrator from Germany who has spent the majority of his/her career in East Asia, would be regarded as an “East Asian practitioner” for purposes of this study.

³ George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

⁴ *Id.*

higher than the costs of settlement, and as long as both sides make a parallel estimate of the likely outcome of the trial, the case should settle.⁵

Distributive bargaining theories conceptualize roadblocks to settlement as a miscalculation of potential joint gains from settlement. Recent work by Robert Cooter, Stephen Marks, and Robert Mnookin examine trials as a failure of effective bargaining.⁶ While in most cases, settlement constitutes a joint surplus for all sides, nevertheless, due to breakdowns in effective bargaining through “hard” bargaining tactics negotiations fail.⁷ In essence, therefore, trials are caused by distribution problems; specifically, parties agree that settling out of court would create a joint surplus, but they are unable to reach agreement on how to divide the surplus.⁸

Finally, psychological explanations of barriers to settlement focus on issues of how a settlement offer is framed, the status of the relationship between the parties, and who makes the settlement offer.⁹ Psychological explanations focus on risk avoidance, whether the offeree sees the offer as either a gain or a loss, and whether the offeree’s claim receives validity.¹⁰ These factors all combine to act as either facilitators or barriers to settlement and ultimately determine whether an offeree will accept a proposed settlement.

Each of these theories illuminates useful insights into those elements that assist or hinder the settlement process. However, none of these models explains how particular roadblocks and facilitators of settlement operate in the context of international commercial arbitration proceedings from a comparative perspective. By drawing on survey research and interviews, the present study aims to examine commonalities and diversity of perspective regarding how arbitration practitioners in East Asia and the West view particular barriers and facilitators of settlement. Such commonalities and diversity of views are grounded in the larger issue of the impact of globalization on law as discussed below.

⁵ *Id.*

⁶ See Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067 (1989).

⁷ *Id.*

⁸ *Id.*

⁹ Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107 (1994).

¹⁰ Robert J. MacCoun, E. Allan Lind & Tom R. Tyler, *Alternative Dispute Resolution in Trial and Appellate Courts*, in HANDBOOK OF PSYCHOLOGY AND LAW 95, 107 (1992).

B. The Impact of Globalization on International Arbitration Practice

Examining the roadblocks and facilitators of settlement in international arbitration provides an avenue to understand the impact of globalization on the international practice of law.¹¹ Anne Marie Slaughter, in her book *A New World Order*, describes how legal networks such as those associated with international arbitration have proliferated in recent years.¹² Slaughter describes how these networks offer “a flexible and relatively fast way to conduct the business of global governance, coordinating and even harmonizing national government action while initiating and monitoring different solutions to global problems.”¹³ On the one hand, these networks promote “convergence,” while on the other hand they also allow for “informed divergence.”¹⁴ Such interactions are founded on the basis of what she calls the foundational norm of “global deliberative equality.” She cites Michael Ignatieff, who derives this concept from the basic moral precept that “our species is one, and each of the individuals who compose it is entitled to equal moral consideration.”¹⁵

In promoting convergence, such legal networks “bring together regulators, judges, or legislators to exchange information and to collect and distill best practices.”¹⁶ Specifically, as Slaughter describes:

[J]udges around the world are coming together in various ways that are achieving many of the goals of a formal global legal system: the cross-fertilization of legal cultures in general and solutions to specific legal problems in particular; the strengthening of a set of universal norms regarding judicial independence and the rule of law (however broadly defined).¹⁷

Such “harmonization networks” Slaughter argues, “exist primarily to create compliance.” Interestingly,

[H]owever, those who would export—not only regulators, but also judges—may also find themselves importing regulatory styles and techniques, as they learn from those they train. Those who are purportedly on the receiving end may also

¹¹ See generally Shahla F. Ali, *Approaching the Global Arbitration Table: Comparing the Advantages of Arbitration as Seen by Practitioners in East Asia and the West*, 28 REV. LITIG. 791 (2009).

¹² See SLAUGHTER, *supra* note 1, at 11.

¹³ See *id.*

¹⁴ See *id.*

¹⁵ *Id.* at 245.

¹⁶ *Id.* at 19.

¹⁷ *Id.* at 102.

choose to continue to diverge from the model being purveyed, but do so self-consciously, with an appreciation of their own reasons.”¹⁸

The process of convergence described above leads to a second process at work, which is “legitimate difference.” This principle allows for diversity within certain boundaries. This zone of “legitimate difference” is a space in which nations can generally take differing approaches with respect to the “specific policy choices embedded in each other’s national laws, but nevertheless respect those laws as legitimate means to the same ultimate ends.”¹⁹ In describing this principle, Slaughter cites Justice Cardozo:

We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home. The courts are not free to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.²⁰

This principle of legitimate difference is limited when such solutions or approaches come in conflict with fundamental principles or values. In the case of the United States, this is true when a law violates the Constitution itself.²¹

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

How diverse societies approach the settlement of disputes in the context of the integration of markets is a new arena for research and practice. Confirming Slaughter’s findings regarding the existence of both “convergence” and “informed divergence” among national legal systems,

¹⁸ SLAUGHTER, *supra* note 1, at 172.

¹⁹ *Id.* at 117.

²⁰ *Id.* at 247.

²¹ *Id.* at 248.

research in social psychology makes clear that diverse cultures employ unique ways of resolving conflict. In particular, with regard to East Asia and the West, concepts of individual versus collective identity as well as dialectical versus non-dialectical thinking have influenced unique preferences for adversarial or mediated approaches to dispute resolution. In a recent study, Kaiping Peng found that a strong sense of collective responsibility in the Asian culture impacted preferences for cooperative processes of resolution.²²

Such findings suggest that in order for a system of arbitration to operate effectively in an increasingly integrated and interrelated global context, it must account for the underlying interrelationship between the operations of “convergence” and “informed divergence.”

C. *Expanding “International Arbitration” Beyond Western Models*

To date, most research on international arbitration has focused exclusively on Western models of arbitration as practiced in Europe and North America. While such studies accurately reflected the geographic foci of international arbitration practice in the mid-twentieth century, in recent years the number of international arbitrations conducted in East Asia has grown steadily and on par with growth in Western regions. In 2008, a total of 1,888 arbitration cases were received by major international arbitration institutions in Western nations, which included the American Arbitration Association (“AAA”), the International Chamber of Commerce’s International Court of Arbitration (“ICC”), the London Court of International Arbitration (“LCIA”), and the international arbitration centers in Stockholm, Vienna, and Vancouver, Canada. This figure was surpassed by the combined total number of cases received by prominent international arbitration institutions located in East Asia. The China International Economic and Trade Arbitration Commission (“CIETAC”), the Beijing Arbitration Commission (“BAC”), the Japan Commercial Arbitration Association (“JCAA”), the Hong Kong International Arbitration Centre (“HKIAC”), the Kuala Lumpur Regional Center for Arbitration (“KLRCA”), the Singapore International Arbitration Center (“SIAC”), and the Korean Commercial Arbitration Board (“KCAB”) collectively received 2,050 cases.²³ Surprisingly, however, few if any studies of international arbitration

²² See Richard E. Nisbett, Kaiping Peng, Incheol Choi & Ara Norenzayan, *Culture and Systems of Thought: Holistic Versus Analytic Cognition*, 108 PSYCHOL. REV. 291, 292 (2001).

²³ It must be noted that data from both the International Chamber of Commerce and the China International Economic and Trade Arbitration Commission combined domestic and international cases in their totals for 2005.

have included Asian nations among those surveyed.²⁴ To represent the emergence of a truly global examination of the practice of arbitration, research on international arbitration must extend to include Asia.

To address this gap, this paper examines how arbitration practitioners in East Asia and Western nations view the elements that constitute roadblocks and facilitators of settlement in international arbitration drawing on the overarching framework of “convergence” and “informed divergence” as outlined by Slaughter. Through comparative empirical survey based research, it will examine two related questions: 1) Does diversity of culture and worldview, and in particular, values and attitudes held in East Asia reflecting preferences for conciliated versus adversarial outcomes, translate into differing understandings and expectations of the roadblocks and facilitators of settlement in international arbitration? 2) Are global economic and legal forces simultaneously exerting a harmonizing influence on the perceptions regarding those elements that hinder or help settlement in international arbitration through conventions such as the UN Convention on Contracts for the International Sale of Goods and the UN Model Law on International Commercial Arbitration?

East Asia presents an ideal context in which to examine these questions as it is increasingly engaged in commercial pursuits with countries throughout the world, yet is home to perhaps one of the most distinct systems of legal organization. By focusing on how international arbitrators view the roadblocks and facilitators of settlement, this paper seeks to contribute to the exploration of the impact of globalization on law by examining the question of how and to what extent global arbitration values respond to varying national legal contexts while providing standardized procedures to resolve transnational commercial disputes.

D. A Survey of International Arbitrators

The survey used in this study was conducted in the fall of 2006 and completed in 2007. Follow up secondary source data was collected in 2009 and 2010. The survey design models one developed by Christian Buhring-Uhle that he conducted between November of 1991 and June of 1992.²⁵ Buhring-Uhle’s study was the first of its kind examining how and why arbitration cases in the West are settled and the role, if any, of arbitrators in

²⁴ Research by scholars in China has mainly examined the theory of arbitration practice, enforcement issues, and the impact of the World Trade Organization on arbitration practice. Comparative studies have focused on nations within the Asian region.

²⁵ See CHRISTIAN BUHRING-UHLE, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* (2d ed. 2006).

the settlement process. The survey asked for the perceptions of European, American, and German participants in international commercial arbitration regarding their reasons for choosing arbitration, the way in which amicable settlements are facilitated, and the extent to which “alternative” procedures are employed.²⁶

In his original study, Buhning-Uhle anticipated that parallel research would be required in countries such as East Asia. Based on the composition of the sample group, Buhning-Uhle reports that the findings of his survey must be viewed as representing the “classical,” “Western-style” practice. He notes that other distinct practices exist, particularly in the Far East, and notes that such practices represent a unique approach to international arbitration that are of particular importance for continued research.²⁷ Thus far, however, no extensive qualitative research study has systematically probed in a comparative framework the parallel attitudes of East Asians regarding the practice of international arbitration and differing attitudes toward the roadblocks and facilitators of settlement.

For the current study, in order to fill this gap, and in particular to determine the existence of variation or harmonization of attitudes and practices among practitioners in the East and West, this same survey was re-administered in East Asia and North America in order to compare responses across regions. The survey sample pool consisted of lawyers, in-house counsel, professors, and arbitrators in East Asia. It included members of China’s International Economic and Trade Arbitration Commission (CIETAC); members of foreign law firms and in-house counsel in China, Malaysia, Singapore, and Japan; participants at two regional arbitration conferences held in Malaysia and Hong Kong; and members of a network of arbitrators who are part of the Northern California International Arbitration Forum. In addition, Western arbitrators from North America and Europe were also surveyed.

Nearly 250 survey questionnaires were distributed to practitioners throughout the world. A total of 115 arbitrators, lawyers, and in-house counsel from over 18 countries responded. Those surveyed came primarily from East Asian countries, with the remaining from Europe and America and a small portion from Latin America and Africa. The participants represented highly experienced practitioners, members of the judiciary, arbitration commissions, representatives to UNCITRAL working group meetings, and both users and providers of international arbitration.²⁸ The questions were

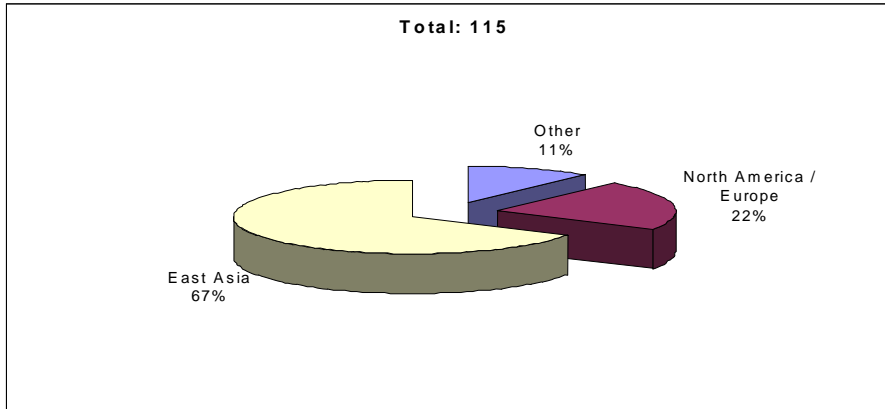
²⁶ *Id.*

²⁷ *Id.* at 131.

²⁸ See generally Ali, *supra* note 11.

distributed at arbitration conferences in East Asia, on-line through a web-based survey collection site, and in person with members of law firms in Beijing, Hong Kong, Malaysia, Japan, Singapore, and to registered arbitrators listed with two major arbitral institutions in China.

Figure 1: Survey Participants



In order to supplement the survey findings, open-ended interviews were conducted to examine whether and how diversity and globalization influence the practice of international arbitration in East Asia.²⁹ Over sixty-four persons were interviewed between August 2006 and February 2007. Those interviewed came primarily from East Asian countries, with the remaining largely from Europe and America. The participants represented experienced arbitration practitioners, members of the judiciary, arbitration commissions, lawyers, in-house counsel, professors, representatives to UNCITRAL working group meetings, and arbitration users.

²⁹ See Rhett Diessner, *Action Research*, CONVERGING REALITIES: A JOURNAL OF ART, SCIENCE, AND RELIGION 1.1 (2000), http://bahai-library.org/file.php?file=diessner_action_research (last visited Jan. 28, 2010). A principal orientation of the research process employed here is an emphasis on participation from those immediately and substantially affected by the potential outcome of the research. Participants were given a voice in framing and reframing the interview question under study, a voice in selecting the means of answering the question defined by the research, and a voice in determining the criteria to decide whether the question has been validly answered. Likewise, this research draws on the model of “social science as public philosophy” described by Robert Bellah, which “accepts the canons of critical disciplined research” but at the same time “does not imagine that such research exists in a vacuum or can be ‘value free.’” See ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COLLECTIVISM IN AMERICAN LIFE* 302 (1985). In this light, the research places special attention on examining the underlying values that inform contemporary processes of dispute resolution in East Asia and the West. Through the course of interviews and surveys the philosophical orientation of the practitioners interviewed are probed to the extent possible.

E. *Principle Findings*

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

On the one hand, factors that facilitate settlement in international arbitration rooted in global treaties and norms, such as principles promoting information sharing, demonstrated the highest degree of convergence across regions. Simultaneously, the findings indicated that in some key areas distinction persists with respect to the factors that operate as barriers to settlement, such as hesitation to make the first move toward settlement and degree of focus on past facts. For example, participants in East Asian international arbitration proceedings exhibited a greater proclivity toward initiating forward-looking resolutions and were more inclined to make the first move toward settlement as compared to their North American and European counterparts.

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

III. EXAMINING THE FORCES OF “HARMONIZATION” AND “LEGAL DIVERSITY” IN EAST ASIA AND THE WEST

This section examines the impact of forces of “harmonization” and “legal diversity” on the practice of international arbitration.³⁰ On the one hand, the United Nations Commission on International Trade Law has contributed to harmonizing procedural aspects of international arbitration practice. On the other hand, the unique historic roots of dispute resolution in East Asia and the West have given rise to diverse structures and rules regarding the approach taken toward the practice of arbitration and the

³⁰ See generally Ali, *supra* note 11.

permissibility of combining arbitration and conciliation. This background provides a context for viewing survey findings regarding East Asian and Western arbitrator perceptions of the barriers and facilitators of settlement.

A. *Promoting Global Harmonization: Overview of the UNCITRAL Model Law System*

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

UNCITRAL was established by the General Assembly in 1966.³¹ According to UN archival documents pre-dating the formation of UNCITRAL, the General Assembly created the body out of the recognition that disparities in national laws governing international trade created obstacles to the flow of trade, and it saw the Commission as the means by which the United Nations could play a more active role in reducing or removing these obstacles.³²

The General Assembly gave the Commission the overarching mandate to further the harmonization and unification of the law of international trade.³³ Since its founding, UNCITRAL has prepared a wide range of conventions, Model Laws, and other instruments dealing with the substantive law that governs trade transactions or other aspects of business law which have an impact on international trade.³⁴

According to the Commission, “‘harmonization’ may conceptually be thought of as the process through which domestic laws may be modified to enhance predictability in cross-border commercial transactions.”³⁵ UNCITRAL uses Model Laws or legislative guides to harmonize domestic law.

The UNCITRAL Commission is composed of sixty member States elected by the General Assembly.³⁶ Membership on the Commission is

³¹ See G.A. Res. 2205 (XXI), U.N. Doc. A/6396 (Dec. 17, 1966).

³² See About UNCITRAL Page, http://www.uncitral.org/uncitral/en/about_us.html (last visited Jan. 22, 2010) [hereinafter UNCITRAL].

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ As from June 14, 2004, the members of UNCITRAL, and the years when their memberships expire, are: Algeria (2010), Guatemala (2010), Russian Federation (2007), Argentina (2007), India (2010), Rwanda (2007), Australia (2010), Iran (Islamic Republic of) (2010), Serbia (2010), Austria (2010), Israel (2010), Sierra Leone (2007), Belarus (2010), Italy (2010), Singapore (2007), Belgium (2007), Japan

“structured so as to be representative of the world’s various geographic regions and its principal economic and legal systems.”³⁷ There are five regional groups represented within the Commission: African States, Asian States, Eastern European States, Latin American, Caribbean States, and Western European, and Other States. Members of the Commission are elected for terms of six years, with the terms of half the members expiring every three years.³⁸

Recognizing the need for greater uniformity of arbitration and conciliation practices, in 1998 the UNCITRAL secretariat suggested that a working group be created to draft a Model Law on Conciliation.³⁹ The principal legal officer stated, “UNCITRAL places dispute settlement as its highest priority.”⁴⁰

The process of drafting the model conciliation law reflected the process of global deliberation at work. While widely differing views were expressed, a Model Law was drafted in relatively short order. A U.S. representative to the working group meetings noted that “the Conciliation Model Law was pretty easy to draft. The drafting took place in two sessions in 2001. There were quite a few models already in existence Our draft was not that different from the existing models.”⁴¹

During the drafting process, the UNCITRAL forum provided space for wide-ranging discussion of diverse perspectives. The Chinese representative to the UNCITRAL working group meetings on the model conciliation law noted that “a heated topic at the UNCITRAL working group sessions was whether the arbitrator can act as a conciliator. Some say that this is a good process and that it works well in such countries as Singapore,

(2007), South Africa (2007), Benin (2007), Jordan (2007), Spain (2010), Brazil (2007), Kenya (2010), Sri Lanka (2007), Cameroon (2007), Lebanon (2010), Sweden (2007), Canada (2007), Lithuania (2007), Switzerland (2010), Chile (2007), Madagascar (2010), Thailand (2010), China (2007), Mexico (2007), The former Yugoslav Republic of Macedonia (2007), Colombia (2010), Mongolia (2010), Tunisia (2007), Croatia (2007), Morocco (2007), Turkey (2007), Czech Republic (2010), Nigeria (2010), Uganda (2010), Ecuador (2010), Pakistan (2010), United Kingdom of Great Britain and Northern Ireland (2007), Fiji (2010), Paraguay (2010), United States of America (2010), France (2007), Poland (2010), Uruguay (2007), Gabon (2010), Qatar (2007), Venezuela (Bolivarian Republic) (2010), Germany (2007), Republic of Korea (2007), Zimbabwe (2010). *Id.*

³⁷ UNCITRAL, *supra* note 32.

³⁸ *Id.*

³⁹ See G.A. Res. 32, U.N. Doc. A/CN.9/WG.II/WP.107 (Jan. 14, 2000) and G.A. Res. 32, U.N. Doc. A/CN.9/WG.II/WP.108 (Jan. 14, 2000).

⁴⁰ Interview 1 with principal legal officer of UNCITRAL, in Kuala Lumpur, Malay. (Nov. 22, 2006) (on file with author).

⁴¹ Interview 61 with Western Arbitrator, U.S. representative to UNCITRAL, in Kuala Lumpur, Malay. (Nov. 22, 2006) (on file with author).

China, Hong Kong, and Stockholm—if the parties agree to it.”⁴² He added that:

“[M]any other countries say no, particularly the U.S. and Mexico. They say that the role of the arbitrator and the mediator is different. The mediator assists parties to reach an agreement and persuade or push parties to settle. Arbitrators on the other hand just decide the dispute. If some information is shared during mediation, this could affect the arbitration.”⁴³

While ultimately the Model Conciliation Law did not provide a role for arbitrator to act as a conciliator, the process provided space for global dialogue on the topic. The Chinese representative to the UNCITRAL working group meetings noted, “China has been very involved in UNCITRAL—some of its suggestions were accepted, and some were not. The decision making is based on consensus Through the exchange of views we can increase . . . understanding.”⁴⁴ Ultimately, the Chinese drafting team did not incorporate the particular aspect of the Model Law restricting the arbitrator’s ability to simultaneously act as a mediator, but it did include a number of other significant provisions from the Model Law pertaining to prehearing directives, the selection and appointment of the arbitrator, the procedure for the filing of claims and counterclaims, procedures for the issuing of awards, and the time frame for award challenges.⁴⁵

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

In recent years, while the process of harmonization is increasingly unifying global legal standards, it is important to simultaneously review the impact of the diverse context from which national legal systems have emerged on contemporary approaches to dispute resolution.⁴⁶ This section examines how the historic prominence of conciliation or litigation has impacted the current structure and rules of contemporary arbitral institutions in these regions. This background provides a context for viewing survey

⁴² Interview 3 with East Asian Arbitrator, Chinese representative to UNCITRAL, in Kuala Lumpur, Malay. (Nov. 22, 2006) (on file with author).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See generally Ali, *supra* note 11.

findings regarding East Asian and Western arbitrator perceptions of roadblocks and facilitators of settlement.

The institutional practices and structural arrangements of a country's system of dispute resolution serves as the foundation for understanding how and why particular factors serve either to facilitate or hamper prospects for settlement in international arbitration within East Asian regions. Buhring-Uhle notes that "different traditions exist with respect to the concept of arbitration Accordingly the concept of arbitration varies with the personalities of arbitrators and is often influenced by their cultural background."⁴⁷ Below, this article will examine in greater depth how particular aspects of dispute resolution as practiced in East Asia continue to affect the concept of arbitration and the role of the arbitrator in the region. Then, this article will compare these findings with a brief examination of the traditional characteristics of Western legal practice.

1. *Traditional East Asian Approach to Dispute Resolution*

Within a given region or tradition, extensive diversity exists that defies simple generalization. For as many individuals exist, so too do methods or approaches toward dispute resolution. Nevertheless, over time and as a result of multiple philosophical,⁴⁸ political,⁴⁹ and socio-economic factors,⁵⁰ particular methods or approaches to dispute resolution may come to take prominence for a time. In contemporary East Asian society, while the rule of law, litigation and legality is growing in importance in recent times, conciliation has had a long-standing place in the Chinese justice system. Early Confucian society mirrored, in many respects, the predominance of resolving interpersonal conflict outside the confines of

⁴⁷ See BUHRING-UHLE, *supra* note 25, at 162.

⁴⁸ Jun Ge, *Mediation, Arbitration and Litigation: Dispute Resolution in the People's Republic of China*, 15 UCLA PAC. BASIN L.J. 122, 123-24 (1996); Robert Perkovich, *A Comparative Analysis of Community Mediation in the United States and the People's Republic of China*, 10 TEMP. INT'L & COMP. L.J. 313, 313 (1996) ("The use of mediation in The People's Republic of China to resolve disputes has a long history that can be traced to Confucian roots.").

⁴⁹ See Fu Hualing, *Understanding People's Mediation in Post Mao China*, 6 J. CHINESE L. 211 (1992).

⁵⁰ See generally KATHRYN BERNHARDT & PHILIP C. C. HUANG, *CIVIL LAW IN QING AND REPUBLICAN CHINA* (1994).

formal law through relational networks.⁵¹ Yet in practice, its implementation has not always mirrored its philosophical ideals.⁵²

From a philosophical perspective, the historic emphasis placed on the underlying values of conciliation can be traced to two Confucian notions of 1) *li*, the preservation of virtue and natural harmony, and 2) *jang*, compromise and yielding to reach settlement.⁵³ Philosophical perceptions of natural law and the cultivation of virtue were valued as superior to positive law and written regulations. Confucian philosophy viewed virtuous deeds as a higher expression of righteousness than merely following a set of legal sanctions.⁵⁴ In the *Analects*, the original writings of Confucius, this distinction is made clear:

The people should be positively motivated by *li*, to do that which they ought; if they are intimidated by fear of punishment they will merely strive to avoid the punishment, but will not be made good. To render justice in lawsuits is all very well, but the important thing, Confucius said, is to bring about a condition in which there will be no lawsuits.⁵⁵

Conciliation, or “*tiao jie*,” when understood in its literal meaning, “to mix” or “bind” in order to reach a “solution,” meant the reestablishment of unity through a process of give and take, sacrifice, and forgiveness. The virtues of “compromise, yielding, and nonlitigiousness”⁵⁶ were stressed, giving rise to preferences for preserving social relations.⁵⁷ Such principles

⁵¹ See Thomas Ginsburg, *Does Law Matter for Economic Development? Evidence from East Asia*, 34 LAW & SOC’Y REV. 829, 834-35 (2000) (explaining that in the absence of a formal legal system during traditional times, “reputation-based alternatives were developed to establish predictability in commercial transactions.” “Other informal institutions, such as guilds and clan groups, also served to coordinate economic exchange by signaling trustworthiness” in the absence of a formal legal system).

⁵² See Fu Hualing, *supra* note 49.

⁵³ Michael T. Colatrella Jr., “*Court Performed*” *Mediation in the People’s Republic of China: A Proposed Model to Improve the United States Federal District Courts’ Mediation Programs*, 15 OHIO ST. J. ON DISP. RESOL. 391, 397 (2000).

⁵⁴ Lester Ross, *The Changing Profile of Dispute Resolution in Rural China: The Case of Zouping County, Shandong*, 26 STAN. J. INT’L L. 15, 16 (1990).

⁵⁵ *Id.*

⁵⁶ See Stanley Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CAL. L. REV. 1284, 1291 (1967) (stating that these early Confucian ethical principles became the foundation upon which the Chinese mediation system was built: “Customary ethical rules of behavior which emphasized status and the necessity of preserving group harmony greatly inhibited the assertion of rights and caused such claims to be regarded as disruptive violations of fundamental ethical rules. The philosophical tenets, the structure of Chinese society, and the operation of imperial government institutions combined to produce striking preference for mediated settlement of disputes.”).

⁵⁷ See Philip C. C. Huang, *Court Mediation in China, Past and Present*, 32 MOD. CHINA 275, 278 (2006) (discussing the virtue of conciliation (*rang*) and forbearance (*ren*) in order to achieve “the ideal moral society . . . characterized by harmony and absence of conflict”).

became internalized and incorporated into all levels of society, from the family to interpersonal relations to the structure of the Chinese government itself.⁵⁸ The justice system, “rather than regarding individual responsibility as being legally accountable, relied upon the concept of collective responsibility.”⁵⁹

In addition to the prominence of early Confucian values, traditional, Maoist and post-Maoist Chinese social and political structures supported an emphasis on out-of-court dispute resolution, albeit for widely differing reasons. In Confucian China, conciliation was promoted based on the belief that ideal social order could be obtained, “not by strict regulation or severe punishment, but by the rule of good men, whose virtuous example was the most effective form of persuasion.”⁶⁰ In addition, limited alternatives including lack of full access to the courts, meant that conciliation in many cases, was the only available option. During Maoist China, conciliation was politically favored as a means of promoting socialist ideology, reeducation, and class struggle.⁶¹ In post-Mao China, conciliation has been promoted in order to reduce conflict and promote social order.⁶² It must be noted that the practice of conciliation is not without significant challenges, and its application continues to reflect gaps between its stated ideals and social reality.⁶³

Because public trial was commonly understood as “hanging one’s private laundry out . . . allowing the scent fly in a hundred directions,”⁶⁴

⁵⁸ See Taga Akigoro, *Sōfuku no kenkyū* 604-08(1960), translated in CHINESE CIVILIZATION: A SOURCEBOOK 238 (Patricia Ebrey ed., 2d ed. 1993). The importance of following Confucian precepts of forgiveness and tolerance when resolving disputes were recorded in a Ming dynasty set of “Family Instructions.” Established by the Miu lineage in Guangdong province, these codes contained admonitions on resolving conflict through a process of introspection, tolerance, and forgiveness: “If one gets into fights with others, one should look into oneself to find the blame. It is better to be wronged than to wrong others. Even if the other party is unbearably unreasonable; one should contemplate the fact that the ancient sages had to endure much more. If one remains tolerant and forgiving, one will be able to curb the other party’s violence.” *Id.* at 243.

⁵⁹ Brian Hook, *Introduction: Reshaping the Relationship between the Individual and the State in China: Issues in the Approach to a New Equilibrium*, in THE INDIVIDUAL AND THE STATE IN CHINA 7-8 (Brian Hook ed., 1996).

⁶⁰ RALPH H. FOLSOM & JOHN H. MINAN, LAW IN THE PEOPLE’S REPUBLIC OF CHINA: COMMENTARY, READINGS AND MATERIALS 4, 5 (1989).

⁶¹ See Fu Hualing, *supra* note 49.

⁶² *Id.*

⁶³ *Id.* at 221 For example, a tendency to suppress rather than transform conflict, harassment on the part of mediators, coercion, unprincipled, illegal practices, blind emphasis on reunification when contrary to the best interest of the parties. *Id.*

⁶⁴ Shahla Maghzi, *Approaching the Middle Way: The Relative Decline of Mediation and Rise of Litigation in Contemporary China* 26 (May 15, 1998) (unpublished B.A. Honors Thesis, Stanford University) (on file with author) (citing to interview with Changsha Community Mediator, Hunan Province, P.R.C. (July 27, 1997)) (on file with author).

relying on trusted intermediaries to assist with private resolution allowed individuals to keep personal affairs confidential. Conciliation, handled in private, small, and familiar environments, (including either the disputant's home or a proximate location), ensured the maintenance of one's public face.

Juxtaposed to conciliation, traditional Confucian society viewed "fa," or law, as a "clumsy system of punishments directed only at strengthening the state and lacking proper regard for an ordered world of peace, harmony, and simple contentment."⁶⁵ In recent times, however, litigation and the rule of law have gained significant prominence and importance. From the first century A.D. to the turn of the twentieth century, the dominant mode of resolution in China could be classified as the informal exercise of conciliation.⁶⁶ The idea that moral governance should operate alongside legal governance can be traced to this time period.

Because of the deeply rooted nature of ideas and beliefs within political and social institutions, they often "exist long beyond the mandate that created them."⁶⁷ The preference for conciliation, cooperation and confidentiality in decision-making—based on early Confucian values, a dense network of social and economic relations and a centralized political structure—has largely persisted to the present day.⁶⁸

⁶⁵ Lubman, *supra* note 56, at 1290.

⁶⁶ *See id.* Aversion to litigation did not mean that litigation was absent from East Asian history. On the contrary, during the Ch'in dynasty, the philosophical school of Legalism was the dominant framework for state organization. The government of the Ch'in regarded ethical principles as "irrelevant to government, whose essence was seen to lie in uniform and harsh regulation." However, the legalist school was greatly discredited when the Ch'in dynasty fell in 210 B.C. Thus, as with the longstanding emphasis on mediation, the traditional disparagement of law and legal processes persisted into the 1970s.

⁶⁷ *See generally* JUDITH GOLDSTEIN, IDEAS, INTERESTS, AND AMERICAN TRADE POLICY 17 (1993).

⁶⁸ *See* Michael Palmer, *The Revival of Mediation in the People's Republic of China: (1) Extra-Judicial Mediation*, in YEARBOOK ON SOCIALIST LEGAL SYSTEM 219, 220-21 (1987). Despite the rapid arrival of positive law in China, informal methods of dispute resolution continue to be preferred. The renewed Chinese Civil Procedures Code of 1982 laid heavy stress on the legitimate use of mediation. Article 6 of the Code states that "in trying civil cases, the peoples court should stress mediation." The court was even required to reconcile the parties through mediation before rendering a judgment in certain types of cases, such as divorce (Marriage Law 1980, Article 25). The guiding principle was "tiaohe weizhu" or "give priority to conciliation." As a result, in 1985 there were more than 4,570,000 mediators in the People's Republic of China ("PRC"). Chinese Legal Yearbook statistics indicated that mediation was used to resolve more than 90% of all civil cases during the mid 1980s and nearly 60% of civil cases in the late 1990s. Palmer outlines the general trends guiding the practice of post-Mao mediation, summarized as follows:

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

2. *Traditional Western Approaches to Dispute Resolution*

While traditional East Asian approaches to dispute resolution reflected underlying principles of *li* (virtue and natural harmony) and *jiang* (compromise),⁶⁹ in the West, the roots of dispute resolution have sprung from a unique set of philosophies that has led to structural variation in its arbitration rules and procedures. These rules and procedures in turn impact current perceptions of the roadblocks and facilitators of settlement.

In contrast to an overarching emphasis on harmony, compromise, and yielding, Western views of justice, drawing on Cartesian rationalization and categorization, placed emphasis on the concept of contradiction. “If one proposition was seen to be in contradictory relation with another, then one of the propositions had to be rejected.”⁷⁰ This tendency appears to lie at the root of legal outcomes resulting in a clear “winner” and “loser” on the merits. Nisbitt notes that contemporary Western judges and juries feel obligated to make decisions that they believe would hold for everyone in approximately similar circumstances.⁷¹ Such tendencies are reflected in the Western legal system, with judges categorizing cases according to particular characteristics and determining whether or not a particular law can be applied.

Although there has been a growing interest in alternate dispute resolution (“ADR”) and greater use of settlement techniques outside of court in Western countries,⁷² when adjudication is selected as the means of

⁶⁹ See Colatrella, *supra* note 53, at 395.

⁷⁰ RICHARD E. NISBETT, *THE GEOGRAPHY OF THOUGHT: HOW ASIANS AND WESTERNERS THINK DIFFERENTLY . . . AND WHY* 25 (2003).

⁷¹ *Id.* at 196. Applying both traditional notions of logic and uniform application of law to contract formation, for the most part in the Western view, once a contract has been agreed to, it is regarded as binding, regardless of circumstances that might make the arrangement much less attractive to one of the parties than it had been initially. Nisbett points out that in contrast, for Easterners, agreements are often regarded as tentatively agreed upon guides for the future, and changing circumstances can determine alterations of the agreement. Therefore, flexibility and broad attention to particular circumstances of the case are the earmarks of wise conflict resolution. These distinctions echo Weber’s earlier analysis: Whereas Puritanism objectified everything and transformed it into rational enterprise, dissolved everything into the pure business relation and substituted rational law and agreement for tradition, in China the pervasive factors were tradition, local custom, and the concrete personal favor of the official. See MAX WEBER, *THE RELIGION OF CHINA: CONFUCIANISM AND TAOISM* 241 (1951). While in reality, a great deal of negotiation and compromise does occur in relation to contract dispute settlement in the West, the underlying notion of what a contract stands for is unique in East Asia and the West. American lawyer and Chinese resident L. Brahm writes, “The Western legal mindset understands a contract as a document which is legally binding and to which a company has legal recourse should anything go wrong. In other words if the other party ‘breaks’ their side of the bargain, you can sue them and drag them through the courts.” LAURENCE BRAHM, *WHEN YES MEANS NO: THE ART OF NEGOTIATING IN CHINA* 45 (2003).

⁷² While the philosophical roots of Western legal order are widely recognized, nevertheless, a significant body of research in Western legal practice indicates that in many cases individuals, prefer to resolve disputes outside of the shadows of formal law through pre-existing relational commitments.

resolution there are no provisions for integrating mediation into simultaneous proceedings as is done in many courts in East Asia.⁷³ As Carrie Menkel Meadow observes, the basic assumptions that underlie Western style litigation is “advocacy, persuasion, hierarchy, competition, and binary results (win/lose).”⁷⁴

3. Summary

The forces of “harmonization” and “legal diversity” have both influenced the practice of international arbitration. On the one hand, the UNCITRAL has contributed to harmonizing procedural aspects of international arbitration practice. On the other hand, the unique historic roots of dispute resolution practices in East Asia and the West have impacted diverse contemporary structures and rules regarding the approach taken toward the practice of arbitration in each region. This foundation will provide the context for examining contemporary attitudes among arbitration practitioners in East Asia and the West toward the barriers and facilitators of settlement in international arbitration as will be discussed below.

IV. A SURVEY OF ROADBLOCKS AND FACILITATORS OF SETTLEMENT IN INTERNATIONAL BUSINESS DISPUTES IN ASIA

In order to explore whether and how diversity and globalization influence particular perceptions regarding the roadblocks and facilitators of settlement in East Asia, a comparative survey was conducted in 2007 followed by a collection of secondary source material in 2009 and 2010. On

Among those whose findings bear on this view are Stewart Macaulay and Robert Ellickson who describe non-contractual relations in both business and community dispute resolution. Macaulay finds that among business men, legal sanctions are used only when the gains are thought to outweigh the costs of compromised relations and trust. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIOLOGICAL REV. 55 (1963). Ellickson finds that Shasta County neighbors apply informal norms, rather than formal legal rules, to resolve most of the cattle grazing issues that arise in the community. See generally ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

⁷³ Research in the field of socio-legal studies has found that on the one hand, actual resort to trial is low in comparison with cases settled out of court. In addition, there has been growing interest and use of ADR in these countries in the past few decades. Nevertheless, when cases are brought for trial, Western trial practices are characterized as highly “litigious” and efforts to mediate are separated out from trial practices. See generally ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001).

⁷⁴ Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women’s Lawyering Process*, 1 BERKELEY WOMEN’S L. J. 39-63 (1985). It has also been described as involving “complex legal rules, formal, adversarial and costly means for resolving disputes, punitive sanctions, more frequent judicial review of administrative and legislative processes, more political controversy over legal rules and institutions, fragmented decision making and legal uncertainty.” See generally KAGAN, *supra* note 73.

the one hand, the findings suggest that in general, arbitration practices rooted in widely held international legal exchange such as the UN Model Law on International Arbitration tend to exhibit the greatest openness to international harmonization throughout the various regions. This is reflected in a high level of uniformity within survey data pertaining to the factors promoting settlement such as information sharing and parties becoming more realistic about their chances of winning.

On the other hand, the findings indicate that in some key areas, distinction can be seen with respect to aspects of international arbitration that appear to be culturally rooted, such as varying arbitrator approaches toward making the first move toward settlement and the degree of focus on past facts and circumstances.

In general, the findings bear out the central hypothesis. International treaties and commercial practice are found to influence harmonization of perspectives (“convergence”) regarding the general legal framework of arbitration. This is indicated by non-statistically significant variation in perspectives of Eastern and Western practitioners on issues such as information sharing and parties becoming more realistic about their chances of winning. The survey revealed a higher level of East/West variation (“informed divergence”) in response to questions touching on cultural and socio-economic aspects regarding the barriers to settlement in arbitration such as hesitation to make the first move toward settlement and degree of focus on past facts and circumstances.

A. *Factors Influencing the Achievement of Settlements*

Here this article looks in greater depth at the factors that operate as barriers against settlement and the specific factors that contribute to the achievement of amicable settlements. Like the Buhring-Uhle study, in addition to deepening an understanding of the dynamics of settlement, this study is particularly interested in region-specific descriptions of particular factors influencing settlement.

1. *Barriers to Settlement*

The survey asked participants to identify the most important obstacles to amicable outcomes. It identified five particular barriers to settlement in international arbitration and asked respondents to rank them according to their significance. These barriers included:

- Parties hesitate to make the first move towards settlement negotiations.
- Party representatives are under internal pressure not to make concessions and therefore prefer to be submitted to a binding arbitral decision.
- Arbitration process focuses on determining past facts and legal rights rather than on finding creative settlement options.
- Attorneys are usually more oriented toward adversarial procedure.
- Same attorney conducting both litigation and settlement negotiations.⁷⁵

Below is a summary of the proportion of arbitration practitioners who regarded the following barriers to settlement as either “highly relevant” or “significant.”

Table 1—Summary Table: Barriers to Settlement Considered “Highly Relevant” or “Significant” by Region of Practice (%), 2006/2007

<i>Response – “Highly relevant” or “Significant” Barrier</i>	<i>Region of Practice</i>	
	<i>East</i>	<i>West</i>
The same attorney conducts both the litigation and the settlement negotiations	27%	12%
The parties hesitate to make the first move towards settlement	61%	72%
Party representatives are under internal pressure not to make concessions and therefore prefer to be submitted to a binding arbitral decision	57%	60%
The arbitration process focuses on determining past facts and legal rights rather than on finding creative settlement options	42%	52%
Attorneys are usually more oriented toward an adversarial procedure	45%	52%

Note: Difference is not statistically significant according to Chi-square analysis

As can be seen from the table, the survey findings indicate a general trend toward convergence of perspectives regarding those factors that act as

⁷⁵ BUHRING-UHLE, *supra* note 25. Survey question based on those designed by Christian Buhring-Uhle.

barriers to settlement. Internal pressure to resist settlement is a common barrier faced in both the East and West. While not statistically significant, areas of divergence can be found with respect to barriers such as hesitation to make the first move toward settlement, degree of focus on past facts and circumstances, and the identity of the individuals involved in the settlement process.⁷⁶ These findings will be discussed in greater detail below.

2. *Convergence of Perspectives: Common Barriers*

Confirming the hypothesis that barriers based on international norms would demonstrate a low level of variation across regions, the survey demonstrated uniformity of perspective in relation to the relevance placed on the hypothetical barrier, “party representatives are under internal pressure not to make concessions and therefore prefer to be submitted to a binding arbitral decision.”⁷⁷ A non-statistically significant difference was found between participants from Eastern and Western regions surveyed. Nearly 57% of East Asians and 60% of Westerners reported that “representatives are under internal pressure not to make concessions and therefore prefer to submit their cases for a binding arbitral decision.”

Table 2: Arbitrator Perception of the Importance of the Hypothetical Barrier to Settlement of Party Representatives Being Under Internal Pressure Not to Make Concessions and Therefore Prefer to Be Submitted to a Binding Arbitral Decision by Region of Practice (%), 2006/2007

<i>Response</i>	<i>Region of Practice</i>	
	<i>East</i>	<i>West</i>
Highly relevant/significant	57%	60%
Limited/No relevance	43%	40%
Total	100%	100%
	(74)	(25)

Note: Difference is not statistically significant according to Chi-square analysis: Pearson’s chi-square = 0.08 (p < 1).

Again, confirming the hypothesis that barriers based in international norms demonstrate a low level of variation across regions, the survey demonstrated uniformity of perspective in relation to the relevance placed on

⁷⁶ *Id.*

⁷⁷ *Id.*

the hypothetical barrier that “party representatives are under internal pressure not to make concessions and therefore prefer to submit their cases for a binding arbitral decision.”⁷⁸ Of those surveyed, 57% of practitioners working in East Asia and 60% of practitioners working in the West saw this barrier as either “highly relevant” or “significant.” Principles of corporate governance and accountability require that company representatives, whether in a state-owned company or a public corporation, are generally under a duty to act in the best interest of either the state or a group of shareholders. Therefore preference is often given to an arbitral outcome over a negotiated settlement. For example, one arbitrator described his experience arbitrating a dispute with a state-owned company. He noted that one party resisted settlement because he “had intense pressure to keep his position—if he ultimately lost he could blame it on an external arbitration process and not to his own weakness.”⁷⁹ Other attorneys working within publicly held multinational corporations noted similar pressures.

3. *Regional Barriers: Informed Divergence*

The survey findings confirmed the hypothesis that barriers to settlement rooted in values emphasizing relationship preservation displayed a slightly higher level of variation across regions.

Table 3: Arbitrator Perception of the Importance of the Hypothetical Barrier to Settlement of Parties Hesitating to Make the First Move Towards Settlement Negotiations by Region of Practice (%), 2006/2007

<i>Response</i>	<i>Region of Practice</i>	
	<i>East</i>	<i>West</i>
Highly relevant/significant	61%	72%
Limited/No relevance	39%	28%
Total	100%	100%
	(74)	(25)

Note: Difference is not statistically significant according to Chi-square analysis: Pearson’s chi-square = 1.10 (p < 1).

Practitioners working in the West regarded the issue of parties hesitating to make the first move toward settlement negotiations as a slightly

⁷⁸ *Id.*

⁷⁹ Interview No. 61 with Western Arbitrator, U.S. representative to UNCITRAL, in Kuala Lumpur, Malay. (Nov. 22, 2006) (on file with author).

more important barrier than counterparts working in East Asia. Over 72% of practitioners working in Europe and America viewed this as a “highly relevant” or “significant” barrier, while only 61% of practitioners in East Asia regarded this as an important barrier. While the variation is not statistically significant, the direction of difference can be regarded as suggesting variation across regions. Follow up interviews expanded on such findings. One arbitrator working in China explained that the arbitrators “are more active and will ask the parties if they want to settle in order to maintain their relationship [T]hey are loath to go the whole way to court.”⁸⁰ Another practitioner working in Asia echoed, “parties hope for future cooperation so they look for a settlement. They want their business relationship to continue.”⁸¹

Table 4: Arbitrator Perception of the Importance of the Hypothetical Barrier to Settlement of the Arbitration Process Focusing on Determining Past Facts and Legal Rights Rather Than on Finding Creative Settlement Options by Region of Practice (%), 2006/2007

<i>Response</i>	<i>Region of Practice</i>	
	<i>East</i>	<i>West</i>
Highly relevant/significant	42%	52%
Limited/No relevance	58%	48%
Total	100%	100%
	(74)	(25)

Note: Difference is not statistically significant according to Chi-square analysis: Pearson’s chi-square = 0.27 ($p < 1$).

Similarly, slight regional variation could be found in relation to the significance placed on the hypothetical barrier that “arbitration processes focus on determining past facts and legal rights rather than on finding creative settlement options.”⁸² Approximately 52% of practitioners working in Europe and America regarded this as an important barrier whereas only 42% of practitioners working in East Asia held the same view. Again, while not a large statistical difference, nevertheless the direction of difference can

⁸⁰ Interview No. 57 with Chinese Arbitrator, in Hong Kong, S.A.R. (Dec. 3, 2006) (on file with author).

⁸¹ Interview No. 10 with member of Chinese arbitration commission, in Beijing, China (Nov. 28, 2006) (on file with author).

⁸² BUHRING-UHLE, *supra* note 25. Survey question based on those designed by Christian Buhring-Uhle.

be regarded as an indicator of subtle variation across regions. This variation can partly be explained by the fact that arbitration processes in East Asia do not merely focus on past facts and legal rights, but also on the possibility of exploring settlement options. As one lawyer working in China explained, “the arbitrator gets to know the background, the context, the motives, and the issues involved in each case so that we can better resolve the issues rather than a narrow view. This helps to avoid simply an award that is based on legal concepts and views.”⁸³

4. *Socio-Economic/Culturally Based Barriers: Commensurate Variation*

Survey findings regarding the importance of the hypothetical barrier of “attorneys [being] usually more oriented toward an adversarial procedure”⁸⁴ can be categorized both as regional and socio-economically rooted. Regional variation bears on the relative proclivity toward finding a conciliated solution, while socio-economic factors related to cost incentives associated with case duration.

Table 5: Arbitrator Perception of the Importance of the Hypothetical Barrier to Settlement of Attorneys Being Usually More Oriented Toward an Adversarial Procedure by Region of Practice (%), 2006/2007

<i>Response</i>	<i>Region of Practice</i>	
	<i>East</i>	<i>West</i>
Highly relevant/significant	45%	52%
Limited/No relevance	55%	48%
Total	100%	100%
	(74)	(25)

Note: Difference is not statistically significant according to Chi-square analysis: Pearson’s chi-square = 0.49 (p < 1).

A similar percentage of practitioners working in both East Asia and the West reported that the adversarial orientation of attorneys working on the case was a significant barrier to settlement. On the whole, 52% of practitioners working in Europe and America and 45% of practitioners working in East Asian regarded “attorneys [being] usually more oriented toward an adversarial procedure” as a “highly relevant” or “significant”

⁸³ Interview No. 22 with Chinese Arbitrator, in Beijing, China (Nov. 28, 2006) (on file with author).

⁸⁴ BUHRING-UHLE, *supra* note 25. Survey question based on those designed by Christian Buhring-Uhle.

barrier to settlement. Illustrating the financial pressures that prevent settlement, a Western attorney shared his experience as a junior partner involved in an arbitration proceeding:

When I was a new partner involved in several arbitrations in which I could easily see a settlement option, early on I suggested to the other partners that this case could easily settle. The partners didn't say anything, but the unspoken message was that such a suggestion was not acceptable because their billable hour requirements were contingent on the prolongation of the arbitration. This was the key to their annual bonus.⁸⁵

Another attorney noted that from his perspective, the strongest opponents to settlement talks are the lawyers. They see "this as an unfortunate form of ADR, or an 'Atrocious Drop in Revenue.'"⁸⁶ With rates exceeding \$650/hour, the potential financial impact of a quick settlement is regarded as significant. As a result, economic considerations were reported to influence the overall approach and support for settlement.

Table 6: Arbitrator Perception of the Importance of the Hypothetical Barrier to Settlement of the Same Attorney Conducting Both the Litigation and the Settlement Negotiations by Region of Practice (%), 2006/2007

<i>Response</i>	<i>Region of Practice</i>	
	<i>East</i>	<i>West</i>
Highly relevant/significant	27%	12%
Limited/No relevance	73%	88%
Total	100%	100%
	(73)	(25)

Note: Difference is not statistically significant according to Chi-square analysis: Pearson's chi-square = 3.84 (p < 0.1).

The survey findings regarding the relative importance of the barrier imposed by the "same attorney conducting both litigation and settlement negotiations"⁸⁷ was not viewed by either practitioners working in East Asia

⁸⁵ Interview No. 55 with Western Arbitrator in Hong Kong, S.A.R. (Dec. 3, 2006) (on file with author).

⁸⁶ Interview No. 53 with East Asian Arbitrator in Hong Kong, S.A.R. (Dec. 3, 2006) (on file with author).

⁸⁷ BUHRING-UHLE, *supra* note 25. Survey question based on those designed by Christian Buhring-Uhle.

or the West as a particularly important barrier to settlement. Only 27% of respondents working in East Asia and 12% of respondents working in the West regarded this as either “highly relevant” or “significant.”

5. *Factors Contributing to Settlement*

Building on the examination of barriers to settlement, the survey analyzed the relative importance of several hypothetical factors contributing to settlement. These hypothetical reasons were:

- Simultaneous attention of both parties to the dispute
- Realization of possible costs and length of arbitration
- Parties become more realistic about their own chances of winning
- Realization of importance of ongoing relationship
- Better communication leads to discovery of mutually beneficial settlement options
- Active involvement of the arbitrator.⁸⁸

The hypothesis tested in this section is that factors encouraging settlement based on international treaties or commercial practices will exhibit the lowest level of variation and thus reflect a similar level of importance across regions. In contrast, those factors grounded in more deeply rooted relational values would display a slightly higher level of variation across regions.

A summary of the survey respondents who viewed the hypothetical factors encouraging the achievement of settlements as either “highly relevant” or “important” is outlined below.

Table 7—Summary Table: Highly Relevant or Significant Reasons for Voluntary Settlement in Arbitration by Region of Practice (%), 2006/2007

<i>Response – “Highly Relevant” or Significant</i>	<i>Region of Practice</i>	
	<i>East</i>	<i>West</i>
Simultaneous attention of both parties to the dispute	75%	80%
Realization of possible costs and length of arbitration *	79%	96%
Parties become more realistic about own chances of winning	87%	84%

⁸⁸ *Id.*

Realization of importance of ongoing relationship	48%	32%
Better communication leads to discovery of mutually beneficial settlement options	56%	41%
Active involvement of the arbitrator	34%	16%

Note: * Difference is statistically significant according to Chi-square analysis

As can be seen from the table, factors such as information sharing and parties becoming more realistic about their chances of winning demonstrated a convergence in perspectives across regions. In contrast, factors rooted in regional characteristics such as the active involvement of the arbitrator demonstrated slight divergence in perspectives across regions. Finally, factors pertaining to the cost and length of the arbitration proceeding demonstrated variation across regions commensurate with variation in legal-economic constructs in each region.

6. *Internationally Based Considerations: Convergence*

Overall, the greatest factor encouraging settlement was that “parties become more realistic about their own chances of winning.” With increased disclosure requirements for information sharing based on international guidelines such as the International Bar Association’s (“IBA”) Rules on the Taking of Evidence in International Commercial Arbitration,⁸⁹ parties get a more realistic view of their case over the course of an arbitration proceeding.

Table 8: Arbitrator Perception of the Importance of Parties Becoming More Realistic About Their Own Chances of Winning in Encouraging Settlement by Region of Practice (%), 2006/2007

<i>Response</i>	<i>Region of Practice</i>	
	<i>East</i>	<i>West</i>
Highly relevant/significant	87%	84%
Limited/No relevance	13%	16%
Total	100%	100%
	(74)	(25)

Note: Difference is not statistically significant according to Chi-square analysis: Pearson’s chi-square = 0.09 (p < 1).

⁸⁹ INTERNATIONAL BAR ASSOCIATION, RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION (1999), available at [http://www.int-bar.org/images/downloads/IBA rules on the taking of Evidence.pdf](http://www.int-bar.org/images/downloads/IBA_rules_on_the_taking_of_evidence.pdf).

Confirming the hypothesis that factors based on international guidelines demonstrate the lowest level of variation and thus greater harmonization of perspective across regions, close to 84% of practitioners working in Europe and America and 87% of practitioners working in East Asia regarded the importance of parties becoming more realistic about their own chances of winning as a “highly relevant” or “important” factor in contributing to settlement.

Table 9: Arbitrator Perception of the Importance of the Simultaneous Attention of Both Parties to the Dispute in Encouraging Settlement by Region of Practice (%), 2006/2007

<i>Response</i>	<i>Region of Practice</i>	
	<i>East</i>	<i>West</i>
Highly relevant/significant	75%	80%
Limited/No relevance	25%	20%
Total	100%	100%
	(72)	(25)

Note: Difference is not statistically significant according to Chi-square analysis: Pearson's chi-square = 0.25 ($p < 1$).

Next in importance was the simultaneous attention of both parties to the dispute. Of those interviewed, approximately 80% of practitioners working in Europe and America, and 75% of practitioners working in East Asia regarded this as a “highly relevant” or “significant” factor in leading to settlement. Under international models such as the UNCITRAL Model Law on International Commercial Arbitration, once parties enter into arbitration “all statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party.”⁹⁰ This creates a process of joint focus on the key elements of the dispute. Confirming the hypothesis that international norms generate harmonization of perspective, arbitration practitioners in all regions universally expressed the importance of this factor in contributing to settlement.

⁹⁰ U.N. COMM'N ON INT'L TRADE L., MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION art. 24(3), U.N. Doc. A/40/17, annex I (1985).

7. *Regional Factors: Informed Divergence*

As noted above, the hypothesis tested in this section is that factors encouraging settlement grounded in relational values would demonstrate a slight degree of variation across regions. This hypothesis is largely confirmed by survey findings as will be discussed below.

Table 10: Perception of the Importance of the Active Involvement of the Arbitrator in Encouraging Settlement by Region of Practice (%), 2006/2007

<i>Response</i>	<i>Region of Practice</i>	
	<i>East</i>	<i>West</i>
Highly relevant/significant	34%	16%
Limited/No relevance	66%	84%
Total	100%	100%
	(74)	(25)

Note: Difference is not statistically significant according to Chi-square analysis: Pearson's chi-square = 2.85 ($p < 0.10$).

The most significant difference across regions related to how parties viewed the importance placed on the active involvement of the arbitrator in promoting a settlement between parties. A greater number of practitioners in East Asia viewed the arbitrator as having a central role in promoting settlement. Of those surveyed, 34% saw his or her role as significant in promoting settlement. In comparison, only 16% of practitioners working in Europe and America saw an important connection between the active involvement of the arbitrator and settlement. While not statistically significant, the findings again indicate greater support on the part of practitioners working in East Asia for the view that arbitrators are central to the promotion of settlement. Interviews with practitioners working in East Asia expanded on these findings by suggesting that among the important qualities sought in a good arbitrator are the “ability to persuade parties to reach compromise agreement” and an “ability to think about the interest of the parties—such as how to settle the dispute.”⁹¹

⁹¹ Interview No. 22 with Chinese Arbitrator, in Beijing, China (Nov. 28, 2006) (on file with author).

Table 11: Perception of the Importance of Parties Realizing the Importance of Ongoing Relationships in Encouraging Settlement by Region of Practice (%), 2006/2007

<i>Response</i>	<i>Region of Practice</i>	
	<i>East</i>	<i>West</i>
Highly relevant/significant	48%	32%
Limited/No relevance	52%	68%
Total	100%	100%
	(74)	(25)

Note: Difference is not statistically significant according to Chi-square analysis: Pearson's chi-square = 1.77 ($p < 0.20$).

Regional variation was also found with respect to the relative importance of maintaining ongoing relations as a factor in influencing settlement. Practitioners working in East Asia attributed a slightly higher significance to this factor than counterparts working in Europe and North America. Of the practitioners working in East Asia, 48% saw the importance of maintaining the parties ongoing relations as either a "highly relevant" or "significant" factor in promoting settlement. In contrast, only 32% of practitioners working in Europe and America saw this as an important factor in promoting settlement. Follow-up interviews further highlighted the significance placed on maintaining parties' ongoing relations. One arbitrator noted that "the motive behind settlement is to preserve the parties' long term relationship. Such parties are likely to deal with each other again. The arbitrator's job is to make their relationship smooth so that they can work together effectively."⁹² Another noted that "parties hope for future cooperation so they look for a settlement. They want their business relationship to continue."⁹³ Still another arbitrator working in China stated that "if there is a long-term relationship between the parties, it is easy to accept some compromise and concessions. This time one party might concede, but next time that party will expect reciprocity in the future. They look to the long-term transactions."⁹⁴

⁹² Interview No. 3 with East Asian Arbitrator, Chinese representative to UNCITRAL, in Kuala Lumpur, Malay (Nov. 22, 2006) (on file with author).

⁹³ Interview No. 10 with member of Chinese arbitration commission, in Beijing, China (Nov. 28, 2006) (on file with author).

⁹⁴ Interview No. 17 with dean of Chinese law school, Beijing, China (Nov. 29, 2006) (on file with author).

While preserving business relations was also regarded as an important objective among practitioners working in the West, it did not carry the same weight in terms of influencing settlement. One arbitrator noted, “I think in the West clients are just as alert to the need for preserving their business relationship. The only difference is that in China there is a . . . feeling that still exists that parties are loath to go to arbitration straight away, even if they have a good case. They still explore settlement options.”⁹⁵

Table 12: Perception of the Importance of Parties Realizing the Importance of Better Communication in Leading to the Discovery of Mutually Beneficial Settlement Options in Encouraging Settlement by Region of Practice (%), 2006/2007

<i>Response</i>	<i>Region of Practice</i>	
	<i>East</i>	<i>West</i>
Highly relevant/significant	56%	41%
Limited/No relevance	44%	59%
Total	100%	100%
	(74)	(24)

Note: Difference is not statistically significant according to Chi-square analysis: Pearson’s chi-square = 1.37 (p < 1).

Finally, practitioners from Eastern and Western regions demonstrated slight variation in the relative importance placed on improved communication leading to the discovery of mutually beneficial settlement options. Nearly 56% of arbitrators working in East Asia saw this factor as “highly relevant” or “important” in comparison with only 41% of arbitrators working in the West. An attorney working in China noted that “when there is a dispute we normally try to communicate with one another and settle the matter. If you don’t do that and go to court directly, this indicates an immediate break in the relationship in China. If there is a problem with a partner, they should talk first.”⁹⁶ Another arbitrator working in East Asia noted, “arbitration is used as a means of communication and negotiation”⁹⁷

⁹⁵ Interview No. 57 with Chinese attorney, in Hong Kong, SAR (Dec. 3, 2006) (on file with author).

⁹⁶ Interview No. 8 with Chinese attorney, in Beijing, China (Nov. 28, 2006) (on file with author).

⁹⁷ Interview No. 63 with Western Arbitrator working in Japan, in Berkeley, CA (Aug. 12, 2006) (on file with author).

8. *Socio-Economic Factors: Commensurate Variation*

The hypothesis tested in this section is that factors encouraging settlement reflecting variation in socio-economic conditions will demonstrate commensurate variation across regions. The survey examined the impact of the hypothetical factor of “parties realizing the possible costs and length of the arbitration.”⁹⁸

Table 13: Arbitrator Perception of the Importance of the Realization of Possible Costs and Length of Arbitration in Encouraging Settlement by Region of Practice (%), 2006/2007

<i>Response*</i>	<i>Region of Practice</i>	
	<i>East</i>	<i>West</i>
Highly relevant/significant	79%	96%
Limited/No relevance	21%	4%
Total	100%	100%
	(74)	(24)

Note: * Difference is statistically significant according to Chi-square analysis: Pearson’s chi-square = 3.8 (p < 0.05).

Due to widely differing cost structures in the East Asian region and Western countries, the survey likewise reflected variation across regions in response to the relative importance placed on the cost of the arbitration proceeding. Practitioners working in the West placed a significantly higher importance on the parties’ realization of the possible costs and length of the arbitration. Of those surveyed, 96% saw this factor as a “highly significant” or “important” factor in promoting settlement. In contrast, this factor was viewed by only 79% of practitioners working in East Asia as an important factor in promoting settlement. This difference was found to be statistically significant. This variation can be explained by the significantly higher cost of arbitration in Western forums in comparison with the cost associated with using regional forums in East Asia.

⁹⁸ See BUHRING-UHLE, *supra* note 25. Survey question based on those designed by Christian Buhring-Uhle.

V. RECONCILING REGIONAL DIVERSITY AND INTERNATIONAL CONVENTIONS IN THE CONTEXT OF INTERNATIONAL COMMERCIAL ARBITRATION IN EAST ASIA

This article presented a cross-cultural examination of how international arbitrators in East Asian and Western countries view the particular factors that help or hinder the settlement process in international arbitration. The result of a one hundred and fifteen-person survey and sixty-four follow up interviews shed light on the underlying cultural attitudes and approaches to perceived roadblocks and facilitators of settlement in international arbitration. The findings indicate that arbitration practitioners' perceptions of the factors influencing the achievement of settlement as well as specific barriers to settlement demonstrate a high degree of convergence across regions. At the same time, regional and socio-economic distinctions are reflected in varying arbitrator perceptions regarding arbitrator proclivity toward making the first move toward settlement in arbitration, the degree of focus on past facts and legal rights as opposed to exploring creative solutions and orientation toward adversarial procedures

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

VI. IMPLICATIONS OF STUDY

A principal implication of the present study is that much of the structural framework of international arbitration is becoming increasingly harmonized. Therefore, when cases arise in international settings, participants can expect a certain degree of familiarity with the substantive legal framework. At the same time, in many instances, arbitrator-initiated involvement in settlement proceedings continues to reflect considerable variation across regions. This largely echoes William Twining's observation that as the discipline of law becomes more cosmopolitan, it needs to be underpinned by theorizing that treats generalizations across legal orders as

problematic.⁹⁹ Therefore, as practitioners increasingly participate in arbitration in diverse regions, they need to be open to the possibility that many of the techniques used during the course of the arbitration process will vary depending on how the arbitrator views his or her role as a conciliator, adjudicator, or some combination of the two.

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

⁹⁹ William Twining, *Have Concepts, Will Travel: Analytical Jurisprudence in a Global Context*, 1 INT'L J. L. IN CONTEXT 5 (2005).