

Combining Arbitration with Mediation: Two Cultures of China and Malaysia

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This study vindicates similarities and differences of hybrid process of arbitration and mediation between China and Malaysia. Both countries develop hybrid processes combining arbitration with mediation in their own cultural soils. The Chinese dispute resolver plays the dual role of arbitrator and mediator during the proceedings of hybrid process of arbitration and mediation. On the other hand, a different arbitrator plays the role of mediator, if conciliation fails in Malaysia. On the other hand, judges are allowed to act as mediator during the proceeding in China and Malaysia.

Key Words : Arbitration-Mediation, Shari'ah, Taoism, Confucianism, Malaysia, China, Hybrid Process

〈 Contents 〉

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|---|--|
| I. Introduction | IV. Two Cultures of Arbitration-Mediation
in China and Malaysia |
| II. Taoism-Confucianism and
Arbitration-Mediation in China | V. Conclusion |
| III. Shari'ah and Arbitration-Mediation
in Malaysia | References |

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I . Introduction

Most of comparative studies of the impact of cultures on the social institutions of various countries are implemented among two countries with distinctive national cultures. For example, some of the researches compare Western societies with Middle Eastern Societies.¹⁾ According to Hofstede, Western society, in general, belongs to individualistic society. In contrast, Middle Eastern societies are known as society of collectivism. In this connection, it is rare to find researches to investigate the similarities and differences of societies with similar national cultures. Malaysia and China belong to East Asian region, geographically. National cultures of both countries belong to collectivism in the perspective of Hofstede's cross-cultural research.²⁾ However, in a deeper sense, there is a difference of dominant cultures of two countries. The dominant culture of Malaysia is Islamic culture. In case of China, Confucianism and Taoism are deeply rooted in the traditional society. Gad and Shane report that differences of cultures influence the choice of dispute resolution mechanism.³⁾ Furthermore, Inman et. al finds that cultural differences between adversaries affects whether or not mediation occurs during an international crises.⁴⁾

This study vindicates similarities and differences of arbitration and mediation between China and Malaysia. It seems that third party plays the dual role of mediator as well as arbitrator in China and Malaysia. In Chinese cultural tradition, there is no definite demarcation between mediator and arbitrator. In Imperial China, Chinese dispute resolver has played the dual role of mediator as well as arbitrator.⁵⁾ In Islam, Prophet A.S.W also has been known to play the dual role of mediator as well as

1) Mohammed, Abu-Nimer, "Conflict Resolution Approaches: Western and Middle Eastern Lessons and Possibilities", *American Journal of Economics and Sociology*, Vol.55, No.1, 1996, pp.35-52.

2) Hofstede, Geert, Hofstede, Gert, Jan, and Michael Minkov, *Cultures and Organizations: Software of the Mind*, 3rd ed, 2010, p.57.

3) Gad, M. Ghada and Shane, S. Jennifer, "A Delphi Study on the Effects of Culture on the Choice of Dispute Resolution Methods in International Construction Contracts", *Construction Research Congress*, ASCE, 2012. Kim, Chin-Hyon and Chung Yongkyun, "Legal Culture and Commercial Arbitration in the United States and Japan", *Journal of Arbitration Studies*, Vol.23, No.3, 2013, pp.185-212.

4) Inman, M. Kishi, R. Wilkenfeld, J. Gelfand, M., and E. Salmon, "Cultural Influences on Mediation in International Crises", *Journal of Conflict Resolution*, Vol.58, No.4, 2014, pp.685-712.

5) Kun, Fan, "Glocalization of Arbitration: Transnational Standards Struggling with Local Norms through the Lens of Arbitration Transplantation in China", *Harvard Negotiation Law Review*, Vol.18, 2013, pp.175-219.

arbitrator.⁶⁾ In this sense, the concepts of arbitration and mediation of China and Malaysia do not conform to Western terminology of arbitration and mediation.

In recent times, there is a confusion in relation to the terminology of med-arb and arb-med.⁷⁾ However, Arnold Zack has a definite meaning of arb-med, which is different from med-arb.⁸⁾ According to Richard Hill, Western type of med-arb is different from Chinese med-arb in the sense that arbitrator might be a different person than the mediator in Western world.⁹⁾ In this connection, Fan Kun uses term of mediation and arbitration to denote the distinctive characteristics of Chinese ADR process.¹⁰⁾ On the other hand, Jay Welsh has the opinion that future of international mediation of business disputes will be a part of arbitration process.¹¹⁾ This paper uses the terminology 'arbitration-mediation' to encompass diverse kinds of hybrid processes such as med-arb, arb-med, and 'mediation and arbitration' to examine and compare diverse kinds of hybrid processes of China and Malaysia.

The purpose of this study is as follows. First, we analyze arbitration-mediation in China¹²⁾. The Chinese arbitration-mediation is a very flexible type of ADR process,

6) Sohn, Z. Young, *Islam: Doctrine, Thought and History*, Illzogak, 2005, p.157.

7) Chen Guang said "Chinese translation on the topic is different from its English translation. The Chinese topic is called arb-med, whereas stand alone mediation in the English translation is med-arb", Stipanowich, T., J. Yang, J. Welsh, Q. Chen, and P. Robinson, "East Meets West: An International Dialogue on Mediation and Med-Arb in the United States and China", *Pepperdine Dispute Resolution Law Journal*, Vol.9, No.2, 2009, p.398.

8) "Parties present their case in arbitration. At the end of hearings, the arbitrator writes up a decision and seals in an envelope without disclosing its content to the parties. Then for a fixed period the parties mediate the dispute. If the parties reach agreement, the envelope is torn up. If they do not reach agreement, the envelope is opened and the decision inside becomes final and binding on the parties." Zack, Arnold, "The Quest for Finality in Airline Disputes: A Case for Arb-Med", *Dispute Resolution Journal*, Vol.58, No.4, 2003, p.37. On the other hand, med-arb is ADR procedure combining mediation and arbitration in sequence, Brewer, J. Thomas and Lawrence R. Mills, "Combining Mediation & Arbitration," *Dispute Resolution Journal*, November 1999, pp.32-40. p.32.

9) Hill, Richard, "MED-ARB: New Coke or Swatch?", *Arbitration International*, Vol.13, No.1, 1997, pp.105-109.

10) Kun, Fan, "Glocalization of Arbitration: Transnational Standards Struggling with Local Norms through the Lens of Arbitration Transplantation in China", *Harvard Negotiation Law Review*, Vol.18, 2013, pp.175-219.

11) Stipanowich, et al. (2009,) p.384.

12) If we focus on the role of mediator in hybrid process among mediation and arbitration, we might examine hybrid process using the term 'mediation-arbitration'. On the other hand, if we focus on the role of adjudicator, we examine hybrid process, using the term 'arbitration-mediation'. Since Chinese mediator belongs to the part of formal dispute resolution system, and the mediator of Malaysia is also subject to Shari'ah, Islamic law, we emphasize the role of decision maker and use

since disputants may decide to enter into mediation process during the arbitration process.¹³⁾ The acceptability among Chinese people of flexible process can be traced back to Taoist' yin-yang interpretation of universe¹⁴⁾ and harmony of Confucianism. Secondly, we examine arbitration-mediation in Malaysia in the area of family disputes and disputes of Islamic banking and finance. Third, we compare and find similarities and differences of arbitration-mediation among China and Malaysia.

II. Taoism–Confucianism and Arbitration–Mediation in China

In order to clarify the reasons of wide acceptability of Chinese type of arbitration-mediation, it is necessary to examine the cultural norms of China. Zeng Xianyi argues that mediation has remained vibrant and alive from antiquity to modernity because it offers a core value meaningful to every human being: harmony.¹⁵⁾ Pitman Potter also reports that the traditional norms remains largely immune to challenges by legal reforms in China.¹⁶⁾

1. Cultural Foundation

The origin of Chinese type of arbitration and mediation is traced back to Taoism and Confucianism. Both philosophical roots of China are deeply embedded in Chinese people from ancient to modern China. Related with arbitration-mediation, the central concept is harmony in Chinese society.

the terminology 'arbitration-mediation' in order to examine the hybrid processes of China and Malaysia.

- 13) Harpole, A. Sally, "The Combination of Conciliation with Arbitration in the People's Republic of China", *Journal of International Arbitration*, Vol.24, No.6, 2007, pp.623-633.
- 14) Du, Rong, Ai, Shizhong and Cathal M. Brugha, "Integrating Taoist Yin-Yang Thinking with Western Nomology: A Moderating Model of Trust in Conflict Management", *Chinese Management Studies*, Vol.5, No.1, 2011, p.55.
- 15) Zeng, Xianyi, "Mediation in China: Past and Present", *Asia Pacific Law Review*, Vol.17, 2009, p.21.
- 16) Potter, B. Pitman, "Legal Reform in China: Institutions, Culture, and Selective Adaptation", *Law and Social Inquiry*, Vol. 29, No.2, 2004, p.476.

(1) Taoism

The philosophical foundation of arbitration and mediation is connected with Taoist's yin-yang perspective.¹⁷⁾ In the symbol of Chinese yin and yang, there are two parts: the dark as yin and light as yang. "There is a small dark spot in the light area whereas there is a small light spot in the dark area. This means that yin always includes yang. Meanwhile, yang always contains yin. They cannot be separated from one another. The "S" shape line marking a distinction between yin and yang stands for a harmonious state or balance."¹⁸⁾ Yin and Yang are not mutually exclusive entities. Rather, they are complementary with each other. They work together which creates the balance or the harmonious oneness as a whole.¹⁹⁾

The yin-yang perspective brings about the flexibility to the Chinese mind over time. According to Lao Tzu, "All things carry yin and hold yang, with the interacting energy to balance the relationship" (Lao Tzu, Chapter 42). Namely, the paradigm of the unity of opposites in both the natural world and human domain. It includes the oneness of feminine and masculine forces, internal and external, water and fire, night and day, passive and active as well as receiving and approaching. It indicates that all apparently separate and opposite systems are part of the whole universe (Lao Tsu) and are governed by same Oneness or Tao that transcends the boundaries of all individualistic entities.²⁰⁾ According to yin-yang perspective, yang's aspect of positive and hard aspect of life should be complemented by yin's aspect of the negative and soft side of life in order to survive in harsh situations of wars. According to *I Ching* (The Book of Changes), no entity is located in a fixed state and they constantly change. In this constantly changing situation, the desirable strategy toward life might be flexibility.²¹⁾

17) Du, Rong, Ai, Shizhong and Cathal M. Brugha, "Integrating Taoist Yin-Yang Thinking with Western Nomology: A Moderating Model of Trust in Conflict Management", *Chinese Management Studies*, Vol.5, No.1, 2011, p.55.

18) Lee, Yueh-Ting, Yang, Honggang and Wang, Min, "Daoist Harmony as a Chinese Philosophy and Psychology", *Peace and Conflict Studies*, Vol.16, No.1, 2009, p.71.

19) Sun, Key, "Using Taoist Principle of the Unity of Opposites to Explain Conflict and Peace", *The Humanistic Psychologies*, Vol.37, 2009, p.272.

20) Sun, Key (2009), p.272.

21) When author visited Beijing, the personnel of information desk in the airport suggested some particular amount of taxi fare. When a person approaches me and suggested an extremely cheaper taxi fare, the personnel of information desk immediately lowered her taxi fare at a low level. One of my impression as a foreign traveller, is that she admitted the co-existence of unofficial as well as official intermediaries of taxi driving service industry in the airport. Yin-yang aspect of life seems to be recognized in Chinese

(2) Confucianism

To appreciate the Chinese approach to dispute resolution, we must recognize and contemplate the cultural roots in Confucian ethics. At the heart of Confucius' teaching was the belief that harmony was to be achieved among persons.²²⁾ Confucius did not emphasize the role of law in dispute resolution. "Law can convict and execute people, but it cannot teach humanity, kindness, benevolence and compassion. In the absence of a formal written law to govern private transaction, various social duties have evolved to ensure the dominance of li in regulating ordinary affairs and maintaining peace and order within the community. Perhaps the strongest of these social sanctions is found in the concept of face"²³⁾. The fear of losing face is a strong reason behind the Chinese culture with dispute prevention.

"The notion of rang or yielding is rooted in the idea that communal peace and harmony can only be attained through parties' willingness to compromise and meet with each other halfway. It is not the pursuit of individual right or justice, but rather the restoration of social harmony".²⁴⁾ This concept is keenly related with modern interpretation of restorative justice.

(3) Synthesis of Taoism and Confucianism

Some scholars argue that Lao Tsu's thought influenced Confucius's thought. Suhi, Kang Sung argues that Confucius are influenced by Lao Tsu, since he suggested "governing people by doing nothing arbitrarily(無爲而治)" as a governing methodology of idea politics.²⁵⁾ Furthermore, some passages of Zhong Yong²⁶⁾ contain the essential concept of Taoism. For example, 10th chapter of Zhong Yong tells that real intrepidity is to teach people with softness and generosity and not to retaliate to others' errors in

society.

22) Zeng, Xianyi (2009), p.7. Kaufmann-Kohler, Gabrielle and Fan Kun, "Integrating Mediation into Arbitration: Why It Works in China," *Journal of International Arbitration*, Vol.25, No.4, 2008, p.480.

23) Vera, de, Carlos, "Arbitrating Harmony: Med-Arb and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Dispute in China," *Columbia Journal of Asian Law*, Vol.18, Fall 2004, p.166.

24) Vera, de Carlos, (2004), p.168.

25) Shui, Kang Sung, (translated Yu, Heejae and Shin, Changho), *老子評傳*, Midasbooks, South Korea, 2005, p.167,

26) The Book of Zhong Yong is regarded as the main text which deals with cosmology of Confucianism.

southern part of China. Since Taoism was known to prevail in southern part of China at that time, a couple of scholars argues that this passage is a part of evidence that Taoism influences Confucianism. A core teaching of *Tao Te Ching* (Lao Tzu) is that an entity should necessarily move to the opposite direction and come back to original departure, if that entity proceeds into a particular direction extremely. This concept of equilibrium(中) occupies the central position in Confucian thought, since that concept of equilibrium emerges in the Zhong Yong.²⁷⁾ Two main concepts of Zhong Yong is equilibrium and harmony (中和). Since then, the concept of equilibrium and harmony occupies the central position in New Confucian thought.²⁸⁾ Accordingly, it is quite difficult to demarcate the line between Taoism and Confucianism, since two rival schools are intermingled with each other across times in the process of action and reaction between them more than two thousand years. Nowadays, Taoism-Confucianism is an amalgam of main Chinese thoughts. Both of two schools emphasize harmony²⁹⁾, rather than the power as a main tool to bring about the peace in the human society. Confucius emphasized the administration by Te rather than administration by power. Lao Tzu also emphasized that soft power is superior to hard power.

2. Arbitration and Mediation in China

(1) Arbitration—mediation in Imperial China

Confucianism and Taoism with its emphasis on harmony and disdain for litigation, are the conceptual basis of predominance of community mediation in China. Confucius believed that the optimal solution of most disputes was to be achieved not by the exercise of sovereign force but by moral persuasion.³⁰⁾ Taoism emphasizes the harmony of yin and yang in the human relationship as well as universe. Ancient China's legal system had focused on criminal cases. "Many cases would be civil cases by modern standard were classified as criminal. Formal law and legal process were principally

27) Kun, Fan, "Glocalization of Arbitration: Transnational Standards Struggling with Local Norms through the Lens of Arbitration Transplantation in China", *Harvard Negotiation Law Review*, Vol.18, 2013, p.189. Chen, Guo-Ming, "The Impact of Harmony on Chinese Conflict Management" Paper presented at the Annual Meeting of the National Communication Association, Seattle, 2000.

28) Chen, Guo-Ming (2000)

29) Zeng, Xianyi (2009), p.21.

30) Kaufmann-Kohler and Fan Kun (2008), p.480.

concerned with punishment. Furthermore many cases in both the criminal and civil realm were decided in accordance with ritualism(Li) rather than legalism(Fa)".³¹⁾

The dispute resolution system in Imperial China seems to indicate that the third party to solve the dispute plays the dual role of adjudicator and mediator. In the Western Zhou dynasty (1027 BC -771 BC), the role of tiaoren (mediator)³²⁾ was an officially recognized position. According to the Rites of Zhou, "tiaoren were persons responsible for investigating and resolving the people's grievances to restore peace and harmony"³³⁾. Based on this description, Fan Kun argues that the role of tiaoren was essentially that of a mediator to be aimed to resolve grievances and restore harmony. In addition, they also played the role of an investigator and even ,to some extent, an adjudicator who could impose punishment on the party who cause further trouble.³⁴⁾

The term 'arbitration' found in clan and guild rules also differs from the meaning of 'arbitration' in the West. Fan Kun views that the function of the dispute resolver in traditional Chinese society was equivalent to neither that of a mediator nor an arbitrator defined in the Western context. "Sometimes their role resembled that of arbitrator, who heard the argument of the parties, look into the evidence and then handed down a decision. However before the dispute reached the stage of decision making, the family heads or guild leaders often first adopted a conciliatory role. In that sense, their role may be a comparable that of a mediator".³⁵⁾

(2) Arbitration—mediation in Modern China

The characteristics of arbitration-mediation: dual role as arbitrator as well as mediator, is reflected in arbitration process in CIETAC(China International Economic and Trade Arbitration Committee), the main arbitration institution of China, which deals

31) Vera, de Carlos (2004), pp.162-164.

32) Zeng, Xianyi (2009), p.4.

33) "Trivial affairs such as marriage and land disputes were mediated and harmonized. Criminal offences such as manslaughter may also be mediated". 周禮 . 地宮司徒 (Rites of Zhou: Mediator) Shanghai Kaiming Press 1934. in Zeng, Xianyi,(2009), p.3. and footnote 77 in Fan Kun (2013), p.195.

34) Furthermore, the role of clan heads in family dispute resolution was not strictly that of arbitrators but mediators as well. Fan Kun argues that there seems to be no clear line between the function of a mediator and the function of an arbitrator. Kun, Fan, "Glocalization of Arbitration: Transnational Standards Struggling with Local Norms through the Lens of Arbitration Transplantation in China", *Harvard Negotiation Law Review*, Vol.18, 2013, p.200.

35) Kun, Fan (2013), p.206.

with disputes in connection with foreign investors. CIETAC allows arbitrator to play the role of mediator to the same dispute.³⁶⁾ In CIETAC process, a third party neutral works with the disputing parties towards settlement first using the technique of mediation. If this is unsuccessful, med-arbitrator then "changes hats" and becomes an arbitrator.³⁷⁾ "While conciliation is not mandatory and no party may be compelled to engage in conciliation or accept its results, in practice, it is common for parties to be asked whether they would like to try conciliation after an arbitration case is accepted. This sometimes takes place shortly after the arbitration case is accepted by the relevant arbitral institution. "Would you like to try conciliation?" is also frequently posed by the arbitral tribunal when the hearing opens and or after all parties have presented their respective arguments and evidence".³⁸⁾

On the other hand, the dual role of adjudicator-mediator is also found in Chinese judicial mediation. According to Phillip Huang, the mediator and trial judge are one and the same person: a fact-finding during mediation is not separated from that during trial, when mediation is a court activity.³⁹⁾ Thus in Chinese system, a failed court mediation is almost followed by arbitration or adjudication by the same judge, a feature that gives much more weight to the suggestions of judge and puts greater pressure on the disputants.⁴⁰⁾ A Chinese Judge is expected to utilize his reason and conscience as well as Chinese law as a source of law. Furthermore, he is presumed to be influenced by local government. The conscience and reason are influenced by local norms. The rules or criteria of local government are also local norms which are deeply rooted in Chinese cultures. In this connection, a Chinese judge as mediator is influenced by both imported legal norm and local norm.⁴¹⁾

36) CIETAC handles all categories of disputes such as trade joint venture, construction, real estate, finance, and licensing, and have in practice successfully conciliated in the process of arbitration, Yu, Jianlong, "Conciliation in Action in China and CIETAC Practice", *Asia Pacific Law Review*, Vol.17, 2009, p.91.

37) Vera, de Carlos (2004), p.156. Yu, Jianlong, "Conciliation in Action in China and CIETAC Practice", *Asia Pacific Law Review*, Vol.17, 2009, pp.89-96.

38) Harpole, A. Sally, "The Combination of Conciliation with Arbitration in the People's Republic of China", *Journal of International Arbitration*, Vol.24, No.6, 2007, p.626.

39) Huang, C. Phillips, "Court Mediation: Past and Present", Phillip C. Huang, *Chinese Civil Justice: Past and Present*, Rowaman & Littlefield Publishers, 2010, p.220.

40) Huang, C. Phillips (2010), p.220.

41) Potter, B. Pitman, "Legal Reform in China: Institutions, Culture, and Selective Adaptation", *Law and Social Inquiry*, Vol. 29, No.2, 2004, p.479.

3. Flexibility in Arbitration–Mediation

One of the main characteristics of Chinese arbitration-mediation is the flexibility, as previously noted. Stanley Lubman comments that a major goal of Chinese legislative drafting is flexibility.⁴²⁾ We can find this flexibility in the role of dispute resolver in China. The dual role of dispute resolver as mediator- arbitrator seems to acquire a cultural value since the dual role of mediator-arbitrator do not change over time. The dual role of mediator-arbitrator is found in CIETAC arbitration as well as Imperial China.

The Taoist's yin-yang perspective provides an interpretation of the flexibility of arbitration-mediation in terms of dual role of mediator-arbitrator. In the symbol of Chinese yin and yang, there is a small dark spot in the light area, whereas there is a small light spot in the dark area. This means that yin always includes yang. Meanwhile, yang always contains yin. They cannot be separated from one another. Yin does not conflict with Yang. Rather, Yin and Yang complements with each other. Similarly, mediator part does not conflict with arbitrator part in the whole structure of arbitration-mediation. Rather mediator part and arbitrator part complement with each other. Arbitration part and mediation part realize Oneness. Based on Taoism, Chinese people does not evaluate that who is right and who is wrong. They try to settle the disputes and restore the peace of community as a whole through the realization of Tao. An alternative explanation of the dual role of arbitrator-mediator might be provided by Confucianism. Many scholars agree that Confucianism is the strongest element of cultural norms in China.⁴³⁾ The notion of rang or yielding is rooted in the idea that communal peace and harmony can only be attained through parties' willingness to compromise and meet with each other halfway.⁴⁴⁾ In arbitration-mediation, arbitration or adjudication part seems to be influenced by mediation part, since the mediating element, norms of Confucianism have a deep impact on the Chinese people.

42) For example, Chinese legislation is intentionally drafted in broad indeterminate language which allows administrators to flexibly interpret the specific meaning of legislative language in different circumstances. Lubman, Stanley, "Bird in Cage: Chinese Law Reform After Twenty Years", *North Western Journal of International Law*, 2000, p.383, p.391.

43) See Potter(2004), Zeng(2009), Kun(2013).

44) Vera, de, Carlos (2004), p.168.

III. Shari'ah and Arbitration–Mediation in Malaysia

1. Cultural Foundation

The dominant religion of Malaysia is Islam. Accordingly, Malaysia is influenced by Islamic cultural tradition in dispute resolution. A couple of scholars point out that the Islamic corpus juris is replete with legal texts prescribing processes such as sulh, tahkim, and hybrid processes for the settlement in an amicable manner.⁴⁵⁾ These ADR processes of Islamic law aim at the settlement of disputes in an amicable manner.⁴⁶⁾

(1) Sulh(good faith negotiation, mediation/conciliation)

The basic method of dispute resolution particularly in commercial and financial transaction is good faith negotiation referred to as Sulh.⁴⁷⁾ In the classical Islamic tradition, sulh means the amicable settlement or conciliation and peacemaking.⁴⁸⁾ In other words, the ethical principle in sulh is to forgive and compromise.⁴⁹⁾ This is an institutionalized method of dispute resolution recognized and prescribed by the primary source of the Shari'ah, Islamic law. Though sulh is generally conducted in informal manner, the law allows institutionalized sulh to facilitate the process of settlement and ensure the enforceability of any agreement reached by the contending parties.⁵⁰⁾ Sulh is not a foreign concept to the Malay society. It was practiced since the time of

45) Rashid, K. Syed "Alternative Dispute Resolution in the Context of Islamic Law", *Vindobona Journal of International Commercial Law and Arbitration*, Vol.8, No.1, 2004, pp.96-99. Oseni, A. Umar, "Dispute Resolution in Islamic Banking and Finance: Current Trends and Future Perspectives", presented at the International Conference on Islamic Finance Services 2009, Islam, Zahidul, "Provision of Alternative Dispute Resolution Process in Islam", *IOSR Journal of Business and Management*, Vol.6, No.3, 2012, p.32.

46) Oseni, A. Umar, "Dispute Resolution in Islamic Banking and Finance: Current Trends and Future Perspectives", presented at the International Conference on Islamic Finance Services 2009,

47) Prior to the advent of Islam, disputes are solved by using different methods with sulh and tahkim as the common modes used. Wahed, Hanis, "Sulh: Its Applications in Malaysia", *IOSR Journal of Humanities and Social Science*, Vol.20, No.6, 2015, p.73.

48) Othman, Aida, "And Amicable Settlement Is Best: Sulh and Dispute Resolution in Islamic Law", *Arab Law Quarterly*, Vol.21, 2007, p.65.

49) Ahmad Sa'odah and Hak Abdul Nora, "Family Mediation and Sulh: An Alternative Dispute Resolution in Malaysia", *International Journal of Social Policy and Society*, Vol.7, 2010, p.220.

50) Ahmad Sa'odah and Hak Abdul Nora, "Sulh(Mediation) in the State of Selangor: An Analysis of Legal Provision and Its Application", *IJUM Law Journal*, Vol.118, No.2, 2010, pp.213-237.

Malacca until the British came and introduce the Charter of Justice to the Strait Settlements and latter expanded the influences of their laws to Federated Malay States and Unfederated Malay States. Sulh is one of the examples of implementation of Islamic law by the Malay Sultans.⁵¹⁾

(2) Tahkim (arbitration)

The origin of tahkim as a process of dispute resolution is traced back to the pre-Islamic Arabia.⁵²⁾ The four major Sunni Islamic schools, Maliki, Hanafi, Hanbali, and Shafi'i all accept arbitration as a dispute resolution forum.⁵³⁾ Tahkim means arbitration which described as the spontaneous and more or less improvised move by two or more parties in dispute to submit their case to a third party neutral for settlement based on the provision of Islamic law. The major characteristics of tahkim is that an arbitral award is binding on the parties. Once an arbitral award is filed in court for the purpose of recognition and enforcement and the judge(qadi) is satisfied that there is no error in the award on the point of law, it will become binding on the parties.⁵⁴⁾

(3) Fatawa of Mufti (Expert Determination)

Consensual ADR processes allow a neutral third party chosen by the parties to make evaluative assessment of a dispute based on merit and his own expertise.⁵⁵⁾ Expert determination is a process where parties entrust disputes to some experts for evaluation in view of the technical nature of the dispute. Unlike other variant of Fatawa, expert determination is usually binding on the parties when it is considered as a contract.⁵⁶⁾

51) Kahn, A. Hanna, "Community Mediation in Malaysia: A Journey from Malacca Sultanate to the Department of Unity and Integration Malaysia("DNUIT"), Paper presented in international conference on Islam in Asia and Oceania 2012, ISTAC, Kular Lumpur.

52) In the fragmented tribal society or pre-Islamic Arabia, tahkim was the only means of dispute resolution short of war if direct negotiation and mediation failed to achieve settlement, Wahed, Hanis, "Sulh: Its Applications in Malaysia", *IOSR Journal of Humanities and Social Science*, Vol.20, No.6, 2015, p.73.

53) Nadar, Aisha, "Islamic Finance and Dispute Resolution: Part 2", *Arab Law Quarterly*, 2009, p.187.

54) Umar Oseni (2009).

55) Rashid, K. Syed (2004), p.115.

56) Umar Oseni (2009).

(4) Med–Arb (a combination of sulh and tahkim)

Within the context of Islamic law, Med-Arb is the hybrid process of sulh and tahkim in order to arrive at an amicable resolution of the dispute. The Med-Arb process has been recognized and prescribed by the Qur'an and it was practiced in the Islamic legal history. The Prophet Muhammad S.A.W used to act not only as the head of the state but also as a mediator and arbitrator in few cases.⁵⁷⁾ The practice has been one of the main dispute resolution mechanisms in Islamic law since over 1400 years ago. There are basically legal texts in the Qur'an that gives approval for med-arb.⁵⁸⁾

If you fear a breach between them twain(the man and his wife) appoint (two) arbitrators, one from his family and the other from her's; if they both wish for peace, Allah will cause their reconciliation, Indeed Allah is Ever All-Knower, Well-Acquainted with all things.⁵⁹⁾

The latter part of the text gives an indication to the effect that if during the proceedings any of the parties or both wish for reconciliation rather than an arbitral award through a compromise, then Allah will guide them to such reconciliation. According to Syed Rashid and Umar Oseni, the med-arb process is a mechanism for dispute resolution enmeshed within general framework of Sulh(amicable settlement) in Islamic jurisprudence. In most of cases, during the Tahkim proceedings, both sulh and tahkim are combined to facilitate the process of dispute resolution. This is encouraged in most cases because employing conciliatory process is considered an obligation for the arbitrator in Islamic jurisprudence.⁶⁰⁾

2. Arbitration–Mediation of Family Disputes

As suggested by Rashid Sayed, Islamic type of arbitration-mediation has been implemented in Selangor state of Malaysia through the combination of sulh with tahkim. Sulh is undoubtedly effective channel of resolving disputes. The successful

57) Wahed, Hanis, "Sulh: Its Applications in Malaysia", *IOSR Journal of Humanities and Social Science*, Vol.20, No.6, 2015, p.73. The Prophet was invited as arbitrator to Medina. Sohn, Z. Young, *Islam: Doctrine, Thought and History*, Illzogak, 2005, p.144

58) Rashid, K. Syed (2004), p.110. Oseni, A. Umar (2009).

59) Qur'an, al-Nisa:35.

60) Rashid, K. Syed (2004), pp.110-111. Oseni(2009).

rate of sulh was 64% as compared to 34% cases referred for trial, in case of department of Syariah Judiciary Selangor.⁶¹⁾ Similar to Imperial China, the implementation of sulh in the form of tahkim is sanctioned by Section 48 and Section 47, the Islamic Family Law Enactment(IFLE, 2003). According to Ahmad and Hak, Section 48 provides that if the court is satisfied that there are constant quarrels between parties to a marriage, the court may order the appointment of two hakams(arbitrators), one for the husband, and another for the wife. In addition, the Section 47 of IFLE 2003 requires that "hakam may also be appointed if the conciliatory committee fails to reconcile the parties in a contested divorce. At this time, the function of hakam in Section 48 is in fact by the Conciliatory committee. Hakam has the power to effect divorce even in the case where the husband refuses to do so while the chairman of conciliatory committee has no such power. Thus it is observed that hakam is an arbitrator rather than a mediator."⁶²⁾ On the other hand, any of the parties to a court proceeding may convene sulh at any stage of the proceeding in order to resolve their disputes by the Section 99 of IFLE 2003.⁶³⁾ Accordingly, we conjecture that judges, similar to Chinese judicial mediation, play an active role to effect mediation in the court of Malaysia.

3. Arbitration–Mediation in Islamic Banking

In resolving Islamic banking and finance disputes, an individual process of dispute resolution like tahkim or sulh may be counter-productive, since no individual entrepreneur or financial institution will want to take any huge financial risk.⁶⁴⁾ According to Hasan and Asutay, the dispute resolution in Islamic banking is more complicated in mixed legal system as in the case of Malaysia, since the Shari'ah co-exists with common law. Umar Oseni proposes a kind of med-arb to resolve the disputes in Islamic banking industry in Malaysia. Med-Ex-Arb consists of three layers of dispute resolution mechanism. As a preliminary step, it is always better to begin dispute resolution proceedings with sulh which is termed "mediation" for the purpose

61) Ahmad Sa'odah and Hak Abdul Nora, "Sulh(Mediation) in the State of Selangor: An Analysis of Legal Provision and Its Application", *IJUM Law Journal*, Vol.118, No.2, 2010, p.215.

62) Ahmad and Hak (2010), p.220.

63) Ahmad and Hak (2010), p.221.

64) Umar Oseni, (2009).

of hybrid process. After that, in order to ensure a well reasoned decision, it is proposed that such good faith negotiation cum mediation should be supported by a binding Expert Determination.⁶⁵⁾ Such experts should be known for their expertise in the field of Islamic banking and finance. This hybrid process starts with sulh and if sulh is not successful within a reasonable time, the dispute should proceed for binding Expert Determination. After an objective evaluation of the case, the experts give the opinion which is considered binding. However, if any of the parties to the dispute refuses to be guided by the opinion of the expert, there is always the need for an enforceable procedure in form of tahkim.⁶⁶⁾

In Med-Ex-Arb, disputants are inevitably faced with either of expert decision or arbitral award, all of which are binding solution in Med-Ex-Arb hybrid process. The first choice is to terminate the disputes through amicable solution. If it fails, disputants should proceed to Expert decision process or arbitration process. The choice of disputants will depend on the acceptability of expert and arbitrator. Who is more suitable for disputants to resolve the financial disputes? Since it is not guaranteed that arbitrator has a professional knowledge of Islamic banking, it is better to resort to expert. Some of arbitrators are judges in conventional court. If they are used to have a verdict on the basis of classical common law in Malaysia, which is different form Shari'ah. In this unfavorable situation, it is desirable for disputants to have an amicable solution or expert determination.

IV. Two Cultures of Arbitration–Mediation in China and Malaysia

1. Dual Role of Dispute Resolver

In Chinese cultural tradition, there is an element of dual character of dispute resolver. Fan Kun argues that the Chinese dispute resolver was essentially that of a mediator to be aimed to resolve grievances and restore harmony. In addition, they also played the role of an investigator and even to some extent an adjudicator who could impose

65) Umar Oseni, (2009).

66) Umar Oseni, (2009).

punishment on the party who cause further trouble.⁶⁷⁾ This dual role of adjudicator-mediator is also found in Chinese judicial mediation. According to Phillip Huang, the mediator and trial judge are one and the same person: a fact-finding during mediation is not separated from that during trial, when mediation is a court activity.⁶⁸⁾

Accordingly, it seems that Chinese characteristics of dispute resolver plays a dual role of adjudicator as well as mediator.

On the other hand, Ahmad and Hak argue that hakam(arbitrator) may also be appointed if the conciliatory committee fails to reconcile the parties in a contested divorce. At this time, the function of hakam is in fact by the Conciliatory committee.⁶⁹⁾ In addition, any of the parties to a court proceeding may convene sulh at any stage of the proceeding in order to resolve their disputes by the Section 99 of IFLE 2003. Similar to Chinese judicial mediation, judges play an active role to effect mediation in this situation.⁷⁰⁾ Accordingly, the dispute resolver plays the dual role of adjudicator as well as mediator. The differences are that arbitrator changes hats in the stage of arbitration in China. In other words, same person plays the role of arbitrator-mediator. Unlike this, each of two sub process of hybrid process are implemented by different bodies in Malaysia: conciliatory committee and hakam, although the role of hakam changes from arbitrator into mediator. In case of Islamic finance disputes, the proposal of Med-Arb suggests that different person take the responsibility of each sub process of med-arb.

2. Governing Law

The distinctive technique of Chinese mediator is known to be a moral education.⁷¹⁾ Accordingly, the dispute resolver is expected to employ the moral education in the

67) Furthermore, the role of clan heads in family dispute resolution was not strictly that of arbitrators but mediators as well. Fan Kun argues that there seems to be no clear line between the function of a mediator and the function of an arbitrator. Kun, Fan, "Glocalization of Arbitration: Transnational Standards Struggling with Local Norms through the Lens of Arbitration Transplantation in China", *Harvard Negotiation Law Review*, Vol.18, 2013, p.200.

68) Huang, C. Phillips, "Court Mediation: Past and Present", Phillip C. Huang, *Chinese Civil Justice: Past and Present*, Rowaman & Littlefield Publishers, 2010, p.220.

69) Ahmad and Hak (2010), p.220.

70) Ahmad and Hak (2010), p.221.

71) Wall, James, "Community Mediation in China and Korea: Some Similarities and Differences", *Negotiation Journal*, Vol.9, No.2, 1993, p.147.

stage of mediation of arbitration-mediation in China. At this stage, dispute resolver's moral education to disputants is expected to be based on cultural heritage of China, mainly, Confucianism. At the stage of arbitration, the governing law is presumed to be Chinese arbitration law and dispute resolution rules of arbitration institution in particular. On the other hand, dispute resolver in Islamic arbitration-mediation relies on Shari'ah, Islamic law originated from Qu'ran and hadith. Related with the application of Shari'ah, there is an obstacle to interpretation problem of Qu'ran and hadith. According to Aisha Nadar, the Ottoman codification effort was primarily based on Hanafi law, but the reality of today's (disputes) includes the involvement of participants from the various schools, each of which representing a distinct system of law with its social values and juristic principles. This diversity does not serve to add the legal certainty required by international financiers.⁷²⁾ Furthermore, Malaysia has two kinds of law system: Common law and Shari'ah, Islamic law. The court in Malaysia has an innate problem in governing law.⁷³⁾

3. Character of Mediator

The character of Chinese mediator is not equivalent to that of mediator in Malaysia. According to Wall and Callister, China's mediation system is a formal one, whereas in Malaysia it is not.⁷⁴⁾ Fan Kun also acknowledges that Chinese mediation is a part of formal system.⁷⁵⁾ Wall and Callister argue that for the Chinese mediators, there is one principal responsibility: to provide harmonious social relations to the community: that is to fix conflicts. The mediators are quite forceful in the pursuit of this goal in China.⁷⁶⁾ By contrast, mediators in Malaysia are not members of a formal mediation system: rather they are primarily civil and religious leaders who have a broad range of

72) Nadar, Aisha, "Islamic Finance and Dispute Resolution: Part 2", *Arab Law Quarterly*, 2009, p.191.

73) Abikan, I. Abdulqadir, "Islamic Banking Disputes between Judicial Pluralism and ADR", *Journal of Islamic Banking and Finance*, 2011, pp.11-29.

74) Wall, A. James and Callister, R. Ronda, "Malaysian Community Mediation", *Journal of Conflict Resolution*, Vol.43, No.3, 1997, p.346.

75) Fan Kun (2013), p. 205.

76) They determine who is right or wrong and then fix the disputes, Wall and Callister (1997), p.346. Neil Diamond also agree with this opinion. Diamond, Neil, "Conflict and Conflict Resolution in China: Beyond Mediation-Centered Approaches", *Journal of Conflict Resolution*, Vol.44, No.4, 2000, pp.523-546.

responsibilities. Wall and Callister expect they would handle this task like any other by meeting with the parties, gathering information and helping the disputants to overcome the problem not by educating them or telling them to make concessions.⁷⁷⁾ From these comparisons, it seems that the dispute resolver of Malaysia maintains the less authoritative attitude than Chinese dispute resolver, although religious leader as dispute resolver has the divine authority based on Qu'ran.

4. Secrecy of Information

Many scholars point out the secrecy of information as the main problem of Chinese med-arb process. Jacob Rosoff argues that the primary concern of hybrid procedures is that the arbitrator-mediator will become biased during the process.⁷⁸⁾ Paul Mason also worried that knowing the mediator may also arbitrate their disputes, parties may be less willing to disclose certain information during the mediation, in turn making the mediation less likely to succeed.⁷⁹⁾ This would render him unfit to continue resolving disputes as an arbitrator. This confidentiality problem is also found in Islamic type of arbitration-mediation process in Malaysia. According to Abdul Hak, there was no provision for secrecy of information given during the reconciliation session under LRA 1976. It was felt that conciliatory bodies should draw up their own Code of Ethics.⁸⁰⁾ Reaction to this confidentiality problem, CIETAC issued a Notice to Arbitrators in March 1991 and adopted a new edition April 1993 to regulate the ethics of arbitrators.⁸¹⁾ Article 13 reads that the arbitrators should strictly observe confidentiality and should not divulge any relevant substantial and procedural matters of the cases.⁸²⁾ In recent times, the Sulh Officer Ethical Code(2002) emphasizes the confidentiality of Sulh officer now and ensure the security of parties during Sulh.⁸³⁾ From these regulations, we expect that both countries acknowledge

77) Wall and Callister (1997), pp.346-347.

78) Rosoff, Jacob, "Hybrid Efficiency in Arbitration: Waiving Potential Conflicts for Dual Role Arbitrators in Med-Arb and Arb-Med Proceedings," *Journal of International Arbitration*, Vol.26, No.1, 2009, pp. 90.

79) Mason, E. Paul, "The Arbitrator as Mediator and Mediator as Arbitrator," *Journal of International Arbitration*, Vol.28, No.6, 2011, p.545.

80) Hak, Abdul Nora, "Family Mediation in Asia: A Special Reference to the Law and Practice in Malaysia", *ILLUM Law Journal*, 2007, pp.121-148.

81) Huang, Yanming, "The Ethics of Arbitrators in CIETAC Arbitrators", *Journal of International Arbitration*, Vol.12, No.2, 1995, p.5.

82) Huang, Yanming (1995), p.14.

the confidentiality problem and make an effort to alleviate this problem. However, this confidentiality problem seems to be remained to be a problem to be solved.

5. Training of Mediators

Unlike arbitrators, mediators need a skill to persuade disputants to settle their disputes. The mediators in community mediation in China has no formal education and training as mediator.⁸⁴⁾ However, in modern arbitration -mediation in China, international arbitrators who play the role of mediator are presumed to have a legal training.⁸⁵⁾ In case of Malaysia, the Sulh Officer Ethical Code(2002) emphasizes the skillfulness of Sulh officer. Since the duty of Sulh officer is to resolve disputes according to the Islamic law, she or he has to be knowledgeable in law and has necessary skills of a good mediator.⁸⁶⁾ In case of Chinese mediator, there is no such obligation to learn a mediation techniques separately.

V. Conclusion

In modern world, a couple of countries of different continents employ the hybrid process of dispute resolution.⁸⁷⁾ This study examines the hybrid process of arbitration

83) Ahmad and Hak (2010), p.229.

84) In broad sense, there is a lot of judges lack the formal education in law. Wang, David, "Judicial Reform in China: Improving Arbitration Award Enforcement by Establishing a Federal Court System", *Santa Clara Law Review*, Vol.48, 2008, p.662. A substantial part of mediators are females in villages. Chung Yongkyun, "A Study of Controversy on Community Mediation in China in Terms of Three Perspectives", *Journal of International Area Studies*, Vol.14, No.2, 2010, p.338. Chinese government also know this problem and tries to establish grand mediation. Hu, Jiren, "Grand Mediation in China", *Asian Survey*, Vol.51, No.6, 2011, pp.1065-1089.

85) Chung Yongkyun and Ha, Hong-Youl, "Arbitrator Acceptability in International Commercial Arbitration: The Trading Firm Perspective", *International Journal of Conflict Resolution*, Vol.27, No.3, 2016, p.382.

86) The Sulh Officer Ethical Code(2002) also emphasizes that sulh officer has to obtain degree in Sharia'h from local or international universities or obtain Diploma in administration and Islamic judiciary from the international Islamic university, Malaysia or University Kebangsaan Malaysia or obtain certificate for conducting mediation from Mediation Consultants recognized by the department of Shari'ah Judiciary Malaysia or appointed as Shari'ah Officer. Ahmad and Hak (2010), pp.235-236.

87) See Syed Rashid (2004) about practices of hybrid process in middle eastern countries. For the East Asian case, refer to following articles. Liang, Jiaqi, "The Enforcement of Mediation Settlement Agreements in China", *American Review of International Arbitration*, Vol.19, 2008, pp.489-519. Lim, Sungwoo, "Mediation in Arbitral Proceedings(Arb-Med): A Korean View," *Korean Arbitration Review*,

and mediation in China and Malaysia. Both countries have a strong tradition of mediation. Chinese people have a strong tradition of Taoism and Confucianism to emphasize the harmony. Similarly, Malaysia has a strong tradition of Sulh, amicable settlement. Since Malaysia is a multi-cultural multi-racial countries,⁸⁸⁾ Malaysian government emphasizes the harmony and amicable settlement to prevent the racial disputes. In 21st century, Chinese government plans to establish the design of grand mediation, encompassing various types of mediation.⁸⁹⁾ In Malaysia, the Shari'ah Civil Procedure Act(2001) provides that parties to civil disputes must first attempt amicable settlement with trained court personnel or sulh officials.⁹⁰⁾ It does not mean that adjudicator's role is not neglected in China, although they emphasize the mediator's role.

The Taoist's yin-yang perspective provides an interpretation of the flexibility of arbitration-mediation in terms of dual role of mediator-arbitrator. In the symbol of Chinese yin and yang, there is a small dark spot in the light area whereas there is a small light spot in the dark area. Meanwhile, yang always contains yin. Yin does not conflict with Yang. Rather, Yin and Yang complements with each other. Similarly, mediator stage does not conflict with arbitrator stage in the whole structure of arbitration-mediation. Rather the mediator stage and arbitrator stage complement with each other. Arbitration stage and mediation stage realize Oneness.

In case of Malaysia, Shari'ah has a long tradition of med-arb (combination of sulh with tahkim) in Islamic heritage.⁹¹⁾ As in example of Selangor state, arbitrator(hakam) plays the role of arbitrator if the conciliation fails. Furthermore, judge in court are encouraged to seek sulh during the proceedings. It seems that there is a convergence in arbitration and

2012, pp.38-42. For the usage of United States, refer to Carlos de Vera(2004) and Chung Yongkyun, "A Study of Med-Arb in the United States", *Journal of Arbitration Studies*, Vol.24, No.1, 2014, pp.85-109.

88) Kahn, A. Hanna, "Community Mediation in Malaysia: A Journey from Malacca Sultanate to the Department of Unity and Integration Malaysia("DNUIT")", Paper presented in international conference on Islam in Asia and Oceania 2012, ISTAC, Kular Lumpur.

89) Hu, Jiren, "Grand Mediation in China", *Asian Survey*, Vol.51, No.6, 2011, pp.1065-1089.

90) Othman (2007), p.72.

91) Modern Islamic world begin to accept arbitration as a dispute resolution mechanism, although they have some feeling toward arbitration in the process of interaction between Western companies and Middle eastern government. Brower N. Charles and Jeremy K. Sharpe, "International Arbitration and the Islamic World: The Third Phase", *American Journal of International Law*, Vol.97, No.3, 2003, pp.643-656.

mediation between China and Malaysia, although their cultures are heterogenous with each other. This paper has a couple of limitations. First, we lack the system wide comparison of arbitration and mediation in China and Malaysia. We only compare a part of whole system of arbitration and mediation in China and Malaysia. Second, we have a limitation to deal with various problems in deeper cultural context, although this paper provides a couple of issues surrounding arbitration and mediation in China and Malaysia. Third, there is no sufficient justification of choosing acronym 'arbitration-mediation' reflecting the fact that there is a confusion of terminologies of med-arb, arb-med, and mediation and arbitration.

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