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**A non-Western Approach to Law and ADR as a Resource for  
Sino-African Business Relations**

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**Introduction**

First of all I would like to thank the organisers of this conference for arranging such an important event, and for inviting me.

The idea underlying this presentation is about giving a contribution for the development and use of legal models for the world economy which are different from the global, prevailing ones mostly originated in the common law tradition – contrasting “world laws” against the “global law”; taking advantage of what in the former can be of use in transnational economic activities.

Currently, globalised common law legal models have become the standard tools not only for north-north or north-south transactions, but even for south-south transactions, so to speak, due to their prestige (someone even thinks about an alleged inherent superiority of the common law model with respect to any other legal tradition!), imitation and sometimes imposition or quasi-imposition by Western financial institutions involved, such as the World Bank and the IFC, or western-inspired ones – e.g. the Asian or African Development Banks.

The western world is not the world’s commerce kernel anymore; the old, star-shaped model of global economy – with the West as the central hub, and the rest of the world as the spikes, entertaining relations with the former – being superseded by a reticular one, as the various spikes started speaking and making connections directly to one another.

Now that, for instance, the Chinese speak directly with Africans, Latin Americans as well as with other Asians, legal models developed outside the common law or even outside the western legal tradition might become usable or even desirable, as better-suited ones. Islamic, African, and Asian legal traditions such as the Chinese one might become sources in which to dig extensively for legal models suitable for south-south transactions (e.g. for China–Africa, China–Middle East, China–ASEAN and China–Latin American countries relations), whether taken alone or in combination with Western legal models.

Study and research for developing those legal models could thus include:

- Ways of dispute resolution (DR) alternative to, or combinable with, Western ones and their interaction with substantial contractual issues.
- Legal models alternative to, or combinable with, Western ones to be developed as more suitable, as well as those to be extracted amongst those already in use, if at a local or domestic or regional level and/or anyway in a less publicised fashion.
- Acknowledgement of those models, their study and dissemination, as well as operational improvement and feedback of such tools by the economic actors of the world scene.

A wider role can also be devised for the civil law traditional approach in the development of new legal models and tools for south-south transactions – the Roman and civil law tradition being, in variable proportions, part of the legal heritage of countries such as China, many African countries, including all the OHADA members as of today, as well as South Africa, Russia, all Latin American and many Caribbean countries.

Moreover, some features of the civil law legal tradition and institutions make it suitable for fruitful combinations with their homologous non-Western items (e.g. in the fields of contract law or administrative law).

This presentation is aimed at indicating some of the fields of legal research that could in my opinion prove fruitful, with a view to the development of the economic cooperation amongst China, African countries and other developing economies. Each of the issues dealt with below amounts basically to a suggestion, and would of course require specific research and study to be developed to a sufficient extent for the purpose.

## **Some interesting common features in the Chinese and African approaches to ADR**

1. Many traditional societies in Asia and Africa feature the shared value that a social/legal relation – ranging from trade agreements to marriages – is a relation involving the parties’ respective communities to some extent, in addition to the very immediate parties to the transaction. In these traditions the law is often shaped on a case-by-case basis, also considering issues other than the mere facts related to the specific transaction. External elements invariably are taken into account, especially the impact of the case on the wider relation between the parties and on the interests of the community, in the physiological management of the relation between the immediate parties; as well as in the resolution/dissolution of each particular dispute between them.

Also widespread in those traditional environments is the idea of entrusting the “assessment and maintenance” of a relation whatsoever to persons belonging to the communities of origin of the parties and/or to respected persons somehow related to them. Dispute resolution processes are traditionally conducted with the help of these authoritative persons (the elderly, the head of the local community or guild, the nobleman, the Imperial servant, the party cadre, etc.).

Those characters often enough are not really what westerners would consider as “third parties” with respect to the dispute.

They often amount to *quasi*-third parties, or maybe *quasi*-parties, we should say, being persons with some kind of authority in the community of which the immediate parts to dispute are part, and in which the dispute has some kind of impact. Sometimes these authoritative persons have already been involved in the specific disputed relation, having performed some facilitating role for the relevant original transaction; it is for instance the case of the traditional Chinese “guarantors” of many patrimonial transactions<sup>1</sup>, who

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<sup>1</sup> Traditionally indicated in many ways in the Chinese sources, including the terms *pang ren*, *zhengzhi*, *bao ren*, *zhongren*.

normally played a role in the original negotiations and used to intervene as mediators/conciliators whenever a dispute arose between the immediate parties<sup>2</sup>.

A similar negotiation/DR model is traditionally implemented in large areas of Ethiopia and Eritrea, where the prescribed witnesses from both families in customary betrothal or marriage (those witnesses usually being senior members of the two families involved) come to act as “family arbitrators” if a dispute arises within the couple. That very same customary mechanism has also been recognized and legislatively sanctioned in the Ethiopian civil code of 1960<sup>3</sup>, and maintained in the Eritrean family law too, after independence of Eritrea from Ethiopia<sup>4</sup>. The name given by the civil code to these characters is precisely the one of “family arbitrators”<sup>5</sup>, having the power to pronounce a divorce, and to solve personal and patrimonial familial disputes without much say of the courts on the merits of the case and the principles (legislative, customary or else) they apply to solve it. What they are allowed to do according to the civil code is a true arbitration, according to customary principles, with the final decision being subject to very limited instances of review by the courts<sup>6</sup>.

From their higher position with respect to the immediate parties, all those persons discharge a persuasive/authoritative role, in helping the immediate parties to negotiate and conclude the original agreement, and later in helping the disputing parties to settle their disagreements, saving both their own face and their original relation between them and with the mediator(s) or arbitrator(s). When solving the dispute these persons also play a higher level, “policy” role between the two communities involved. In sensitive

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<sup>2</sup> See Marina TIMOTEO, *Il contratto in Cina e Giappone nello specchio dei diritti occidentali*, Padua, 2004, especially at 63-68; LI ZHUHUAN, *Zhongguo chuantong minshi qiyue yanjiu* (research on civil contracts in the Chinese tradition), in *Falu shilunji*, Beijing, 1999, II at 194; HULSEWE, “Contracts” of the Han Period, in LANCIOTTI (ed.), *Il diritto in Cina*, Florence, 1977, at 26 and ff. ones.

<sup>3</sup> On the Ethiopian family law as reformed with the 1960 Civil Code, drafted by René David, see René DAVID, *Le droit de la famille dans le Code Civil Ethiopien*, Addis Ababa, 1970.

<sup>4</sup> See Ignazio CASTELLUCCI, *Eclectic Legal Reforms in Africa and the Challenges of Reality: the Case of Eritrean Family Law*, in *Essays in Honour of Chris Okeke*, Lagos, 2008.

<sup>5</sup> See articles 666 and 668 of the Ethiopian Civil Code.

<sup>6</sup> DAVID, *Le droit de la famille*; CASTELLUCCI, *Eclectic Legal Reforms*; supra.

areas, some kind of responsibility of these persons towards the public authority and public judiciary power is also part of the traditional model, both in Ethiopia<sup>7</sup> and China<sup>8</sup>. *This traditional approach to mediation and arbitration, reversed with respect to the “independence” approach common in the West, can fruitfully be maintained and fully implemented for the benefit of a sizable part of south-south international commercial arbitration and ADR activities, e.g. when Chinese and African parties are involved. Only in an individualist social, cultural, political context a contractual dispute is a mere matter of contractual obligations and rights solely between the parties to the contract.*

The absence, or weakness, or lesser influence of individualist principles in much of China’s as well as in much of Africa’s traditions and legal thought make the communitarian impact relevant, to some extent, in any dispute. If a dispute is everybody’s matter, so to speak, in a traditional environment everybody (i.e. the parties’ respective communities) will have a say or a way in its management and settlement.

The very immediate parties feel themselves as being parts of a community at least as much as they feel they are individuals<sup>9</sup>, “naturally” accepting thus some degree of community interference, and considering the authoritative facilitators as “natural judges”<sup>10</sup> or, better, of “natural helpers” in solving the dispute – be it represented by the respected Chinese guarantor or the authoritative local strongman having facilitated the business transaction now under dispute; or be it the senior relatives having witnessed the marriage and now representing the two enlarged families’ interests in solving the dispute between two Ethiopian spouses.

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<sup>7</sup> The family arbitrators, having the power of sanctioning a divorce and solving the related patrimonial issues are an obvious example.

<sup>8</sup> See, e.g., MYERS, *Customary Law, Markets, and Resource Transactions in Late Imperial China*, in RANSOM-SUTCH-WALTON (eds.), *Explorations in the New Economic History*, New York, 1982, at 287.

<sup>9</sup> For the African reality see Rodolfo SACCO, Marco GUADAGNI, Roberta ALUFFI BECK-PECCOZ, Luca CASTELLANI, *Il diritto africano*, Turin, 1995, at 80-88.

<sup>10</sup> M.TIMOTEO, *supra* at 64.

2. In both China and most of Africa compromise and re-negotiation or settlement are traditionally preferred to litigation before the courts, considered as the worst option to solve a dispute – court proceedings normally implying that the original relation is over.

I would like to stress in this framework the importance of a non-western theoretical as well as operational approach to ADR as a resource for south-south international investment and trade. *In a non-western approach, “DR” and “contract” might actually be considered to a fair extent as just one issue, or closer to just one issue – rather than two different and separate ones* as they are considered in the western approach to law. DR mechanisms are not entirely different from the contract itself; they do not start to function when the contract stops to function, so to speak<sup>11</sup>.

The contract is perceived as an enduring relation, needing *physiological* means of dispute resolution or dispute dissolution –like a marriage– rather than being perceived as a spot allocation of obligations and rights done at the beginning, once and forever – with litigation as the inevitable outcome for any situation of non-compliance. Common “maintenance” of a relation is the key for traditional non-western mediation/arbitration, whereas in the western tradition ADR means are mere substitute of court litigation after a break of the relation – just more convenient.

The clause often found in international contracts stipulating that in case of disputes the parties will explore possible solutions “through friendly negotiations” or the like, is often considered in the West as a mere expression of wishful thinking. Conversely, *these mechanisms are often enough perceived in Asia as a part of performance mechanisms and contractual obligations of the parties* – rather than a consequence for non-performance and just a formal and nominal step before litigation.

3. The uses made of substantive applicable rules in the ADR process also have something in common, in China and in Africa.

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<sup>11</sup> For an overview of the Asian approach to arbitration and the related cross-cultural issues, see Thomas B. GINSBURG’s final chapter in the volume P.J. McCONNAUGHAY - T.B.GINSBURG (eds.), *International Commercial Arbitration in Asia*, 2<sup>nd</sup> ed., Jurisnet, 2006.

Rules, especially black-letter rules, if you read them, tend to be similar or even the same, nowadays, everywhere. The difference in outcomes hails precisely from what do you do with those rules, how do you use them. Application of rules, ways to manage disputes are factors that really affect the final outcome of any given case, be those rules of a national legislative origin, or of a supranational, transnational and/or customary one.

Dispute resolution (DR), interpretation and implementation of law, rather than legislation, is thus where the cultural differences make themselves very apparent and affect the final outcome – in addition to possible legislative doors being left open for usages and plurality of laws.

In both China and much of Africa, DR in addition to and probably more than legal texts can contribute greatly to shape the substantial law, *the law being taken in the west as a given set of strictly applicable rules, whereas in many non-western legal environments it often amounts to an array of flexible, arbitrable principles.*

#### 4. Mediators/arbitrators: independence as a wrongfully posed issue

Of course conciliators/mediators/arbitrators shall be independent: this means they shall not depend from the parties. However, as we noticed, in China and Africa the tradition is sometimes reversed: the *parties do depend* from the dispute-solvers.

An important guarantee for the parties is given in the west by the required independence of arbitrators from their appointing party; in different contexts like those mentioned the guarantee for a satisfactory outcome of the proceedings is given, also, by the authority enjoyed by the arbitrator on the party who appointed him –with a view, of course, to relation maintenance rather than disruption. Seniority of arbitrators within the parties' communities and the trust they enjoy also provide the dispute-solvers with a wider perception of the needs of both communities, putting the dispute in a wider perspective.

This model can be widely applicable in African and Chinese contexts, whenever big business corporations or governments should have controlled entities engaged in joint economic ventures. The perfect dispute-solvers could in many cases be higher-level representatives of the corporations/governments controlling the parties involved in

litigation, representing the wider, long-term interest of both communities – transforming maybe arbitration into a more fuzzy product, also akin to mediation/conciliation but still characterized by some of the typical adversary approach – still featuring a third arbitrator, some formal rules for procedure and merits, an adjudicative role of some sorts discharged by the dispute-solvers.

In this attitude, non-western arbitrators sometimes do things, completely acceptable according to the Asian values and traditions, that western ones would be horrified of doing – such as the so-called back-to-back consultations; or the conciliation attempts based on full disclosure of facts from the parties to the conciliators/arbitrators, followed by arbitration with the same conciliators acting as the tribunal if conciliation fails<sup>12</sup>.

Legal and behavioural models for economic transactions and arbitration can be researched, unearthed, developed. They are based on Asian/African basic values such as the prevalence of a communitarian approach over the individualistic one, the prevalence of public interest over the private one, the preservation of relations rather than a win-or-lose, litigation-oriented, relation-destroying approach to conflicts.

Appropriate legal models and rules operated by this kind of arbitrators will be instinctively perceived as more fair on the parties. One consequence would probably be a higher ratio of spontaneous adhesion to arbitral awards, and a lesser amount of unenforced ones, with respect to awards issued following arbitral proceedings conducted the usual western way, by aseptic Geneva-based arbitrators.

##### 5. The OHADA arbitration law and regulations

The OHADA arbitration system shows some originality, and a strong favourable attitude towards a pan-African arbitration, perceived as a valuable resource for commercial development. Other Speakers at this Conference and many Authors have entered in the details; I will thus refrain from doing so.

I just want to point out at a few of its remarkable features:

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<sup>12</sup> See, e.g., T.B. GINSBURG, *supra*.



1) the existence of a single court of last instance for all OHADA jurisdictions in commercial matters, also providing last instance support to arbitration in all OHADA cases according to the OHADA Uniform Law on Arbitration.

2) the provision of a CCJA *exequatur* amounting to a sort of a pan-African *res iudicata* for the awards issued in arbitral proceedings conducted under the auspices of the CCJA (CCJA arbitration), as provided in articles 30 (especially at.30.2) and 31 of the CCJA arbitration rules.

3) The ability of the arbitral tribunal in a CCJA arbitration to issue *interim* and conservatory measures, to be given award status and immediate pan-African *exequatur* (articles 10.5 of the CCJA arbitration rules) also reinforces the CCJA arbitration as a valuable tool for transnational commercial operators in Africa.

4) The arbitrators' independence/neutrality issue I discussed above is not infringed by the provision of rules on the independence of arbitrators, especially in a CCJA arbitration.

The OHADA Arbitration Act provides in fact for independent, impartial arbitrators (article 6), but the CCJA Arbitration Rules just provide for "independent" ones (article 4.1): this does not impair the ability of the parties to appoint arbitrators having with them some kind of relation, or even the special relation mentioned in previous paragraph – which does not make the arbitrators "dependent" on the appointing parties (it is rather the other way around).

The need for "impartiality" is not directly provided for in the Arbitration Rules, and possible problems can be prevented anyway with the acknowledgement and acceptance of the parties, according to article 7.2 of the Rules: the parties should not have any problem in accepting each other's selection, if both party-appointed arbitrators are selected with a more traditional approach, as discussed above.

5) The solid CCJA supervising authority resembles for many reasons to the powers given to the Chinese CIETAC, proving a certain degree of compatibility in the fundamental philosophy of the ADR system in both China and Africa (see, e.g. art. 1 of the arbitration rules). The unified supervisory system where the CCJA is the appointer/confirmer of arbitrators, the reviewer of the draft award (articles 2.2. and 23 of the Arbitration Rules),

and is also the last instance judge on the validity of the award made a famous scholar<sup>13</sup> observe that a full mechanism of checks and balances has not been put in place.

I think that in fact this observation is well-founded; but this is not necessarily a problem. The concept of “supervision”, very well known in the Chinese public organizations, rather than the western one of “checks and balances”, is at the basis of this model<sup>14</sup>.

“Supervision” is less resource-consuming than “checks and balances”, and more cost/effective, as two separate instances (one administering the arbitration and the other providing the jurisdictional check) would cost twice as much and at this stage wouldn’t probably provide much better results. Besides, legal norms strictly applied by the municipal courts of many different African jurisdictions would not necessarily guarantee a more uniform and more fair response of the system to the needs of the relevant business communities.

In this particular African context the system has been devised and put in place in a way capable to provide reasonable efficiency, uniformity and specialization. “Supervision”, in contrast to the “checks and balances” model, already proved in China to be a successful developmental model for the organization of public powers (whether a transitional one or not, it remains to be seen).

6) The possibility for sovereign States to submit to the OHADA arbitration and final CCJA jurisdiction (article 2 of the OHADA Uniform Act) makes recourse to CCJA arbitration a possibility for economic operations involving governments, which are not uncommon in the developing world.

With the traditional DR approach of African nations, some of which shared by the Chinese legal tradition; with the seizure of jurisdiction on a large area of commercial law attributed to the OHADA laws; and with the common OHADA arbitral/jurisdictional space, *the arbitral tool provided by the OHADA will be a valuable tool for inter-African*

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<sup>13</sup> Philippe Fouchard, *Le système d'arbitrage de l'Ohada: le demmarrage*, in *Petites Affiches*, 39, 13.10.2004 n.205, 52-58, especially at paragraphs 14 and 15.

<sup>14</sup> See Ignazio CASTELLUCCI, *Rule of Law with Chinese Characteristics*, in *13 Annual Survey of International and Comparative Law* (2007) 35, Chapter II, ‘Socialist Law’, and the bibliography indicated therein.

*as well as Sino-African commerce; it will give a valuable contribution to the transformation of a large area in a dominion governed by widely recognized, still flexible, arbitrable principles of business law.*

It is an important development, consistent with Chinese and African contexts, favourable thus to the development of a commercial legal environment perceived as fair by business persons and entities hailing from both areas. These two areas of the world so far have suffered somehow the rigour of western legal principles, rules and ways of solving disputes, often perceived as inappropriate and basically unfair. It is reasonable to expect a higher compliance ratio of CCJA arbitral awards, with respect to the awards following more westernized proceedings.

### **Interesting features of transactional models in non-Western legal traditions**

6. The Chinese –and to a large extent Asian– approach to law:

Chinese legal tradition has always been far more flexible than the Western one with respect to the enforcement of the law in the private field, trying to provide protection for the existing relations between the parties rather than protecting the singular position and expectation of one party against another – according to the millennia-old Chinese communitarian views and (Confucian and, later, socialist) harmony-seeking or harmony re-building approach to transactions and human relations in general. Modern Chinese law, often state-of-the-art legislation, created mixing Chinese elements with elements borrowed in the most advanced Western legal tradition (from common law, civil law, even Roman Law experiences), has changed only partially the basic communitarian nature of the Chinese values. The same can be said about the other Asian countries.

In the centuries there has been a wide circulation of inter-Asian legal models (Hindu and Buddhist legal models circulating in India and South East Asia, Chinese models circulating in Korea, Japan, Vietnam, Singapore and other Malay territories), and still legal thought in those countries is indebted to Asian traditions and Asian values.

Moreover, Chinese communities overseas and their dealings amongst them and with the Mainland have probably kept some specific customs and behaviours, the substantive rules of which would be very interesting to penetrate and analyse thoroughly –as it also has been the case for centuries, and to some extent still it is the case, with the Hindu communities of South-East Asia and Eastern Africa. Many inter-Asian transactions can be done the Asian way.

## 7. China and Africa

The modern Chinese general legal framework has developed on a primeval basis of traditional values, with a subsequent stratification of other values based on the socialist background, with the importance of public laws, administrative power, political rule, personal relations.

The African environment often reveals comparable features.

African customary laws are also based, like the Chinese ones, on the importance of the communitarian element, and society is regulated by strong societal elements such as the political, administrative and personal ones. Traditional DR mechanisms are also managed by respected persons of the community to which the parties belong, and are aimed at restoring harmony in said community. In large areas of Africa legal transactions, including relevant patrimonial ones, marriages etc., are often concluded at the community level; the approach to dispute resolution is not so different from the traditional Chinese one. These similarities make the recourse to traditional legal tools likely to be to some extent successfully brought into modern ADR activities for Sino-African economic relations.

On a more technical point of view surely Chinese contractual models, based on wider formulations, more general terms, as developed within the socialist and civil law traditions, are more suitable for large areas of Africa than the very detailed, strict and technical common law ways and forms of contracting, to regulate contractual relations between Chinese and most African parties – especially those from countries affected by the civil law tradition.

A very sophisticated and detailed drafting, indeed, is often inappropriate for the developing countries' context; it can sometimes provoke discomfort, mistrust and at least a good measure of lengthy and sometimes useless negotiations.

Moreover, an excess of legal provisions in a contract in a Western or westernised environment might more often make litigation an attractive option for at least one of the parties; more detailed provisions might indeed bring about more self-reliant, rigid, uncompromising positions for at least one of the parties, whenever a dispute arises.

In some cases of breach of contract, for instance, a party to a contract might have a legal right to have the contract terminated and its expected earning paid without even starting the actual economic operation agreed upon; this would very likely lead to litigation and to the end of the agreed economic transaction. This legalistic approach protects the individual interest of the specific party willing to litigate, but surely does not seem in the best interest of the economic relations between developing countries, on a policy scale.

*Wide, more open contractual terms, along with appropriate trouble-solving and ADR mechanisms based on the "non-western" approach described above create a favourable environment, encourage and to some extent force the parties to cooperate and maintain a working business relationship, a litigation-averting approach, and to make extensive recourse to mutual understanding and operational good faith in the course of business (a legal requirement anyway in all civil law jurisdictions, traditionally almost unknown in the common law tradition), for the sake of mutual benefit.*

**8.** Chinese ventures with Chinese overseas communities, and/or in Asia and Africa are already conducted to some extent without making recourse to the common law standardised global contractual tools, or with a lesser amount of recourse to them.

These two large and important areas of the world could develop specific legal models for their economic interactions, as both share the civil law heritage as at least a part of their respective legal systems. This makes Sino-African legal dialogue easier, by making recourse to legal concepts rules and terminology all parties are used to work with.

Civil law and in some cases even the very Roman law might provide the grammar to legal activities, the basic principles and many of the operational rules beyond those expressly negotiated by the parties. Economic actors of both areas are used to the civil law abstract and general drafting style of both rules and contractual agreements.

For instance, they are also used to deal with, and be bound by, the standards of contractual good faith and fair dealing (now also part of global tools such as CISG and the UNIDROIT principles), and of those specifications of it developed in their national laws or in scholarly and case law out of general principles. An example of national legislative rule developed by the Chinese lawmaker out of the general principles of world civil law could be article 92 of the contract law of China, stipulating an obligation of post-contract good faith which the European civil law tradition has developed through decades of scholarly research and case law. A feature of Chinese law very well exportable in many contexts where a high level of cooperation is required of the parties for a successful economic development, which can be easily accommodated in any civil-law-framed legal environment. The vast amounts of case law on contractual good faith in all civil law jurisdictions could amount to another valuable resource; good faith is a general clause capable of allowing usages and reasonable expectations of the parties to shape other legal principles to suit the needs of the case.

It is not impossible to imagine the recourse made to general principles of the civil law tradition (with their load of values shared by both communities) in ADR activities involving parties from China and Africa. This implies operational flexibility and, especially, *a higher level of need to cooperate* with respect to common-law-style-drafted contracts, especially having in mind the different approach to ADR described above.

African, Asian, Islamic traditional legal models are different from ultra-liberal models, less tight on weaker parties; they are maybe better-suited for a development more equal, for fostering reciprocal trust, other than being more user-friendly for the parties of south-south transactions.

It cannot be overlooked the fact that a sizable part of Africa has recently reformed its commercial laws and institutions through the creation of the OHADA, which produces

legislation, so far strongly affected by French legal models and language, making legal interaction easier for those using a civil law approach to business law.

**9.** Other important legal issues for this Sino-African legal discourse would be related for instance to the choice applicable law in transnational economic transactions, which in many cases might not be expressly made by the parties. Possible responses to tackle this situation would include the comparison/coordination of legal principles internationally recognized (as it happened with the Iran-US Tribunal, or making recourse to international legal tools such as the UNIDROIT Principles) and of those somehow related to the specific parties and relevant types of transactions.

Lawyers dealing with Sino-African affairs could thus have to learn to work, in a comparative, eclectic approach, with international/transnational law and tools such as the UNIDROIT Principles. And in the near future, maybe, also with the soon-to-be-produced OHADA principles of contract law, which ideally should be more context-specific and take African traditions and customs into a wider consideration.

**10.** A role for Islamic law

The Islamic world features very rich commercial traditions and a sophisticated commercial law; still, it averts the ultra-liberal mentality, as also Jewish law, Roman law, Canon law, medieval *ius commune* used to. It is little known or often forgotten, for instance, that the aversion towards interest transactions used to be shared by all those Euro-mediterranean and middle-eastern (legal) cultures<sup>15</sup>, all based on a less individualist vision of society and economy, that allows individual entrepreneurship, trade and

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<sup>15</sup> The underlying ideas have been well explained, especially in the 15<sup>th</sup>-16<sup>th</sup> century by Spanish and Portuguese Jesuits and other Christian theologians and jurists, also based on non-religious philosophic works such as the one of Aristotle, according to which it was against the nature to have money produce money by itself; and also recalling Roman law, for which the *mutuum* was basically an interest-free transaction, unless a special additional stipulation –*pactum de usura*– was formalized in a very clear way.

commerce but refuses the hyper-capitalist socio-economic and legal models, more related to the common law world.

Obviously finance is a fundamental feature of modern economy and it is to a good extent a necessary tool for development; but everybody can see that an excessive burden of debts and/or imposition of interests can lead to disastrous consequences for single persons indebted with their banks, as well as for developing countries which cannot really develop because of the unbearable burden of their foreign debt – which in many cases would require them to pay yearly interests higher in amount than their GDP.

In Asia, Islamic banking services provided by *Shari'a*-complying financial institutions have already been available for decades (Malaysia, Indonesia), providing finance served through means different from pure and brutal interest-charging lending; and they do so with growing importance and refinement of financial instruments, as other Islamic banking institutions do in the Gulf area, in the Middle East and in the very Europe.

Sino-Islamic legal instruments can be developed for Sino-Muslim transactions, as well as for multi-lateral Sino-Muslim-African ones –including African nations like Mauritania and Sudan, or Asian ones such as Indonesia, Malaysia, Brunei Darussalam, Pakistan. Moreover, the use of Islamic finance instruments and contract law is not unimaginable for business transactions between China and even non-Muslim African entities or states, or for particular segments of complex south-south multi-national operations. Islamic finance instruments include, after all, very sophisticated ones, and are all based on the values of cooperation and risk-sharing between the parties of the financial relation – which fits well in the scheme of south-south transnational economic relations based on the principle of mutual benefit.

This seems possible considering the shared values of both Chinese and Islamic traditions about contractual good faith, aversion for inequality and abuse of position and rights; a shared vision which is in some respects fundamentally similar –at least historically, if often forgotten– to the Roman/civil law one (on the developments of which the Chinese legal system is also at least partially based).



11. Finally, recourse to customary law tools cannot be ruled out, e.g. in cases of energy, mining or other resources international investment involving the interests of native rural populations, for the dealing with which specific legal tools can be devised or developed out of customary laws – e.g. as it has already been done in Indonesia.

African customary laws are transnational by nature<sup>16</sup>, as well as the African traditional approach to dispute resolution/dissolution; customary law tools could thus prove useful and apply on a wider-than-country scale, whenever the relevant economic operation affects more than one of the formal jurisdictions of African countries. Some segments of the legal architecture of a complex economic operation could be effectively regulated by going directly to the bottom, unfiltered by different state structures and formal legal systems, to deal directly with local communities in a fair and productive way, according to local customary law mechanisms.

12. Legal pluralism<sup>17</sup> is something both cultures know well; persons belonging to both professional and business communities will thus have some level of mutual understanding, when dealing with transnational economy complex issues involving their respective states, and the multiple levels of regulation, formal (e.g. laws, regulation, administrative practices) or informal (e.g. politics, personal relations), related to these pluralist environments – phenomena that they instinctively know very well from their domestic experiences.

Legal pluralism, transnational soft legal instruments, world, regional and local statutory and customary laws and also other social phenomena affecting the legal environment should definitely enter the picture of legal research with a view to the development of Sino-African commercial relations.

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<sup>16</sup> See, e.g., Salvatore MANCUSO, *Trends on the Harmonization of Contract Law in Africa*, in *Annual Survey of International and Comparative Law*, 13 (2007), 157, at 173-176.

<sup>17</sup> On legal pluralism, e.g., see Guadagni, M (1998), 'Legal Pluralism', in Newman, P (ed.)(1998), *The New Palgrave Dictionary of Economics and the Law* 542; Griffiths, J(1986), 'What is Legal Pluralism?', in 24 *Journal of Legal Pluralism & Unofficial Law* 1; Merry, SE (1988), 'Legal Pluralism', 22 *Law & Society Review* 869

### Financial institutions and instruments

**13.** International finance is also diversifying its world centers, institutions and operational macro-models. Islamic and more recently Chinese finance are becoming important on the world scene.

This will at least offer world investors the alternative choices and/or possibilities to combine financial instruments, with their respective specific features, advantages and disadvantages; merchants as well as governments will be able to choose amongst:

1) Western-style institutions (micro- and macro- finance for private persons and entities, sovereign borrowing, investment operations on securities), provided by both private and public international banks and financial institutions, ensuring efficient, cost-effective finance – if demanding an inflexible discipline from the borrower

2) Western-developed “policy” financial institutions, such as WB, IFC, AfDB, AsDB. Providing cheaper and more flexible funding, at some costs in terms of freedom of use of capitals and sometimes in terms of sovereignty of the borrowing State.

3) Islamic finance (all kind of *shari’a*-compatible financial tools), providing the only acceptable financial activity for many Muslim throughout the world (a sizable part of the world’s population including some big developing countries such as Indonesia, Pakistan, Nigeria, Egypt, Sudan) and anyway a resource, competing with Western ones, offering both material and spiritual rewards to those willing to use them.

4) An incepting presence of Chinese finance, so far mostly consisting of sovereign borrowing of States, especially in Africa, with finance provided by Chinese public entities or State-owned “policy banks” such as China Development Bank or China Eximbank. This financial institutions provide not only Chinese firms but also, sometimes, the States receiving Chinese investments with finance for their much-needed economic development, without interfering with those States’ sovereignty and/or demanding them to undergo reforms etc. – an attitude perceived as fair from the borrowing side<sup>18</sup>.

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<sup>18</sup> Many in western circles rise an eyebrow to this Chinese approach to financing development in developing countries, due to the fact that support is often provided to Countries with poor human rights records. Besides, the lending provided by World Bank, IFC *et similia* to African countries,

This Chinese appearance on the world financial scene is often complemented by additional policy tools such as the providing of generous technical aid (often including general support such as in the fields of health and education), the establishment of political and cultural relations, debt reductions or cancellations, all at State-State level.

China is probably promoting a model of development different from the one based on the development of entirely private economies, historically proposed by the West; it is promoting instead local adaptations of the Chinese model of a socialist market economy in construction; or, anyway, a model closer to the Chinese concept than to the WB/IFC one of developing country – surely promoting, for instance, the active intervention of governments in their respective states' economies.

**14.** Several legal issues, thus, arise in relation to these important developments.

In addition to the public international law, and to the law of international transactions involving at least one sovereign party, very important will be the development of comparable administrative legal tools –at least at the level of basic concepts or of a common set of terms of reference– to enable the parties to dialogue with each other's governments, governmental agencies and so on. Chinese/socialist and Western (mostly civil law) administrative law concepts will become relevant at the legal core of these developments, even for African countries and especially for present OHADA members.

One other crucial legal feature of these economic activities would then be, again, the ADR dimension: consultations, first of all, and possible arbitration in the event will probably be common features of these economic activities. A non-western approach would probably be particularly suitable for ADR in this area of international economic transactions, using the principles analysed above (flexibility of principles, “maintenance” of relation, non-conflictive attitude towards DR, non-neutral arbitrators/mediators) to provide flexibility in finding the appropriate decision; putting the dispute of the

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conditioned on legal reforms etc., has not proved to foster development as devised. It is also a fact that new infrastructure and industrial realities are appearing in Africa due to the Chinese cooperation. An objective assessment of this issue will probably be made by the historians in the future, now being too politicised to be serenely evaluated, especially by lawyers, in all its facets.

immediate parties in a wider perspective and protecting the wider interests of the countries involved in addition to the specific interest of the disputing parties.

Substantially, policy and macro-economic issues would enter in the legal picture, which applied *cum grano salis* is not necessarily a bad thing in a developing world context.

## **Conclusions**

1 - “World laws rather than global law”, could be the core concept of this paper, for a complex world economy, rather than for a global one –or even for “glocal” one(s), as it is now fashionable to say not without some hypocrisy.

2 - All mentioned inter- or trans- national tools could also be used in some coordination with local, state or regional principles of law, such as the Chinese General Principles of Civil Law of 1986, or with other general principles of law related to the area of origin of the parties involved, or having a connection with the transaction –principles which could well be, in some cases, the principles of Roman, civil or Islamic law.

3 - Moreover, national or regional legal systems and even systems of rules such as local, regional, transnational customary laws could become relevant and would need to be considered in many cases. After all, even the Unidroit principles do restate widely recognized principles of transnational contract law, that can be identified with the results of centuries of merchant practices, well before codifications; i.e., to some relevant extent, with the world’s merchants’ community’s transnational customary law.

4 - The development of ADR, and of an ADR culture different from the western one, will probably be a crucial factor for the development of such a complex legal environment.

5 - The dynamics of the public intervention in the economy on both sides, as well as the existence of the OHADA, COMESA, ASEAN, MERCOSUR institutional laws and regulations should also be researched, as they are likely to provide additional legal models, or to affect the existing ones, with a view to the economic activities of China with the countries pertaining to the developing world and to the mentioned organisations.

Legal models and tools currently in use, mostly developed within the common law tradition, will still be indispensable, as being well-known worldwide, predictable, often well-working etc.; besides, the traditional dichotomy *civil law v. common law* is losing its significance in the very Western world, due to the current developments of both legal traditions along converging paths.

You don't throw the kid away along with the bath water... The contents of the common-law-based global legal toolbox can still be helpful for all, even in south-south transactions, being used as they have always been in the last decades, or combined with the different new tools and approach I suggested in this presentation; the complexity of the legal environment always has its price, in terms of both economic costs and legal security. In a large number of situations the simplicity of the "global" approach might still provide cost-effective solutions, preferable to more "pluralist" ones.

The idea I want to convey today is that developing the diversity in available legal options is possible, and good indeed, with a view to a diversified economic development; a development closer to the needs and the feelings of the different peoples of the world, for a more distributed, fair and equal economic growth of developing countries.