

World Laws vs. Global Law: Legal Models for the World Economy
A non-Western Approach to Law and ADR
as a Resource for South-South, South-East Business Relations

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Introduction

This paper is intended as a contribution for the development and use of legal models for the world economy; models 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,¹ due to their prestige, imitation and sometimes imposition or quasi-imposition by Western financial institutions, such as the World Bank – this institution actually theorising the inherent superiority of the common law model with respect to any other legal tradition² – and the IFC, or western-inspired ones such as 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the West as the central hub, and the rest of the world as the spikes, entertaining relations with the former – being superseded by a reticular one, as the various spikes started speaking and making connections directly to one another.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 or east-south transactions (e.g. for China–Africa, China–Middle East, China–ASEAN and China–Latin American relations), whether taken alone or in combination with Western legal models, and others such as those hailing from Russian and Eastern Europe legal traditions.

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.

¹ See L.M.FRIEDMAN, *One world: notes on the emerging legal order*, in M.LIKOSKY (ed.) *Transnational Legal Process – Globalisation and Power Disparities*, London 2002, 23.

² See for instance the World Bank’s yearly reports *Doing Business*, still in 2007 affirming that. Strong contestations of course have followed from the civil law world, such as the Henri Capitant collection of writings *À propos des rapports Doing Business de la Banque Mondiale* (2006).

- 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 developing economies. The main focus of this paper is on China's relations with other developing countries, especially with African ones; however, many discourses made and issues mentioned might well be adaptable to other south-south, or east-south, international economic relations. 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 the law and 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 through 'communally-based systems of managing conflict'.³

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

³ In the words of Laurence BOULLE, *Mediation: Principles, Process, Practice*, Butterworths, Sydney, 1996, at 32

nobleman, the Imperial servant, the party cadre, etc.), ‘high-ranking elders acting as mediators who perform the binary role of conflict solver and public peacekeeper, who wield personal authority and enforce social sanctions.’⁴

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 transactions⁵, who normally played a role in the original negotiations and used to intervene as mediators/conciliators whenever a dispute arose between the immediate parties⁶.

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 1960⁷, and maintained in the Eritrean family law too, after independence of Eritrea from Ethiopia⁸. The name given by the Ethiopian civil code of 1960 to these characters is precisely the one of “family arbitrators”⁹, 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 were allowed to do according to the Ethiopian

⁴ GOH Bee Chen, *Law without Lawyers, Justice without Courts*, Ashgate, Aldershot, 2002, at 3.

⁵ They are traditionally indicated in many ways in the Chinese sources, including the terms *pang ren*, *zhengzhi*, *bao ren*, *zhongren*.

⁶ 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 qiye 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.

⁷ 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.

⁸ Eritrean rules of family law have been in force in the liberated areas of Eritrea since before independence from Ethiopia, reached in 1991. With Proclamation n. 2 of 1991 Eritrean rules have been incorporated in the previously in force Ethiopian Codes; the Ethiopian Civil Code of 1960 having been amended to constitute the Transitional Civil Code of Eritrea. See Ignazio CASTELLUCCI, *Eclectic Legal Reforms in Africa and the Challenges of Reality: the Case of Eritrean Family Law*, in C.C. Nweze (ed.), *Legal Questions of International and Comparative Law: Essays in Honour of Christian Nwachukwu Okeke*, Vandeplass, Lake Mary, FL, 2008.

⁹ See articles 666 and 668 of the Ethiopian Civil Code.

civil code, and are still allowed to do according to the Eritrean Transitional family law is a true arbitration according to customary principles, with the final decision being subject to very limited instances of review by the courts¹⁰. A major reform of family law has been enacted in Ethiopia in 2000; the latitude of powers entrusted to the family arbitrators has been somehow reduced, but still the arbitrators are a fundamental part of the system, allowing traditional ways and values to permeate the system.¹¹

Also in other areas of Africa, like Nigeria, traditional arbitration, with a prominent role of elderly and family members acting as the arbitrators, is recognised by the law.¹²

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 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 Ethiopia¹³ and China¹⁴; the mentioned features of those models, besides, are also identifiable in the socialist tradition of arbitration and other forms of non-conflictive dispute resolution amongst productive and economic units.

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.

¹⁰ DAVID, *Le droit de la famille*; CASTELLUCCI, *Eclectic Legal Reforms*; supra.

¹¹ See Proclamation no. 213 of 4 July 2000, articles 119-122. The arbitrators (not named “family arbitrators” anymore) are now appointed by the spouses rather than having to be the witnesses to the marriage; they solve patrimonial disputes stemming from divorce but cannot pronounce the divorce; their activity is subject to the Court’s supervision and their award is subject to appeal before the court.

¹² For Nigeria see, amongst the many Supreme Court’s decisions, *Agu v Ikewibe*, (1991) 4 SCNJ 56. In literature, see Elias, *The Nature of African Customary Law*, 1956, Manchester University Press; more recently, Abdulmumini A. OBA, *Juju Oaths in Customary Law Arbitration and Their Legal Validity in Nigerian Courts*, in *Journal of African Law*, 52 (2008), 1, 139.

¹³ The family arbitrators, having the power of sanctioning a divorce and solving the related patrimonial issues are an obvious example.

¹⁴ 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.

Since a dispute in a traditional environment is everybody's matter, so to speak, everybody (i.e. the parties' respective communities) will have a say or a way in its management and settlement, through the relevant 'communally-based systems of managing conflict(s)'.¹⁵ The very immediate parties feel themselves as being parts of a community at least as much as they feel they are individuals¹⁶, "naturally" accepting thus some degree of community interference, and considering the authoritative facilitators as "natural judges"¹⁷ or, better, of "natural helpers" in solving the dispute – be they respected Chinese guarantor or the authoritative local strongman having facilitated the business transaction now under dispute; or be they the senior relatives having witnessed the marriage and now representing the two enlarged families' interests in solving the dispute between two Eritrean spouses.

2. In China, most of Asia and most of Africa mediation, compromise and re-negotiation or settlement are traditionally preferred to litigation before the courts and enforcement of judgments through the legal circuit, considered as the worst option to solve a dispute – court proceedings normally implying that the original relation is over. This is demonstrated by the importance recognized to mediation and ADR in legal systems such as those of China, India, South Africa – and also in countries such as Australia, with respect to aboriginal populations and native title disputes – through legal rules framing and regulating ADR mechanisms, both in general and in specific court-annexed variants.

Asian, African traditional DR approach and mechanisms, manned by respected persons of the community, aimed at restoring harmony in the community, could prove mutually compatible –and very different in fundamental philosophy from western-style litigation. This traditional approach to dispute resolution, indeed, can successfully be brought into modern ADR tools, including mediation and arbitration.

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 speak¹⁸.

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

¹⁵ BOULLE, *supra*, at 32.

¹⁶ For the African reality *see* Rodolfo SACCO, Marco GUADAGNI, Roberta ALUFFI BECK-PECCOZ, Luca CASTELLANI, *Il diritto africano*, Turin, 1995, at 80-88.

¹⁷ M.TIMOTEO, *supra* at 64.

¹⁸ For an overview of the Asian approach to arbitration and the related cross-cultural issues, *see* P.J. Mc CONNAUGHAY, *Rethinking the Role of Law and Contracts in East-West Commercial Relationships*, chapter 12, p. 475 and ff. ones, in P.J. Mc CONNAUGHAY - T.B.GINSBURG (eds.), *International Commercial Arbitration in Asia*, 2nd ed., Jurisnet, 2006.

allocation of obligations and rights done at the beginning, once and forever – with litigation as the inevitable outcome for any situation of non-compliance. “Maintenance” of a relation is the key for traditional non-western mediation/arbitration, whereas in the Western tradition, especially the common law one, ADR means are quite often mere substitute of court litigation after a relation breakdown – 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 Asia and in Africa.

Rules, especially black-letter rules, if you read them, tend to be similar or even the same, nowadays, everywhere. The difference in outcomes in many instances hails precisely from what do you do with those rules, how do you use them – rather than in their textual expression. 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 enforcement 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 policy, usages and plurality of laws. In much of Asia and 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: a different perspective on the “independence” 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* in some sense from the dispute-solvers, who mustn’t necessarily be impartial or neutral.

An important guarantee for the parties in modern Western environments seems to be given by the required independence of arbitrators from their appointing party. However, in different contexts like those mentioned in this paper the guarantee for a satisfactory outcome of the proceedings is given, also, by *the authority or influence of the arbitrator on the appointing party* – 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 Asian 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. This approach is transforming maybe arbitration into a fuzzier product, also akin to mediation and/or conciliation but still characterized by some of the typical adversary approach – still featuring a third arbitrator, rules and principles for procedure and merits, an adjudicative role discharged by the dispute-solvers. It is the so-called “med/arb” processes, with mediation and conciliation activities involving disclosure of facts to the conciliators followed by arbitration, with the same conciliators acting as the tribunal¹⁹ – of course, a reverse process of adj/med or arb/med is also possible, as it is in the common experience of every lawyer: quite often litigating parties only need to have some issues decided by a third party to be able to find a general settlement immediately after.

In this attitude, non-western arbitrators often engage in activities, completely acceptable according to the Asian values and traditions, that western ones would be horrified of thinking, or at least consider with a clear sense of unease – such as the so-called back-to-back consultations.²⁰

The existence of an Asian archetype behind these processes is also demonstrated by the importance attached to court-annexed arbitration and mediation processes, with significant “med/adj” mechanisms, so to speak, in many Asian jurisdictions, such as the ones of China,²¹ South Korea²² and India.²³

Legal and behavioural models for economic transactions and arbitration can be researched, unearthed, developed. They are based on Asian/African traditional basic values implying, in short, the flexibilisation of subjective rights and stances with a view to the preservation of relations, rather than to a win-or-lose, litigation-oriented, relation-destroying approach to conflicts.

The mentioned approach to arbitration is instrumental to that effect. Appropriate legal models and rules operated within this kind of arbitration 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

¹⁹ A practice also allowed by Asian laws and arbitral regulations, if normally subject to an express mandate or approval of the parties. See M.PRYLES-M. J. MOSER, Introduction to the volume they edited *The Asian Leading Arbitrators' Guide to International Arbitration*, JurisNet Publishing, 2007, at 13-14; in the same volume also see WANG WENYING, *The Role of Conciliation in Resolving Disputes: a PRC Perspective*, at 501, and S.A.HARPOLE, *The Role of the Third Party Neutral when Arbitration and Conciliation Procedures are Combined: a Comparative Survey of Asian Jurisdictions*, at 525.

²⁰ See, e.g., P.J.McCONNAUGHAY, *supra*.

²¹ See WEI Ding, *The Reform of Grass Roots Tribunals and the Application of the Law in Rural China*, in *Perspectives Chinoises*, 61 (September-October 2005).

²² See Kwang-Taeck WOO, *Court-Annexed Mediation in Korea*, in T.E.Carbonneau-J.A.Jaeggi, *Handbook on International Arbitration*, Juris Publishing, 2006, of the *American Arbitration Association Handbooks series*, at 253 and ff. ones.

²³ See, e.g., Niranjan J. BHATT, *Court Annexed Mediation*; paper presented at the fourth Indo-US legal forum meeting at the US Supreme Court on Oct. 15, 2002.

respect to awards issued following arbitral proceedings conducted the usual western way, by distant, aseptic Geneva-based arbitrators.

It wouldn't take much to implement such an ADR model within a global framework of enforceability, either: it would probably suffice to obtain the appropriate reciprocal parties' written consent to the appointment of the tribunal's members, making successive challenges or applications to set the award aside an inadmissible case of *venire contra factum proprium*, to produce decisions which are enforceable through the usual mechanism of national laws and international instruments such as the New York Convention or the OHADA arbitration act.

It must be noted that also in the western legal thought the need for impartiality of arbitrators hasn't always been a requirement. In continental developments during the XVIII and XIX century, for instance, many expressed the opinion that a father could arbitrate for a son or even vice versa, especially in the presence of the counterparts' consent.²⁴ A fundamental work of modern civil law such as *Les lois civiles dans leur ordre naturel* by J.Domat also stresses the contractual nature of arbitration²⁵ and does not indicate any condition related to independence from the parties for being appointed as an arbitrator – whose duties can be discharged by anyone, except women, minors, incapacitated persons.²⁶

In 1942, the Italian code of civil procedure introduced an option between two kinds of arbitration; both feature the entrusting of a dispute to party-appointed arbitrators and a final decision after a process. One can be considered more judicial, or quasi-judicial in nature (*arbitrato rituale*), whereas the other amounts to basically a contractual mechanism (*arbitrato irrituale*),²⁷ working in many respects according to a med-arb or arb-med scheme.²⁸ The 2006 reform of the Italian civil procedure code, the contractual arbitration still features less strict conditions for discharging the role of an arbitrator,

²⁴ G.ALPA, Chapter *Arbitrati*, in *La parte generale del diritto civile*, vol.2, *Il diritto soggettivo*, in Rodolfo SACCO (ed.) *Trattato di diritto civile*, UTET, Torino, 2001, at 228; this Author stresses the fundamentally contractual nature of arbitration..

²⁵ From the introduction of *Livre I, Titre XIV, Des Compromis*: « *L'autorité des sentences arbitrales a son fondement dans la volonté de ceux qui ont nommé les arbitres. Car c'est cette volonté qui engage ceux qui compromettent à exécuter ce qui sera arbitré par les personnes qu'ils ont choisis pur être leur juges* ».

²⁶ *ID.*, same *titre*, section 2, subsection VII.

²⁷ The different nature brings about a different level of enforceability, similar to a court decision in the former case, more similar to a contract in the latter. Moreover, the applicability of the New York convention to decisions of the latter kind is very debated. One should go through the *arbitrato rituale*, to secure an internationally enforceable decision; however, full disclosure of the background of party-appointed arbitrators and full written acceptance from the parties would still enable the approach suggested to be implemented.

²⁸ R.M.MORRESI, *Should We Revisit and Revise the Prevalent U.S. View of Med-Arb (and Arb-Med) as ADR Stepchildren in Light of Their Extensive Use in China, Italy, and Other European Countries?*, paper presented at the ABA–Pacific Currents International Med-Arb Program in Seattle on Apr. 5, 2008.

basically following Domat's model²⁹. In both cases, however, the approach of Italian lawyers towards arbitration is generally speaking that of recognising the potential of arbitration as a way to find solutions bearable to all the parties involves, rather than using arbitration as a mere substitute for court litigation.³⁰

Even in the US tradition of arbitration it has been considered common and acceptable until very recently that a party-appointed arbitrator be not neutral.³¹

Only in the second half of the XX century the ideal of absolute neutrality, impartiality, independence of arbitrators became so important in the Western world and global commerce, carrying with it the sensitive character of the issue in modern international arbitration – and the related flourishing of detailed rules and ethical guidelines.

The global idea seems to be that arbitration is a convenient substitute for litigation: a process to litigate alternative to Court, rather than an alternative way to solve a dispute.

One could even consider that a very developed global economy mandates, perhaps, that kind of approach. Precisely for this reason, however, the developing world would find more appropriate and be more comfortable with a “less modern”, different approach, so to speak; an approach that used to belong to the western world too, until recently.

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. I just want to point out at a few of its remarkable features:³²

1) the existence of a single court of last instance (Common Court of Justice and Arbitration – CCJA) 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; a much-needed development would be of course the creation of several offices, sections or panels of this court, now seated in Abidjan, in OHADA countries other than Ivory Coast, to bring the OHADA justice reasonably close to a wider number of potential its users.

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

²⁹ Italian c.p.c., article 808-ter.

³⁰ My opinion, of course, based on my experiences within the Italian legal community; also see Alpa, supra, and Morresi, supra.

³¹ The joint AAA/ABA Code of Ethics of 1977 included a presumption of non-neutrality of party-appointed arbitrators. Only in 2004 the presumption has been reversed with the revised Code of Ethics Canon IX.A. However, a non-neutral stance of party-appointed arbitrators is still permitted, if disclosed and agreed upon by the parties; these are what the AAA Code calls “Canon X arbitrators”, permitted to discharge their duties subject to the specific ethical rules stipulated in the tenth canon of the Code. These ethical rules permit them to be “predisposed” towards the appointing party, and to have communications with that party, subject to an obligation of “good faith, integrity and fairness”.

³² A more complete review of the Ohada arbitration's features can be found in N.PILKINGTON – S.THOUVENOT, *Les innovations de l'Ohada en matière d'arbitrage*, in *Cahiers de droit de l'entreprise*, supplement n. 5 to *La Semaine Juridique* n. 44 of 28 October 2004, p. 28 ff. ones.

(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), even should they be not "impartial".

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: as discussed above, there shouldn't be any problem of legality of process and 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.

The success of such an arbitration and the fairness/acceptability of results would of course rely very much on the authority enjoyed by the arbitrators on the parties as well as on their integrity and their sense of the importance of their function, encouraging them to work in the parties' best interest rather than acting as mere advocates of their respective appointing parties within the tribunal.

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 scholar³³ 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 model³⁴.

"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

³³ 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.

³⁴ 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.

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 fairer 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 as well as Sino-African commerce; it will give a valuable contribution to the transformation of a large area of the African continent 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 rigours of western legal principles, rules and ways of solving disputes, often perceived as inappropriate and basically unfair. It is reasonable to expect a higher ratio of compliance to CCJA arbitral awards, with respect to the awards following more westernized proceedings.

Other interesting features of legal traditions and transactional models in China and other non-Western legal traditions

6. On law

Chinese legal tradition has always been far more flexible than the Western one with respect to the enforcement of the law, 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 millennia-old Chinese communitarian views and a (Confucian and, later, socialist) harmony-seeking or harmony re-building approach to human relations in general.

Modern China’s general legal framework has developed in the XX Century on a primeval basis of traditional, communitarian values and on a subsequent stratification of values hailing from its socialist experience, developing a system featuring the foremost importance of public law, administrative power, political rule, personal relations.

Some part of this discourse may also be applied, *mutatis mutandis* of course, to Russia and former-USSR jurisdictions, due to the fact they share with China the socialist experience as well as the civil law general frame and technical language of the law.

On a different point of view it could also apply to most Asian countries, sharing or not with China the importance of the Confucian tradition.

Present-times' Chinese legal system is still in transition, but surely its most recent layer, often state-of-the-art legislation created by mixing Chinese elements with elements borrowed in the most advanced Western legal traditions (common law, civil law, even Roman Law), has changed only partially the basic communitarian nature of the Chinese legal values. Most other Asian and African jurisdictions and environments often reveal comparable features; this could make Asian-African legal dialogue easier, by making recourse to a legal mentality, concepts rules and terminology all parties are used to.

In fact, Chinese communities overseas and their dealings amongst them and with the Mainland have kept some of their ancestral specific customs, behaviours and DR mechanisms,³⁵ the rules of which would be very interesting to penetrate and analyse thoroughly.

In fact, there has been a wide circulation throughout the centuries of inter-Asian legal models (Hindu and Buddhist legal models in India and South East Asia, Chinese models circulating in Korea, Japan, Vietnam, Singapore and other Malay territories), and still nowadays legal thought in those countries is heavily indebted to Asian traditions and Asian values. Buddhist and Hindu business communities in India and Southeast Asia still use legal tools stemming from the Hindu legal tradition, such as the *Damdupat* loan transactions still recognized by the Indian Courts³⁶ or the *Chettiar* moneylending practices amongst the Hindus in Malaysia.³⁷

Chinese ventures in developing countries, with Chinese overseas communities, and/or in Asia and Africa are already conducted to some extent without making recourse or with a reduced recourse to the common law standardised global contractual tools.

Many inter-Asian transactions can be done and are in fact done the Asian way.

7. Drafting of contracts

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

³⁵ For the Chinese communities in Malaysia and their enduring loyalty to traditional Chinese ways of solving disputes, see GOH Bee Chen, *Law Without Lawyers, Justice Without Courts*, supra, at 92 and ff. ones, especially at 105-106.

³⁶ See MULLA, *Hindu Law* (1912), twentieth edition by S.A.DESSAI, New Delhi, 2007, p. 941 and ff. ones;

³⁷ See, e.g., S.S.AHMAD, *Malaysian Legal System*, Kuala Lumpur, Singapore, 1999, at 41-42.

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, sometimes useless negotiations; especially considering that trying to foresee everything can be very difficult in environments characterised by levels of unpredictability higher, or much higher, than those of developed countries.

An excess of legal provisions in a contract might more often make litigation an attractive option for at least one of the parties; very detailed provisions may 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 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 to be in the best interest of the economic relations between developing countries, on a policy scale.

Moreover, the use of contractual models originated in a different legal tradition, e.g. the use of common-law-originated standard clauses in a civil law environment, could in many cases lead to uncertainty and bring about disputes on interpretation and even on the very validity of specific clauses, or of the entire contract.³⁸

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, almost a bizarre animal the common law tradition), for the sake of mutual benefit.

8. Other important legal issues for this legal discourse are related to the choice of applicable law in transnational economic transactions; a choice which in many cases may include the comparison/coordination (different sets) of legal principles internationally recognized (examples of which could be those used before the Iran-US Tribunal or the UNIDROIT Principles) with those somehow related to the specific parties (national, regional, customary laws and principles) and relevant types of transactions. Creative solutions in international arbitration are not uncommon, pursuing fairness to the parties and justice in dispute solution, including application of more than one legal system or set of rules, *depeçage* of a contract in different segments with different applicable law,

³⁸ See, for instance, Giorgio DE NOVA, *Il contratto alieno*, Torino, 2008, p.47 and ff. ones. This Author carries out a very interesting analysis on several clauses originated in a common law environment and very common in the transactions of the global economy – like the “merger clause”, the “no waiver” clause, the clauses limiting one of the parties' liability or the available remedies against it, and so on – and their possible (dys-)functionality in a contract governed by a national law of the continental tradition.

extraction of common principles or of the *tronc commun* of several relevant laws for the purpose of deciding, application of trade usages, and so on.

In this attitude, the civil law tradition might provide, in many cases, the grammar to legal activities, the basic principles and many of the operational rules, beyond those expressly negotiated by the parties. The Roman law itself can be a rich source of legal principles and rules, a toolbox for all, sometimes made recourse to even by common lawyers to find solutions which are appropriate, or sometimes more appropriate than the very common law ones³⁹ – beyond the widely acknowledged “convergence” process and also beyond the fact, now increasingly recognised, of the presence of Roman and civil law within the English common law tradition.⁴⁰

African, Asian, Roman and 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. Economic actors of many areas of the world areas are used to the civil law abstract and general drafting style of both rules and contractual agreements. Rules and basic values of the continental tradition of contract law are widely shared worldwide. The continental legal language is widely known and understood.

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

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 Latin America, Asia and Africa. These principles would provide operational flexibility and, especially, *a higher level of need to cooperate* with respect to common-law-style-drafted contracts, mostly within an ADR framework as the one described above.

Lawyers and businessmen from those areas of the world are used to deal with, and be bound by, the principles and standards of contractual good faith and fair dealing (now also part of global tools such as CISG and UNIDROIT Principles), and of the related specifications developed in many legislations, scholarly and case laws.

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,

³⁹ See, e.g., *Indian Oil Corp. Ltd. v. Greenstone Shipping S.A. (Panama)* [Queen’s Bench Division][1988] Q B 345, where an appeal against an arbitral award has been decided, in the absence of (satisfactory) English case law and after a thorough analysis of cases dating back to the XVI century, according to a Roman law rule – and also representing ‘the rule which justice requires’.

⁴⁰ See, for instance, the recent and very interesting piece of Seán P. DONLAN, ‘*Our laws are as mixed as our language*’: *Commentaries on the Laws of England and Ireland, 1704-1804*, vol. 12.1 ELECTRONIC JOURNAL OF COMPARATIVE LAW (May 2008), available at <<http://www.ejcl.org/121/art121-6.pdf>>.

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 very recent feature of Chinese law, very well exportable and recognisable as a general principle of civil law in many contexts (a similar function could be performed in the appropriate contexts by the Chinese General Principles of Civil Law of 1986), being easy to accommodate 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.

Lawyers dealing with South-South or South-East affairs could thus have to learn to work, in a comparative, eclectic approach, with several national laws and sets of principles (such as the mentioned Chinese General Principles of Civil Law of 1986) as well as with trade usages and with international/transnational law and tools such as the UNIDROIT Principles. The UNIDROIT Principles seem to be a very interesting expression of widely recognized international legal principles, favourable to economic cooperation in developing environments being based on ideas such as good faith, *favor contractus*, objective balance of the parties' performances, third-party intervention (of judge or arbitrator) on contractual terms to overcome the impossibility of the parties to find appropriate negotiated solutions in case of trouble. The OHADA principles of contract law could also be elaborated in the near future, largely following the UNIDROIT concept, but of course aimed at producing a more context-specific set of principles, taking African conditions, traditions and customs into a wider consideration.

9. Specifically on Latin America and the Roman law tradition

The Latin American Roman Law heritage, instead, is still a fundamental part of all of those legal systems, all developed from the Luso-Ispanic *ius commune*, the *Ley de las Siete Partidas* of Alfonso X (XIII century) and later codified, after early attempts based on the Code Napoléon, around a few quite original Latin American models (Andrés Bello, Teixeira de Freitas, Vélez Sarsfield).

The traditional Latin American approach to law is quite Roman-law related (although north-americanisation of society is a clearly detectable phenomenon there), and privileges the equity of substantial result, not without community and social nuances, more than the very liberal traditional common law approach – see for instance the pivotal importance of good faith in the civil law tradition law of contract,⁴¹ or the doctrines based on Roman Law of abuse of right and of rescission for *laesio enormis*.

This similar origins and development paths of Latin American legal systems made the idea possible of some kind of unity in the continental legal environment – to some scholars amounting to a single legal system of *ius commune* based on Roman Law, now

⁴¹ See, for instance, Riccardo CARDILLI, *Bona fides – tra storia e sistema*, Torino, 2004, on the transfusion of the Roman concept of *bona fides* in the laws of contract of Latin American jurisdictions.

and there still emerging to provide actual solutions to singular cases, unregulated or regulated differently by the relevant state legislations⁴².

The systemic implications can be momentous, as well as the operational consequences: transnational commerce at least at the intra-continental level can be affected by Roman Law principles or by the romanistic interpretation of contracts, laws and international conventions such as the CISG –for which we already have some relatively old examples⁴³– as well as for the interpretation of other kind of transnational legal tools such as the UNIDROIT Principles,⁴⁴ to fill cases of legal vacuum, and/or to supplement and interpret applicable rules or relevant principles in arbitration and other ADR activities.

The harmonization of law seems to already be there to a relevant degree, in Latin America, due to the Roman Law/Iberic *ius commune* background of all legal systems.

Moreover, the same Roman principles could also end up to be more or less indirectly applicable in case of litigation should one of the parties and/or the arbitrators and/or the applicable law and/or the seat of the arbitration proceedings be Latin American ones.

Another very interesting (and politically very sensitive) issue, where the Latin-American and Romanist approach to Law can propose a new approach, is related to financial matters, especially in relation with the foreign debt of developing countries.

That debt, according to Roman Law principles,⁴⁵ might amount to an illegal debt, based on the *rebus sic stantibus* doctrine, allowing termination/renegotiation of contracts

⁴² See the relatively recent case decided by the *Tribunal de Justiça do Estado de São Paulo* on 14 September 1993, published in *Jurisprudência do Tribunal de Justiça*, a.27 vol. 150 (Nov. 1993), 90. The court decided a case applying a rule of Roman Law with preference over the Brazilian codified rule of art.4 of the civil code; also see the many Argentinean cases decided in the 1930s and 1940s applying Roman law and principles extracted from comparative research in contrast with the national legislation, such as in *Superior Tribunal de Jujuy*, 23 July 1947, in *La Ley*, 48, 842. On this issue I wrote my PhD thesis, *Derecho Común Latinoamericano? Una prima verifica*, which I defended in Trento in 1999, which will be published in 2009; the mentioned cases are cited and analysed therein.

⁴³ See J.ADAME GODDARD, *La regla periculum est emptoris aplicada a la compraventa internacional de mercaderías*, in *Anuario jurídico*, XI (1984), 237; ID., *La obligación del vendedor de entregar las mercancías, según la Convención de Viena sobre compraventa internacional de mercancías, interpretada a la luz del derecho romano clásico*, in *Estudios jurídicos en memoria di R.L. Mantilla Molina*, Mexico 1984, 47; A.M. VILLELA, *O direito romano e a unificação das normas jurídicas relativas aos contratos de compra e venda internacionais de mercadorias*, in *Revista de Informação Legislativa de Brasília*, 72, (October/December 1981), 135.

⁴⁴ See M.J.BONELL-S.SCHIPANI (eds.), “*Principi per i contratti commerciali internazionali*” e *il sistema giuridico latinoamericano*, Padua, 1996.

⁴⁵ For a detailed analysis of the Roman Law principles involved, see J.C. MOREIRA ALVES, Brazilian, former Chairman of the *Supremo Tribunal Federal* and professor in the Universities of São Paulo and Brasilia, in *As normas de proteção ao devedor e o favor debitoris do direito romano ao direito latinoamericano*, in S.SCHIPANI (ed.) *Debito internazionale – Principi generali del diritto*, Padua, 1995, at 77. In the same volume, also see J.L. DE LOS MOZOS,

becoming too onerous for one party due to unexpected circumstances (*imprévision, excessividade superveniente da prestação*). Comparable legal principles are part of the Chinese legal tradition; the UNIDROIT Principles also feature a tool (*hardship*) to manage similar situations.

The unexpected circumstances mostly being related to the US monetary policy decisions of the 1970s allowing the value of the US dollar to disengage from its previous gold-based standards, and provoking its skyrocketing which, in turn, made impossible for many heavily indebted borrowers to repay principal and interests.

Rescission for *laesio enormis* is also a doctrine that could apply in some cases, as it allows to terminate a contract proving to be too costly at its original moment (with an unbalance of over one half of the actual value received in exchange, according to classical Roman Law: *laesio ultra dimidium*) when concluded by the disadvantaged party in a state of danger or need; this doctrine could also be risen as a defense to the advantage of those sovereign states who borrowed money to finance their development.

The matter is very sensitive; debate and research in Latin America, as well as in Italy and amongst scholars from other Mediterranean countries of Islamic tradition, are proceeding – to which concrete results, it is still difficult to say. This is however one of the areas where the common-law-originated legal ideas and the very concept of rule of law show some of their limits; two well-known scholars made a reference in the title of a recent book to the “illegality of the rule of law”,⁴⁶ in relation to foreign debt of developing countries.

The approach just described is of course contrary to the interests of north-western banks, financial institutions and moneylenders – with their powerful political backing of the US and other Western countries – who are on the opposite side of those obligations, and who could find themselves in trouble, at least on the accounting point of view, should all these debts be declared null and void or anyway considered as defaulting ones⁴⁷.

The issue should be studied, as the possible consequences of doing nothing should also be: developing countries not developing at all, poverty, instability, mass immigration into Western countries etc., amounting to violations of those Human Rights the developed West fights –or alleges to fight– wars for. On the other hand, it must also be noted that Brazil, having been a very indebted country, has now repaid all of its foreign debt and it is developing fast, consolidating its economic leadership in the Latin American continent. The rigid observance of contractual provisions in the lending side’s interests have so far been guaranteed by the common law framework of loan agreements and their applicable law; and by the detailed drafting of such loan documents and especially the forum

Spanish, professor at Valladolid and judge of the *Tribunal Constitucional*, *Principios generales del derecho e iniquidad en las obligaciones*, 121.

⁴⁶ Ugo MATTEI and Laura NADER, *Plunder – When the Rule of Law is Illegal*, Blackwell, 2008.

⁴⁷ Foreign debt of Latin American countries has been a bad debt for decades and this is well known to governments, banking and financial institutions, as well as to the general public. Of course shockwaves would probably run through the Western financial system, with possible domino-effects and likely dire consequences, in case of a general moratorium or default on the borrowing side. A previous basic political consensus would be needed, followed by appropriate legal/arbitral and social mechanism to absorb the impact of debt reduction/cancellation.

selection clauses imposed to the debtors, normally submitting litigation to common law jurisdictions such as London or New York: arguably, judicial outcomes in foreign debt cases could be very different if the proceedings took place in Quito or Caracas.

10. A role for Islamic law

The Islamic world features very rich commercial traditions and law; still, it averts the ultra-liberal mentality, as also Jewish law, Roman law, Canon law, medieval *ius commune* used to. It is less known or often forgotten that the aversion towards interest transactions used to be shared by all those Euro-Mediterranean and middle-eastern (legal) cultures⁴⁸, all based on a less individualist vision of society and economy, that allows individual entrepreneurship, trade and commerce but refuses the hyper-capitalist socio-economic and legal models, more related to the common law world; a very ancient and widely shared vision favouring real economy over the idea of money reproducing itself and wealth being produced by mere arithmetic.

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.

More, even the developed west had to learn some hard lessons during the world financial crisis of 2008, provoked, *inter alia*, by the excesses of ‘creative’ finance.

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 money-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, for instance, 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. This seems possible considering the shared values of both Islamic and Chinese traditions about contractual good faith, aversion for inequality and abuse of position and rights; a shared vision which in relation with finance and interests is not too far – at least historically, if often forgotten – from the Roman/civil law one (on the developments of which the Chinese legal system is also at least partially based).

⁴⁸ The underlying ideas have been well explained, especially in the 15th-16th 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.

Moreover, the use of Islamic finance instruments and contract law is not unimaginable for business transactions even involving non-Muslim 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 vision of economy and finance has all reasons to be shared by Latin Americans, for instance, they having experienced directly the burden of an exceedingly heavy foreign debt, and being able to refer to Roman law principles of *favor debitoris* in support of their case against excessive imposition of interests.⁴⁹

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. Customary laws do develop irrespective of the formal States' boundaries, thus being transnational by nature.⁵⁰

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.

Customary law tools could thus prove useful and apply on a local as well as on a wider-than-country scale, whenever the relevant economic operation affects native communities living in more than one of the formal jurisdictions of African countries or Latin American ones. 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 – of course having secured the relevant states' political *placet* and legal cover as appropriate.

An interesting laboratory for co-existence of formal laws with customary law could be Indonesia some day, where some recognisance of the *adat* customary laws is becoming visible in the legislation and policy, along with the decentralisation process.⁵¹ Some local

⁴⁹ For an interesting collection of essays combining Islamic and Latin American perspectives on the issue, see P.CATALANO and A.SID AHMED (eds.), *La dette contre le droit – une perspective méditerranéenne*, Paris, 2001.

⁵⁰ See, e.g., S.MANCUSO (2007), *Trends on the Harmonization of Contract Law in Africa*, in *Annual Survey of International and Comparative Law*, 13, 157, at 173-176.

⁵¹ The Indonesian Forestry Law n. 41 of 1999 recognises customary title and right of use of rain forests to local communities, in a concurring fashion with the right of the central government (after Law 22 of 1999 on decentralisation also of local governments, to some extent) to concede the forest for economic use to domestic and international exploiters. In general, the formal legal system does not recognise the *adat* customary law to a wide extent in economic matters of large significance; still, the *adat* is recognised in several governmental documents, and survives in a parallel way in native and local communities. For the

governments, notably the one of West Papua, legislated on the activities of resource exploiters obliging them to consider the interests and rights of native communities and to get them involved in some parts of their decisional processes, through the creation of specific *fora* and/or through the existing *adat* institutions.⁵²

Information is scarce, however, on the practical impact of the alleged new trends of the Indonesian central and local governments towards the *adat* traditions of the archipelago, with a view to balancing economic activities with native populations' rights and expectations. The general impression is still much towards the negative,⁵³ and the very possibility, suitability, feasibility of such an approach is debated;⁵⁴ but, at least, some ideas have been put on the table.

Those ideas could soon become part of the debate in a very distant place, in an entirely different socio-cultural and political context, such as Bolivia: the new Constitution of 2008 entitles Quechua and other native populations to rule autonomously the territories they live on and to have a say on the exploitation of the resources thereon⁵⁵ – including those areas where about half of the world's reserves of lithium are located.

12. Legal pluralism⁵⁶ 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

interaction of *adat* laws with land law and with mining and forestry activities following with the agrarian and the forestry legal reforms, see the three essays of J.WALLACE, *Indonesian land law and administration*, D.FITZPATRICK, *Beyond dualism: Land acquisition and land law in Indonesia*, and C.MARR, *Forest and mining legislation in Indonesia*, all in T.LINDSEY (ed.) *Indonesia: Law and Society*, 2nd ed., Federation Press, Leichhardt, NSW, 2008.

⁵² See, for instance, the very interesting assessment of an investment operation in West Papua according to the mentioned legislation and with a view to harmonising the interests of the foreign investor and those of the local communities: *Human Rights Assessment of the Proposed Tangguh LNG Project - Summary of Recommendations and Conclusion*, presented to the investing corporation (BP Indonesia) by its consultants, Gare A.SMITH and Bennet FREEMAN; <http://www.bp.com/liveassets/bp_internet/indonesia/STAGING/home_assets/downloads/h/Tangguh_HRIA.pdf>

⁵³ See, e.g., Wallace, Fitzpatrick, Lindsey, supra; also see Tania MURRAY LI, *Masyarakat Adat, Difference, and the Limits of Recognition in Indonesia's Forest Zone*, in *Modern Asian Studies*, 35, 3 (2001) 645-676.

⁵⁴ See Fitzpatrick, supra.

⁵⁵ Many articles of the 2008 Bolivian *Constitución Política del Estado* stipulate the ownership and decisional power of native communities over the renewable resources existing on their territories; as well as the right to be previously informed and consulted, and to partake in the related benefits, for non-renewable resources; see for instance the CPE's Art. 403.

⁵⁶ 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.

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 South-South, or South-East, commercial relations.

Of course, I am discussing here about what is traditionally known as legal pluralism in scholarly circles. Rather different is the idea of “global legal pluralism” recently proposed by a very authoritative Scholar.⁵⁷ This Author makes an extremely interesting observation of global reality, identifying “sites” (a probably more appropriate term than, say, “jurisdictions” or “sources”) which in the global economic reality produce or contribute to create rules, including economic actors, regulating bodies expression of single or several polities, or of an inter-polity environment. These “sites” interact with one another, driven by the forces of politics, economy, markets as well as by the many sets of technical regulatory standards available; the final outcome of this process being a situation, a network of “regulatory sites” determined in shape and features of each segment by effectivity rather than by a hierarchy conceived *ex-ante*.

This Author makes the example of the global toy industry (a “site”, or a network of many “sites”, in his concept), producing toys in a multi-national environment, according to the global industry operational rules and contractual models, involving parties located in several jurisdictions, in a network of rules originated, implemented, enforced well above the national level. The activities of these global corporations are developed sometimes considering, sometimes not considering, sometimes shaping the rules of national jurisdictions and other regulatory bodies; sometimes contributing, with their economic power, to the success, survival or agony of such regulatory “sites” – by simply deciding to dialogue with them and to be bound to some extent by their indications or rules.

This describes well, in my opinion, the global dissemination of autonomous economic groupings. In this descriptive model, in which global law firms play an important role, there is an obvious plurality of *entities* producing their internal protocols, generating global practices with external relevance and even affecting the produce of regulatory entities; the mechanisms of legal pluralism are doubtlessly at work in this scheme.

Still, what is not very plural (much more global than plural, actually) is the source of the legal ideas, doctrines, model standard practices developed thereof, mostly consisting of developments of the usual western, common-law-originated tools.

The trend, however complex the network of “sites” might be, is toward uniformity of the legal mechanisms making the operations of the network possible; the hybridisation of global legal models now and then identifiable in local situations⁵⁸ – which some may call “glocal” in consideration of local culture and tradition, maybe out of political correctness – normally displays a recessive attitude vis-à-vis the sweeping drive of global legal tools.

⁵⁷ Francis G. SNYDER, *Governing Globalisation*, in Michael LIKOSKY (ed.), *Transnational Legal Process – Globalisation and Power Disparities*, London, 2002, 65.

⁵⁸ SNYDER, *supra*, at 94.

The objective of this paper is precisely to suggest that a reverse trend of hybridization may be both possible and beneficial, in some environments.

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. Other financial models are also emerging that could become important in 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 and relatively promptly available finance – if demanding solid guarantees and 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. It is well known that funding from those institutions are often coming along with (or following) a demand on the borrowing state to pass specific legislative reforms; what we may call “legal implants” – a specific type of legal transplant⁵⁹ where the item introduced in the existing body has no function except the purely aesthetic one of making the receiving body look good and attractive for money providers.

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, policies⁶⁰ and/or

⁵⁹ The obvious reference is to Alan Watson’s classic *Legal Transplants* (1971).

⁶⁰ The Chinese Government’s *White Paper on Africa Policy*, of 12 January 2006, Part IV, subsection I, issue (9), states that China, according to its financial capabilities and international situation will endeavour to gradually increase economic assistance to African nations, irrespective of political considerations or pre-requisites.

demanding them to undergo reforms etc. – an attitude perceived as fair from the borrowing side⁶¹.

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 obviously pursuing its policy goals and interests, implementing its momentous African policy.⁶² At the same time, and as a part of this strategy, China is promoting a model of development different from the one based on the development of entirely private economies, historically proposed by the West. In fact, it is promoting instead local adaptations of the Chinese model of a socialist market economy in construction; or, anyway, a developmental model closer to the Chinese concept than to the WB/IFC one – surely promoting, for instance, the active intervention of governments in their respective states' economies.⁶³

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 administrative law concepts (common, e.g., in the mostly francophone members of the OHADA, or in many Latin American countries), will become relevant at the legal core of these developments.

One 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.

Other legal issues would be related to the choice applicable law, which in many cases will not be made by the parties; solution would necessarily include

⁶¹ 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, 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.

⁶² See, e.g., Cecilia BRIGHI - Irene PANOZZO - Ilaria SALA, *Safari cinese – Petrolio, risorse, mercati. La Cina conquista l'Africa*, Milano, 2007.

⁶³ It should also be noted, however, that many sensitive situations can be identified, more and more related to the economic field, in which Western governments decide on contingency to switch to a more active course of action. As demonstrated, for instance, by the developments in summer 2008 related to the fate of the Italian flag airline; or by the many policy actions and enactment of laws and regulations taken by Western governments, including the US, to rescue national banks and financial institutions during the global financial crisis in fall 2008.

comparison/coordination of legal principles internationally recognized (such as International law and UNIDROIT Principles) and of those somehow related to the specific parties and transactions, including national and regional *corpora*, Islamic and/or Roman law and others, as discussed above.

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 in DR, med/arb tools featuring not-necessarily-neutral arbitrators/mediators) to provide flexibility in finding the appropriate decision; putting the dispute of the 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 transactional and legal picture, which applied *cum grano salis* is not necessarily a bad thing in a developing world context – especially considering that every single private venture in a developing context may have a much wider systemic impact on the hosting community than it would have in a developed environment.

15. Another interesting development of the financial world in terms of emerging of “eastern/southern” new models is related to micro-finance, e.g. of the sorts devised and developed by Muhammad Yunus in Bangladesh. Micro-finance typically has a local relevance, rather than an international dimension. Still, cross-border operations of that kind are not unimaginable, perhaps in areas near the border of neighbouring states, or even between more distant places.

Legal doctrines and regulatory tools would probably need to be developed accordingly, in pursuing the best interest of the developing world, to regulate fairly this type of cross-border financial operations; and, especially, in order to facilitate them. For instance, to develop and consolidate their *shari’a*-friendly nature, which will favour the growth of this phenomenon in the Muslim world.⁶⁴ And, also, to create appropriate licensing and taxation regimes –different from those applicable to banks and “normal” financial institutions– as well as appropriate, simple and not too costly, ADR mechanisms; all of course with a view to encouraging a (foreign) perspective financier to engage in micro-credit (this side of the border). This should be done by acknowledging in the national legal systems, in the first place, the specific legal nature of these micro-finance

⁶⁴ Yunus himself experienced the opposition of local religious leaders when started his project decades ago. Time has passed, and in 2008 Mr. Yunus presented a keynote speech in Dubai, at the International Islamic Finance Forum, emphasizing the important role of (micro-)financial services for Islamic Banks in pursuing *shari’a* ultimate goals, fulfilling the mission of alleviating poverty. The Government of Bahrain backed his ideas and signed a MoU with his Grameen Bank in order to develop micro-finance tools and institutions in Bahrain. The Islamic Development Bank has also allocated significant amounts of resources to micro-finance projects. Other financial institutions based in Dubai engage in micro-finance activities in Afghanistan. See the report titled *Muhammad Yunus calls for an increased role of Islamic finance and microfinance to end poverty*, available on the internet at <<http://ribh.wordpress.com/2008/04/29/muhammad-yunus-calls-for-an-increased-role-of-islamic-finance-and-microfinance-to-end-poverty/>>.

operations, different from most financial instruments due to the former's prevailing dimension of important tools for social, human development.

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 the mentioned legal traditions share, if to different degrees, a less individualistic approach to life and economy with respect to the common law tradition: Islamic, Roman and civil law, African, Asian 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 better known and consequently more user-friendly for the parties of south-south transactions.

3 - All the legal traditions mentioned in this paper share or can accommodate, on the technical point of view, the absence of need for very detailed contracts as it happens in the common law tradition, and the wide recourse to general concepts and ideas such as good faith and fair dealing, *favor contractus* (now also part of global tools such as CISG and the UNIDROIT principles).

4 - Most of these legal traditions can accommodate well ADR tools in a different function, as part of the very contract, committing the "assessment and maintenance" of a relation to authoritative people belonging to the community and/or somehow related to the parties; this traditional approach may fruitfully be maintained for the benefit of international commercial arbitration and ADR.

5 - A greater importance of the mentioned ADR mechanisms would probably be a crucial factor for the development of a more complex legal environment. More than one national or regional legal systems as well as local, regional, transnational hard, soft and customary laws could become relevant and would need to be considered in many cases. The principles and sometimes the rules of Roman, civil and Islamic law may well have an important role to discharge within this scheme.

6 - The dynamics of the public intervention in the economy, as well as the existence of 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 countries belonging to the developing world.

Of course, all the mentioned possibilities mustn't necessarily prove workable at all times, and in every place and situation. The indication I made is just a possible list of issues to research; a thorough assessment of them could only follow the research, not precede it.

Another point I want to stress is that this is not meant to be an anti-common-law or anti-western pamphlet. This is not meant to be anti-anything, in fact.

In fact, 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 functionality and

predictability of the “global” legal approach might still provide cost-effective solutions, preferable to more “pluralist” ones.

You don’t throw the baby away, along with the bath water... the contents of the common-law-based global legal toolbox can still be helpful for all – whether used as they have always been or combined with the new tools and approach I suggested in this presentation.

No utopia, thus; just additional tools. Developing the diversity in available legal options is possible, and good indeed, with a view to a diversified economic development, closer to the needs and the feelings of the different peoples of the world, for a more distributed, fair and equal economic growth.