MASTER’S THESIS:

INTERNATIONAL ARBITRATION AS AN EPISTEMIC COMMUNITY:

CONSEQUENCES OF EXPANSION OF INTERNATIONAL ARBITRATION IN ASIA
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**Subject area: International Economic Law**

**Problem formulation: How has the expansion of ICA to East Asian jurisdictions led to the development of new mechanisms for resolution of transnational disputes.**

- How has the epistemic community of professionals responded to pressures of transnational business needs of their jurisdictions?
- Have the responses been even, that is, uniform and identical or have they altered and varied with time?
- How does the role of epistemic community explain the gaps that cultural or systemic limitations cannot answer fully?

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<td>Hersh Sewak</td>
<td>HNC675</td>
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**Supervisor: Joanna Lam**

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INTRODUCTION

I. RESEARCH QUESTION

Formulation of concrete legal policies in international law has been generally explained in terms of doctrines of treaty making and/or the decisions of multilateral organs established as part of those treaties. This can be observed in numerous specialized legal regimes within international law, like World Trade Law and Human Rights in Europe. However, the development of particular treaty and decision-making practice has also been recognized to be influenced by informal activities of community of professionals associated with the practice of that domain of law.

This is true for development of International Commercial Arbitration [hereinafter, ICA]. ICA has developed as a response to the needs of transnational businesses to resolve disputes by a community of professionals skilled in arbitration doctrines and procedures. ICA, unlike Human Rights or World Trade Law, does not depend on a specific treaty for its substantive principles. Neither does it have a multilateral treaty-based dispute resolution organ, such as World Trade Organization’s Appellate Body in case of World Trade Law or European Court of Human Rights in case of European Human Rights Law. This lack of uniform rules and treaty-based institutions adds another layer of complexity to the inquiry regarding formation and justification of the principles of ICA.

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1 International Law Commission, Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, A/CN.4/L.682 (13 April 2006) at 83 emphasizes the role of informal networks between diplomats, scholars and practitioners in developing specialized International Law.
2 Id at 85-87 deals with specific case of WTO law and human rights law.
3 Stephen Lee Mudge and Antoine Vauchez, Building Europe on Weak Field: Law, Economics and Scholarly Avatars in Transnational Politics, 118 Ame. J. Socio. 449 (2012) discussing how the scholars lying at intersection of national academia and European politics have shaped European politics.; Yves Dezalay and Bryant Garth, Merchants of Law as Moral Entrepreneurs: Constructing International Justice from Competition for Transnational Business Disputes, 29 Law Soc. Rev. 27 (1995) applies Bourdieusian field theory to show the development of International Commercial Arbitration from competition between American Law firms and Continental Professors; International Law Commission, Supra n 1, at 84-85
4 Yves Dezalay and Bryant Garth, Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order (1996) remains the study of departure for International Commercial Arbitration as to its origins, conflicts and development of the discipline; Dezalay and Garth, Supra n 3 for concise description of competition between American law firms and continental professors; See Emmanuel Gaillard, Sociology of International Arbitration, 31 Arb. Intl. 1 (2015) for a bird’s eye view of actors and institutions that play a role and affect the field of International Arbitration; See Thomas Hale, Between Interests and Law: The Politics of Transnational Commercial Disputes 346-351 (2015) presenting the empirical support for role of practitioners in developing International Arbitration in China; But see Florian Grisel, Competition and Cooperation in International Commercial Arbitration: The Birth of a Transnational Legal Profession, 51 Law Soc. Rev. 790 (2017) for the alternate explanation as to the origins of ICA by collaboration among secant marginals consisting of practitioners operating at the intersections of national and transnational fields.
This thesis attempts to explain how the principles and doctrines of ICA develop into an applicable law. It does so by studying the community of ICA professionals through the concept of epistemic community in order to explain the formulation of concrete legal proposals as well their justification and defense. The concept of epistemic community is to zoom in the lens at the professionals as they articulate, defend and give shape to concrete policy proposals that comes to be understood finally as ICA.

More specifically, the thesis takes East Asian jurisdictions as the focal point to answer the inquiry as to how expansion of community of legal professionals has led to changes and modifications of the doctrines of ICA along with formulation of new doctrines. In order to do so, the thesis studies the evolution of ‘Med-Arb’ practice. This inquiry also reveals formation of new patterns in dispute resolution that are the result of the expansion of ICA to East Asian jurisdictions.

In line with this background, the thesis asks the following question: How has the expansion of ICA to East Asian jurisdictions led to the development of new mechanisms for resolution of transnational disputes. In connection with this inquiry, the thesis asks the following sub-questions:

- How has the epistemic community of professionals responded to pressures of transnational business needs of their jurisdictions?
- Have the responses been even, that is, uniform and identical or have they altered and varied with time?
- How does the role of epistemic community explain the gaps that cultural or systemic limitations cannot answer fully?

II. SCOPE OF RESEARCH AND LIMITATIONS

The last three decades have witnessed an increase in transnational business and consequently, growth of ICA community in East Asia. This thesis examines the arbitration practices in China, Hong Kong and Singapore to demonstrate the growth of this community of professionals, accompanied by increase in confidence at formulation and articulation of legal principles.

The research concerns the development of new patterns of dispute resolution by expansion of ICA to East Asian jurisdictions. It argues that the growth of the epistemic community of professionals is at the core of formulation of policy responses to the needs of transnational business. In line with this, the research question outlined above has been limited in two main
aspects: (a) to three jurisdictions of China, Hong Kong and Singapore (home countries to leading arbitral institutions) and (b) examination of Med-Arb practices that have developed within ICA in the version that originated from China in the 1990s.

For the purpose of this thesis, the practice of Med-Arb is used as the focal point for research to locate the epistemic community, its formulation of debates and responses to them. The term Med-Arb is difficult to define with precision given the competing definitions surrounding its use. For the purpose of this thesis, the term Med-Arb is understood as any proceedings that combine procedures of mediation with arbitration, with mediation commencing prior to arbitration or during arbitration or being fully hybrid with parties going back and forth between the two procedures. Briefly, mediation is a set of procedures in which a third person assists the disputing parties to resolve their dispute through facilitating a dialogue between them. On the other hand, arbitration is broadly defined as a method of dispute resolution where a non-government third party decides the outcome of the case through a judicial evaluation under the terms of the contract between the two parties.

In this manner, the evolution of epistemic community of professionals of ICA in three jurisdictions is canvassed by tracing the evolution of legal practice of Med-Arb. The development of Med-Arb is a relatively new phenomenon, owing the present version in popularity within ICA to innovations being made in China in 1990s and thereafter, subsequently spreading to Hong Kong and later, Singapore. This tracing of historical development of Med-Arb as part of discursive exercise undertaken by the ICA professionals from these jurisdictions enables two key outcomes: first, development of doctrine and

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5 Dilyara Nigmatullina, Combining Mediation and Arbitration in International Commercial Dispute Resolution 17-24 (2019) discusses the difficulty within the extant literature as to consensus regarding the term Med-Arb.
7 Nadja Marie Alexander, International and Comparative Mediation: Legal Perspectives (2009)
8 Emmanuel Gaillard and John Savage, Fouchard, Gaillard and Goldman on International Commercial Arbitration 11 (1999) is a leading textbook on ICA; Dilyara Nigmatullina, Supra n 6, at 15-16.
principles around Med-Arb practice itself and second, the presence of an epistemic community of professionals that shares a set of assumptions, normative beliefs and a policy agenda.

III. THEORETICAL APPROACH AND METHODOLOGY

In terms of methodology, the thesis is a sociolegal study which employs discourse analysis of the literature produced by professional community. This is done to locate the shared assumptions and beliefs by exploring the literature produced by the professional community consisting of academics and practitioners from East Asia.\(^\text{12}\) The practice of Med-Arb in this way becomes the doctrinal issue through which these debates and formulation of applicable law is studied. The purpose of this exploration is comparative.\(^\text{13}\) It attempts to locate and present policy proposals alongside the assumptions, normative claims and principled beliefs advanced as part of promotion of Med-Arb in East Asian jurisdictions.

The studied professional community is dispersed over multiple jurisdictions. But it is aligned in terms of coherent policy enterprise that has been undertaken to promote a particular set of rules.\(^\text{14}\) By drawing upon comparative approach, this process of communication and collaboration can be identified through publications in journals, official releases of the institutions and speeches made by the practitioners. These findings are further augmented by reference to empirical literature incorporating the attitudes of arbitrators in East Asia is used to explain the expectations of this community.

In terms of empirical data, the thesis relies directly on the responses from the respondents in the existing studies done over the last fifteen or so years.\(^\text{15}\) The direct conduct of interviews

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\(^{12}\) Anthea Roberts, *Is International Law International?* 28-32 (2017) employs field theory and comparative analysis to study the competition between US and Western scholars on one side and Russian and Chinese scholars on the other side for their competition to define and promote their understandings of International Law and in the process creating what she terms ‘Competitive World Order’. She presents in the chapter discussing Project Design that the study of writings of international law academics from different countries enables to map their concerns, assumptions and goals.

\(^{13}\) *Id.* at 20-22 discussing the advantages of adopting comparative approach to international law to locate differences in approaches, examination of their understandings and application and freeing from the need to take a standpoint.

\(^{14}\) Oscar Schachter, *Invisible College of International Lawyers*, 72 Nw. Uni. L. Rev. 217 (1977-1978) for discussion on the profession and role of international lawyers where he had called public international lawyers as an invisible college working in a single discipline spread across geographies and organizations.

\(^{15}\) The last 15 years has seen series of empirical studies directed at the ICA community located in East Asia. See Dilyara Nigmatullina, *Supra n 5*, investigates combinations of Mediation with Arbitration by relying on interviews and administration of questionnaires to understand use of combined methods.; Shahla Ali, *Resolving Disputes in the Asia-Pacific Region: International Arbitration in East Asia and the West* (2010) develops carries out survey on the attitudes and use of combination techniques in East Asia and compares it with the attitudes in the West.; Gabrielle Kaufmann-Kohler and Kun Fan, *Integrating Mediation into Arbitration: Why it works in China* 25 J. Intl. Arb. 479 (2008) carries out semi-structured interviews among Chinese arbitration practitioners
supplementing this review of literature and doctrines exceeds the scope of this thesis. The conduct of qualitative empirical research through semi-structured interviews exceeds the scope of this thesis and they are planned to be undertaken in the further studies. However, their absence does not detract from the larger inquiry as to the existence of an epistemic community. They can be studied by reference to texts and textual analysis of the arguments advanced by the members of this community.

The benefit of such a method is in the comparison of their beliefs and arguments enables to locate congruities and coherence of narration about Med-Arb. As a result, the influences of local as well as transnational fields can be examined and categorized. Anthea Roberts defines field as inclusive of “many foundational issues, such as which areas are significant, which actors are important, which principles are fundamental, which sources are relevant, as well as which rules are settled and which are subject to change”. The ICA as a community has remained in constant communication with its members debating, discussing and developing solutions to the problems that are present within the community. Therefore, the references to these debates give insight into the questions that the members grappled with and the solutions they formulated in response to these inquiries.

By conceptualizing the divergence in understandings of ICA as that of rise of an epistemic community engaged in a shared enterprise having shared assumptions and normative beliefs, this thesis argues that the presence of this epistemic community of professionals in East Asian jurisdictions is driving this shift. This is not to minimize the account the economic or cultural causations for divergence. On the contrary, this thesis locates the agency and the method through which such economic and cultural viewpoints are presented as a coherent policy proposal with well-defined normative vision.

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to understand their attitudes and justifications towards Med-Arb.; Thomas Hale, Supra n 4, carries out interviews in China to locate the efforts of the community of professionals in China in developing Med-Arb.
16 Anthea Roberts, Supra n 12, at 1-6
17 Anthea Roberts, Supra n 12, at 2
18 Emmanuel Gaillard, Supra n 4, discusses roles of various practitioners in International Arbitration; Dezalay and Garth, Supra n 4, at 16, 18, 49 and 70 finds the community of professionals deeply involved in developing the principles of ICA as a symbolic capital and benefiting from the mixing of roles as arbitrators and lawyers and constructing a legal order; Sociology of International Arbitration; Andrea Bianchi, Epistemic Communities in International Arbitration 570 in The Oxford Handbook of International Arbitration (Thomas Schultz eds., 2020) focuses on the community of professionals that practice International Arbitration as being interactive to produce the field of ICA.
19 Thomas Hale, Supra n 4, at 334-343 specifically finds that the role of market is insufficient to explain the rise of arbitration in China, especially with foreign counterparts; But see Kun Fan, Arbitration in China: A Legal and Cultural Analysis 181-196 (2013) and Gabrielle Kaufmann-Kohler and Kun Fan, Supra n 15, where rise of Med-Arb is explained in terms of role of Confucian culture.
The adoption of this approach has enabled to look beyond the anonymity of objectivity of law to understand the rationale, practices and policy agenda of the community of professionals. Through this critical distancing in assessment, different vocabularies used in the profession can be studied to locate the biases as well as blind spot within the profession.\(^{20}\) The epistemic communities approach is therefore most suited to locate a shared enterprise having a common vocabulary and set of assumptions as to the nature of discipline and its normative basis. The advantage of this approach is that it presents an insight into processes of policy formation. Sabatier has argued understanding policy formulation through a coalition advocacy approach that also involves study of common belief systems.\(^{21}\) However, it is not appropriate for this study of Med-Arb practice because there are no rival advocacy coalitions in competition within the East Asian jurisdictions to define the legal agenda.

IV. \textbf{Research Value and Relevance}

This thesis adopts a socio-legal approach by fusing sociological methods drawn from the conceptualization of epistemic community and field theory with the study of Med-Arb practices in East Asia. A common critique of such a study has been its distance from practice oriented concerns.\(^{22}\) However, theoretical research enables a better appreciation of the practice, which in case of Med-Arb in East Asia gains heightened relevance as it reveals development of new principles in response to local needs. This has a direct relevance for engagement with East Asia by enabling a new lens to look at the articulation and formulation of legal practices. Furthermore, academic expertise has been part of ICA practice from mid-twentieth century with the leading practitioners even today having an academic background or atleast, interface.\(^{23}\)

\(^{20}\) Andrea Bianchi, \textit{International Law Theories: An Inquiry into Different Ways of Thinking} 162 (2017) where he argues for importance and centrality of self-reflexivity among international lawyers, “If international lawyers can no longer hide behind the anonymity of the objectivity of the law for which they notionally act merely as impersonal agents, the persona of the members of the profession ought to be studied. To understand who we are, what we do, and the reasons why we do things in a certain way can now be understood as a fundamental professional duty. A critical distance in assessing what one practises (I include theory as a performative act in the concept of practice), an interest in learning more about the different vocabularies used in the profession, and an open-mindedness towards different styles and sensibilities in the profession, are all necessary elements for developing a self-reflexive instinct.”


\(^{22}\) Andrea Bianchi, \textit{Supra n 18}, rejects the concerns of seeing theoretical concerns distinct from practice contending that practice requires theoretical knowledge for justification and theory dependent upon practice for validation; \textit{See} Emmanuel Gaillard, \textit{Supra n 4}, where he counts academic journals in ICA as part of his sociological analysis of International Arbitration.

\(^{23}\) Florian Grisel, \textit{Supra n 4}, presents an empirical study of ICA practice in mid-nineteenth century with the leading practitioners demonstrating a mixture of practice as well as academic practice. Grisel argues that this has since become a template for the succeeding generations of ICA practitioners with leading practitioners having a strong academic background along with practice.; Dezalay and Garth, \textit{Supra n 3}, argues that the symbolic
Roberts recognized the end of post-cold war triumphalism of the 1990s as becoming a transition to what she called “competitive world order” with greater divisions between West and East as well as diffusion of power from the industrialized North to the industrializing South.\(^{24}\) In this milieu, where different approaches to international law are likely to compete, it is imperative for both theoreticians as well as practitioners to understand these perspectives from unlike-minded states.\(^{25}\) The study of growth of professional communities within ICA (characterized by Emmanuel Gaillard\(^{26}\) as polarized groups) enables a focusing on these cleavages and divergences that are arising within ICA doctrines and principles.

Shahla Ali\(^{27}\) argued that acknowledging and understanding the difference in approaches enables a more efficient training of practitioners who benefit from knowledge of viewpoints that exist in different jurisdictions. This thesis builds towards such an understanding. It locates the episteme\(^{28}\) (the shared worldview) of the practitioners in East Asian jurisdictions. By doing so, the thesis adds to the knowledge of how practitioners are approaching different issues in their jurisdictions. This knowledge enables understanding of the professionals and the practitioners in the globalizing world.\(^{29}\) To put it simply, it is no longer possible to work with one single understanding of ICA, especially, when dealing with jurisdictions with large community of practitioners of their own.\(^{30}\)

Finally, from an economic perspective as a practitioner, it assists in understanding the East Asian jurisdictions whose economic relevance has increased in last two decades.\(^{31}\) To that extent in of itself, a research linking the community of professionals and their impact on the body of law adds to the understanding of law and its expected divergences.

capital of ICA is a mix of technocratic expertise fused with the academic background in order to legitimate ICA as a field capable of resolving transnational business disputes. For further details of how this complementariness developed in ICA with oil arbitrations as a case study see Dezalay and Garth, Supra n 4, at 100-110.

Anthea Roberts, Supra n 12, at 282-290 where she charts the diversion of scholars along with their arguments for defining and controlling the field of international law as part of the struggle between the West and Russian and Chinese response commencing in 1990s and 2000s.

Anthea Roberts, Supra n 12, at 13-14.

Emmanuel Gaillard, Supra n 4, argues to look at ICA community of professionals as having moved beyond the closed knit community that had prevailed in the twentieth century towards a larger and diverse community of professionals.

Shahla Ali, Approaching the Global Arbitration Table: Comparing the Advantages of Arbitration as Seen by Practitioners in East Asia and the West, 28 Rev. Lit. 791 (2009)

Episteme is discussed at length in the Section III of Chapter 1.

Shahla Ali, Supra n 27, at 55

Anthea Roberts, Supra n 12, at 13

Anthea Roberts, Supra n 12, at 289, discusses at length the geopolitical challenge posed by China and Russia to US and its impact on fragmentation of international law. She puts it pithily as, “International law reflects international power. If international power becomes more competitive and fragmented, one can expect increased pressure to be placed on notions of universal international law.”
V. **STRUCTURE OF THESIS**

The thesis comprises four chapters. Chapter I, entitled, “Theoretical Foundations: Epistemic Community” introduces the concept of epistemic community and epistemes. It details the concept of epistemic community by exploring its elements. The chapter presents the professional community of ICA as an epistemic community. It then presents the concept of episteme, that is, the shared knowledge developed by the community that reflects its assumptions and policy agenda to show how ICA is an epistemic community.

Chapter II, entitled “Epistemic Community of International Commercial Arbitration” develops on the first chapter by detailing the origins of the epistemic community of ICA through historical records. This is followed by presenting the episteme of the ICA professionals as exemplified in the series of principles adopted within ICA. The chapter concludes with the discussion of the current state of the ICA community as a polarized group spread across the world.

Chapter III, entitled “Med-Arb and East Asia” introduces the practice of Med-Arb as developed within ICA. This is followed by discussion on debates around Med-Arb that have been raised periodically commencing in 1990s and ongoing till date. Finally, the chapter closes by presenting the development of ICA, including its arbitral institutions and law in the jurisdictions of China, Hong Kong and Singapore.

Chapter IV, entitled “Epistemic Community of East Asia” traces the development of hybrid proceedings in 1980s in China, followed by introduction of Med-Arb in 1990s. It traces its episteme in form of the arguments, normative beliefs and policy agenda that developed over the next three decades to 2010s. This is followed by discussion on adoption of Med-Arb in Hong Kong with focus on Gao Haiyan case and its eventual acceptance within the Hong Kong community. The examination continues with the case study of Singapore with the focus on the role of different government functionaries and practitioners in promoting AMA Protocol.

Chapter V, entitled “Concluding Remarks” recapitulates the result of the research. This deals with the account into the debates around culture, use of cultural vocabulary as representative of presence of epistemic community and the role of epistemic community in developing a policy agenda.
THEORETICAL FOUNDATION: EPISTEMIC COMMUNITY

This chapter concerns theoretical foundations of this thesis by introducing the concept of epistemic community. It traces the origin of the concept and lists out the key features that an epistemic community has that in turn enables policy formulation and maintenance. It continues by presenting insights of international law as a result of its practitioners and their priorities and goals in time. Finally, it closes with discussion on episteme that is the common vocabulary and assumptions developed by a particular epistemic community in pursuit of its policy preferences.

In canvassing the world of ICA, Dezalay and Garth\textsuperscript{32} presented a break from the doctrinal understanding of ICA towards a sociological one. Their work begins with the powerful statement about ideas – “ideas do not circulate and take hold by themselves. However powerful, an idea, like any new invention or technology, still requires carriers to promote it in a new context”.\textsuperscript{33} The key idea explored was that laws and doctrines of ICA were the results of actions of a group of individuals responding to specific pressures of commerce and need for legal intervention. In other words, they argued that ICA was an issue-based network of persons organized around “certain beliefs in an ideal of international private justice” or an epistemic community.\textsuperscript{34}

This method of looking at ICA informs the questions of divergences and fragmentation within international law. This fragmentation within international law has attained a center-stage for discussion in the last thirty years.\textsuperscript{35} This fragmentation is the result of increase in complexity of issues that international law has had to respond. In turn, it has led to development of specialized rule regimes within international.\textsuperscript{36} In other words, the unified and harmonious invisible college of International lawyers, described by Oscar Schachter of 1970s, has come to be the divisible college of international lawyers, as characterized by Anthea Roberts, with

\begin{itemize}
\item \textsuperscript{32} Dezalay and Garth, \textit{Supra n 4}  \\
\item \textsuperscript{33} Dezalay and Garth, \textit{Supra n 4}, at 3  \\
\item \textsuperscript{34} Dezalay and Garth, \textit{Supra n 4}, at 16  \\
\item \textsuperscript{35} International Law Commission, \textit{Supra n 1} was a report commissioned specifically to study the fragmentation with International Law.; Anthea Roberts, \textit{Supra n 12}, makes a strong case to study the approaches of unlike-minded countries and their academicians to understand the field of International Law in a more wholesome manner; James Crawford, \textit{International Law Bar: Essence before Existence?} 338 in International Law as Profession (Jean d’Aspermont et al. eds., 2017) argues that suggestion of international law bar is undesirable on account of differences in approaches and subject matter that have developed within the practice of International Law.  \\
\item \textsuperscript{36} International Law Commission, \textit{Supra n 1}, at 247 argues that the world is pluralistic and that due to this, an abstract resolution of divergences between different subject-matter special rules is not possible.
\end{itemize}
differing approaches, narratives and strategies. Therefore, the study of professional networks engaged in a common enterprise sheds further light into the divergence within the international law.

I. CONCEPT OF EPISTEMIC COMMUNITY

The term ‘epistemic community’ has been originally used in relation to scientific communities and international relations. Peter Haas employed the concept of Epistemic Community as part of his investigation to understand how policy formulation, including identification, definition and solutions of problems, is undertaken transnationally. Haas found that the traditional explanations centering around systemic limitations were insufficient. He found that there still existed a wide latitude for decision-making within these systemic limitations, from which eventual policy options were adopted.

Philosophically coining the debate, he argued that the role of human agency could be understood by studying the role of network of professionals engaged within these systemic limitations. These networks of professionals were made of tacit alliances and shared beliefs engaging with each other transnationally. The eventual choice of policy was thus the result of coordination by this set of professionals being an amorphous network of experts, professionals and practitioners that enjoyed credibility within that domain. Thus, when confronted with the inquiry as to how policy decisions were made in a complex environment, consisting of multiple interests and varied States, Peter Haas argued to locate the agency of

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37 Oscar Schacter, Supra n 14, gave the memorable phrase Invisible College of International Lawyers to present a picture of profession of International Lawyers as linked together by a common pursuit across the world.; Anthea Roberts, Supra n 12, at 16, uses the phrase Divisible College of International Lawyers as a word play on the Schachter’s formulation to argue that the coming of Competitive World Order with contestations over the field of International Law has necessitated a study of diverse frameworks.; Andrea Bianchi, Supra n 20, at 161-162 makes a strong case to see the community of professionals of International Law to be a subject matter of research in itself to better understand the evolution of International Law.

38 Peter Haas, Introduction: Epistemic Communities and International Policy Coordination, 46 Intl. Org. 1 (1992) at 3

39 Andrea Bianchi, Supra n 18, at 572

40 Peter Haas, Supra n 38

41 Peter Haas, Supra n 38, at 2 acknowledges the systemic limitations posed when developing a policy but argues strongly for the latitude available to the practitioners in developing a specific policy agenda in the words, “we acknowledge that systemic conditions and domestic pressures impose constraints on state behavior, but we argue that there is still a wide degree of latitude for state action. How states identify their interests and recognize the latitude of actions deemed appropriate in specific issue-areas of policymaking are functions of the manner in which the problems are understood by the policymakers or are represented by those to whom they turn for advice under conditions of uncertainty.”

42 Peter Haas, Supra n 38, at 1 and at 2, Peter Haas meant theories that attempted explanation of State behavior in terms of rational choice, deductive type approaches or interpretive approaches.

43 Peter Haas, Supra n 38, at 32
decision-making through the viewpoint of the actors that coordinated to bring about preferred outcomes.\textsuperscript{44}

The role of epistemic communities is therefore an element necessary to understand how States and transnational actors, such as Multinational corporations [hereinafter, MNCs] and Intergovernmental organizations [hereinafter, IGOs], negotiate and navigate\textsuperscript{45} the dynamics of uncertainty, interpretation, complexity\textsuperscript{46} and institutionalization\textsuperscript{47} surrounding the rules and policies. These complexities require solutions that are beyond guesses or “raw data” of information.\textsuperscript{48} It is here that these actors turn to communities of experts specializing in those domains.\textsuperscript{49} These communities of experts and professionals define the nature of the problem by controlling the frame of the collective debate and consequently influencing further negotiations and outcomes.\textsuperscript{50} Furthermore, they assist in mitigation of risks that could occur on account of ignorance of interlinkages with other issues\textsuperscript{51} and thereby assist in formulating relevant policy choices\textsuperscript{52}. As a result, by defining self-interest as well as normative considerations, these communities help in formulating solutions by giving meaning to raw data and information.\textsuperscript{53} Transnationally, these networks can span across bureaucratic agencies, the

\begin{flushleft}
\textsuperscript{44} Peter Haas, \textit{Supra n 38}, at 1.
\textsuperscript{45} International Law Commission, \textit{Supra n 1}, at 244-245.
\textsuperscript{46} Peter Haas, \textit{Supra n 38}, at 13.
\textsuperscript{47} Peter Haas, \textit{Haas, Epistemic Communities}, 792 in The Oxford Handbook of International Environmental Law, (Daniel Bodansky et al. eds., 2008) at 794 argues for the central role of epistemic communities in developing State policy under conditions of complexity and uncertainty.
\textsuperscript{48} Peter Haas, \textit{Supra n 38}, at 4
\textsuperscript{50} Peter Haas, \textit{Supra n 38}, at 5.; Anthea Roberts, \textit{Clash of Paradigms; Actors and Analogies shaping the Investment Treaty System}, 107 Am. J. Intl. L. 45 (2013) at 54 states the importance of the repeat players who have an interest in privileging an approach that is tied to them in the words, “The public international law paradigm, for instance, focuses attention on the system’s treaty basis, thereby putting the treaty parties in a position of relative superiority to both investors (who are not treaty parties) and investment tribunals (which are presented as agents of the treaty parties). The commercial arbitration paradigm, by contrast, focuses attention on the disputing parties and emphasizes that the investor and host state are disputants subject to “equality of arms,” which tends to downgrade the relative significance of states and elevate that of investors.”; Martti Koskenniemi, \textit{The Politics of International Law – 20 Years Later}, 20 Eu. J. Intl. L. 1 (2009) at 11-12 argues that the politics of redefinition in International Law is about “shifts in the production of types of outcome within international institutions, reflecting efforts by the native language speakers of some local idiom to raise the status of that idiom to a kind of Esperanto … To this extent the vocabularies act as ‘ideologies’ in the technical sense of reifying, making seem necessary or neutral something that is partial and contested.”
\textsuperscript{51} Peter Haas, \textit{Supra n 38}, at 15
\textsuperscript{52} Peter Haas, \textit{Supra n 38}, at 13
\textsuperscript{53} Peter Haas, \textit{Supra n 38}, at 4
\end{flushleft}
academia and professional practice that through tacit alliances or shared ideals work to promote specific policy outcomes.\textsuperscript{54}

To put it simply, an epistemic community is a network of professionals whose expertise is recognized along with having an authoritative claim to policy-relevant knowledge.\textsuperscript{55} Haas distinguished four features that any such network of professionals – an epistemic community – will possess. They include:

1. A shared set of normative and principled beliefs, which provide a value-based rationale for the social action of community members;
2. Shared causal beliefs, which are derived from their analysis of practices leading or contributing to a central set of problems in their domain and which then serve as the basis for elucidating the multiple linkages between possible policy actions and desired outcomes;
3. Shared notions of validity – that is, intersubjective, internally defined criteria for weighing and validating knowledge in the domain of their expertise; and
4. A common policy enterprise – that is, a set of common practices associated with a set of problems to which their professional competence is directed, presumably out of the conviction that human welfare will be enhanced as a consequence.\textsuperscript{56}

An epistemic community is therefore a concept.\textsuperscript{57} It is not necessary that its members necessarily call or recognize themselves as one.\textsuperscript{58} It is a tool to understand the world by enabling to understand actors, their actions and consequences. It is used generally to explain how certain specific policy outcomes have come to exist.\textsuperscript{59} Conceptually, Epistemic Community enables to locate shared causal beliefs, assumptions and normative beliefs among a group of experts within a domain working towards a common policy enterprise.\textsuperscript{60} It enables to understand how consensual knowledge is generated within these networks of experts and how it identifies issues in an attempt to provide resolution to them.\textsuperscript{61}

\textsuperscript{54} Peter Haas, \textit{Supra n 38}, at 32; \textit{See} Oscar Schachter, \textit{Supra n 14}, at 217
\textsuperscript{55} Andrea Bianchi, \textit{Supra n 18}; Oscar Schacter, \textit{Supra n 14} at 222
\textsuperscript{56} Peter Haas, \textit{Supra n 38}, at 3
\textsuperscript{57} Andrea Bianchi, \textit{Supra n 18}, at 572-573
\textsuperscript{58} Oscar Schacter, \textit{Supra n 14} called public international lawyers as an invisible college working in a single discipline spread across geographies and organizations.
\textsuperscript{59} Andrea Bianchi, \textit{Supra n 18} at 574-575
\textsuperscript{60} Andrea Bianchi, \textit{Supra n 18} at 573
\textsuperscript{61} Peter Haas, \textit{Supra n 38}, at 23; Thomas Hale, \textit{Supra n 4}, at 357 argues that legalization is a self-reinforcing process where rules and institutions come to organize market relations with the consequence that the individuals who shape and interpret those rules – lawyers, judges, arbitrators – gain increasing influence over outcomes.
An illustration of this development of consensual knowledge and network advantage was noted in the role played by ecological epistemic community consisting of atmospheric scientists and policymakers sympathetic to the scientist’s values in response to the question of depletion of ozone layer. This community’s shared values and common enterprise was built upon the 1974 Rowland-Molina hypothesis that “chlorine in CFC emissions upsets the natural ozone balance by reacting with and breaking down ozone molecules and hence depleting the thin layer of stratospheric ozone”. Their shared value of halting and reversing ozone layer depletion enabled them to work together towards a common policy enterprise that eventually culminated in the Montreal Protocol, 1987.

II. INTERNATIONAL LAW VIEWED THROUGH THE LENS OF EPISTEMIC COMMUNITY

While the above is an example of a temporary network of professionals working towards a single policy enterprise, the concept of epistemic community is also applicable in relation to a larger community not limited to one particular enterprise. So too, public international lawyers have been conceptualized as an epistemic community on account of their shared normative beliefs in the form of laws and rules that have developed as public international law. This is also true of community that practices ICA. It is a network of professionals, including, arbitrators, arbitration professionals and academics. They are organized around belief in the resolution of disputes through privately appointed dispute resolvers that specialize in practice and doctrines of what has been termed ICA. Their shared ideal and policy agenda is a mixture of these ideals as well as competition for business.

These communities of experts includes both working in government agencies and Intergovernmental Organizations as well as those working in non-government organizations.

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63 Id. at 189.
64 See Oscar Schacter, Supra n 14 at 23 where he notes that “Evidence of this process is found in the journals and yearbooks of international law, in the transnational movement of professors and students, and in the numerous conferences, seminars and colloquia held in all parts of the globe.”; David Bederman and Lucy Reed, The Visible College of International Law: An Introduction 95 Pro. Ann. Meet. (Am. Soc. Intl. L.) ix (April 4-7, 2001); Luiza Leão Soares Pereira and Niccolò Ridi, Mapping the ‘Invisible College of Lawyers’ through obituaries, 34 Lei. J. Intl. L. 67 (2021); Jean d’Aspermont, The Professionalization of International Law, 1 in International Law as a Profession (Jean d’Aspermont eds., 2017) at 28 puts it succinctly as “the professional community of international lawyers can be understood as an epistemic community that is a non-systematically organized network of professionals with recognised expertise and authority that allow them to contribute to the production of policy-relevant knowledge in relation to their area of expertise.”
65 Dezalay and Garth, Supra n 4; at 16; Dezalay and Garth, Supra n 3 discussing at length the competition and collaboration between ‘Young technocrats’ and ‘Grand Old Men’ in the development of the field of ICA with special advantage for ‘Young technocrats’ who could use the prestige gained from arbitration experience to project into other fields to secure greater business.
and academic institutions. They are recognized to have influence over decision-making concerning interpretations of international law and shape the political environment by engaging in ongoing debates by reliance on their expertise and shared knowledge. Consequently, the outcomes to these debates influence the eventual decision-making and resolving the ambiguities or gaps that inevitably arise in law. In turn, what comes to be accepted as international law, including ICA, depends to an extent on how the epistemic communities involved construct their understandings of law and transmit them. That is, the concerned law and its doctrines are linked with the professional worldview shared and developed by those practicing it as a profession.

This sociological turn in international law has also come with the key insight that International Law is not just set of formal rules and abstract theories but a result of concerted enterprise of individuals and communities acting together to define, construct and formulate solutions to ongoing problems. This is seen not only in the role that international lawyers as a profession plays in formulating multilateral treaties but also in developing the customary international law and general principles. This assumes significance because these practitioners deeply involved in developing and formulating policy, including determining the problem, setting agenda and formulating solutions to be adopted in response to these identified problems. In this manner, they play a role in formulating specific rules that are developed and applied. This has emerged

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66 Anthea Roberts, Supra n 12 at 8
68 Oscar Schacht, Supra n 14, at 223 on the legislative role of international lawyers argues that the evolution of customary law, general principles and formative effects of resolutions of international bodies is dependent on international lawyers.; Anthea Roberts, Supra n 50, at 53 observes the use of analogy is deeply influential on development of international law by stating that “Cause and effect can work in both directions: sometimes participants will pick an answer that suits their interests and use it to find a supportive analogy, while at other times participants will select an analogy that strikes them as self-evident and use it to find a supposedly neutral or “objective” answer.”
69 Anthea Roberts, Supra n 14 at 2; Martti Koskenniemi, Supra n 50 at 13 puts bluntly as “Human rights activists and security experts frequently choose strategies for ‘mainstreaming’ to increase their influence in trade policy, government of failed states, or development co-operation. If the strategy is successful, the object institution will make increasing use of human rights or security language in its official documents and new administrative positions will be opened for ‘human rights experts’ or ‘security experts’.”
70 Andrea Bianchi, Supra n 20, at 161 states that “It can be thought of as a kind of ‘conversation’ in which states, diplomats, and scholars alike engage to tackle the issues that arise in international relations.”
71 Wouter Werner, Concluding Remarks: The Praxis of International Law, 428 in International Law as a Profession (Jean d’Aspermont eds., 2017) at 429 notes on the definitional and identifying power of international law and observes that the binding force of law lies in the methods lawyers use to imagine and construct the idea of a binding norm followed by how they further classify in terms of law and non-law, legally relevant and legally irrelevant.
72 Oscar Schacht, Supra n 14, at 223.
73 Thomas Hale, Supra n 4, at 348; Peter Haas, Supra n 38.
74 Oscar Schacht, Supra n 14, at 224.
through professionalization of international law being both taught as a separate discipline in the academy and practiced by practitioners who identify and are recognized as such.\textsuperscript{75}

This professional practice of international law has also resulted in pluralization of this practice\textsuperscript{76}, that is, the practitioners of international law are no longer engaged in identical enterprises. This is the result of both the specialization in international law as different issues and needs have arisen requiring domain specific expertise as well as issues have become more complex in practice.\textsuperscript{77} They continue to share a common language, history and experience but have diversified in roles, capacities and modes of reasoning.\textsuperscript{78} This specialization of international bar continues to correspond to the specialization of different domains of international law\textsuperscript{79} and the corresponding formulations of rules and norms are related to shared interests and values of these networks\textsuperscript{80}.

The fragmentation or divergence in law is not limited to specialization of laws, say, that of international environmental law versus international trade law.\textsuperscript{81} These rule-specialized regimes are inevitable given the complexities of each issue requiring prioritization and narrow focusing on that particular domain.\textsuperscript{82} What is more is that even within these specialized rules, there is competition between different approaches and narratives reflecting the competing priorities of different states\textsuperscript{83} and epistemic communities\textsuperscript{84}. The understanding of causation as well as mechanisms for this divergence within international law and continuity of divergent

\textsuperscript{75} Jean d’Aspermont, \textit{Supra n 64} presents a case for professionalization of International lawyers International law as profession as one, rise of scientific method in practice; two, growth as a community of experts; three, as diversity of practice reflected in pluralization of law; four, as part of the socialization process.

\textsuperscript{76} Jean d’Aspermont, \textit{Supra n 64}, at 32 argues on that the professional community of international lawyers is diverse empirically organized around different issues which in turn is part of fragmentation of international law.

\textsuperscript{77} Anthe Roberts, \textit{Supra n 12}, at 27 puts the issue clearly as “In addition to distinctions between academia and practice, and between transnational and national communities, the field of international law is also fragmented into subfields, including human rights law, trade law, and environmental law. These subfields are often partially governed by their own rules, institutions, and practices, and they may be subject to their own doxa and forms of capital.”

\textsuperscript{78} Jean d’Aspermont, \textit{Supra n 64}, at 32.

\textsuperscript{79} James Crawford, \textit{Supra n 35}.

\textsuperscript{80} Bryant Garth, \textit{Issues of Empire, Contestation, and Hierarchy in the Globalization of Law}, University of California Irvine School of Law Paper Series no. 2015-56 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2864717) (SSRN) at 29 puts it simply as, “At the core of one of these epistemic communities (whether international law or international commercial arbitration, for example), and a key basis for success, then, is the link between the norms and the interests of transnational businesses and Western societies.”; Martti Koskenniemi, \textit{Supra n 50}, at 9

\textsuperscript{81} See International Law Commission, \textit{Supra n 1}, at 30-34 for discussion on nature of fragmentation within international law.

\textsuperscript{82} International Law Commission, \textit{Supra n 1}, at 247.

\textsuperscript{83} Anthea Roberts, \textit{Supra n 12}, at 14-15 studies competing perspectives from Chinese and Russian scholars vis-à-vis Western scholars of International law as being distinct approaches, perspectives and goals for International law as a whole in view of the competitive landscape of a post US unipolar moment.

\textsuperscript{84} Martti Koskenniemi, \textit{Supra n 50}, at 11.
approaches reflects presence of epistemic community of lawyers of particular jurisdictions that may not wholly share the policy priorities with their counterparts from other jurisdictions.\textsuperscript{85}

This fragmentation within a domain of international law corresponds to presence of a community of lawyers that shares the common language with the larger community but at the same time emphasizes localized priorities. In this way, development of law and its divergences also correspond to presence of community of professional lawyers who are responding to similar issues but with different priorities and strategies.\textsuperscript{86} Thus, the presence of different formulations of outcomes with shared values within a jurisdiction also corresponds to presence of a community of professionals pursuing a policy based outcomes within that domain.\textsuperscript{87} This in turn leads to localized divergences within a particular law which in turn are sustained by these epistemic communities. To conclude, international law is presence of competing fields of transnational legal communities interacting with each other spanning over various states.\textsuperscript{88}

III. \textbf{COMPETING EPISTEMES AND ROLE OF EPISTEMIC COMMUNITIES}

The study of the epistemic communities along with their shared policy agendas and goals therefore enables a better description of divergences taking place within international law.\textsuperscript{89} This has been termed as ‘episteme’ or the shared worldview of the epistemic community.\textsuperscript{90} As Bianchi puts it simply, “concept of episteme refers to the knowledge we have of a given field, to the way in which we come to apprehend it theoretically, to use it practically and to explain

\begin{itemize}
\item \textsuperscript{85} Anthea Roberts, \textit{Supra n 12}, at 325.; Thomas Hale, \textit{Supra n 4}, at 358 examines the role of market as well as profession of lawyers upon dispute resolution mechanism and concludes that “Delegation to lawyers to decide the form of dispute resolution institutions was observed across the historical record. Both the multilateral treaty negotiating exercises relied heavily on committees of legal experts to draft the needed provisions. The NYC negotiations in particular were decidedly legalistic. But even though the negotiators had scarcely any input from commercial interest groups, the end result – the NYC – essentially replicated and reinforced the policy provisions of the 1920s treaties (albeit in an updated fashion). In other words, it reproduced the policy goals for which firms had lobbied decades before”
\item \textsuperscript{86} Anthea Roberts, \textit{supra n 12}, examines this divergence at the level of States between the West on one hand and China and Russia on the other hand while discussing the South China Sea Arbitration as well the doctrine of responsibility to protect.; Jean dAspermont, \textit{Supra n 64} at 32 argues that this pluralization is a natural part of professionalization of international law and would continue to respond to the needs and interests of the subject domains and jurisdictions.; Anthea Roberts, \textit{Supra n 50} examines the differences in assumptions and worldviews in the practice of International Investment Law.
\item \textsuperscript{87} Anthea Roberts, \textit{Supra n 12} at 25 states that “International law is best understood as a transnational legal field made up of multiple, partially overlapping fields.”
\item \textsuperscript{88} Anthea Roberts, \textit{Supra n 12} at 25 states that “To understand international law as a transnational legal field, one must encompass both sets of communities and understand the relationship between them, which often varies across states”.
\item \textsuperscript{89} Anthea Roberts, \textit{Supra n 50}.
\item \textsuperscript{90} Peter Haas, \textit{Supra n 38} at 26-27 defines episteme as “We use the term to refer to concrete collection of individuals who share the same worldview (or episteme) and in particular share the four aspects of it that were outlined earlier. While members of an epistemic community by definition share an episteme with each other, they do not necessarily share it with other groups or individuals. In practice, the number of members in the communities we describe is relatively small.”
\end{itemize}
its operation”.

It is the ‘how to do’ part of the craft that its practitioners employ and can be deduced from the composition of their works, their strategies and goals. It is not a grand theory of everything but ways of thinking, set of presuppositions about historical conditions, and that they are so entrenched that they are invisible to those who use them. It is insular, if not wholly self-referential by restricting themselves to very core areas of their own specialization.

The importance of understanding the worldview or episteme with its shared assumptions and values has real world consequences. In Investment Treaty Arbitration, the two competing worldviews are that of public international law and ICA. Each view has its own presumptions, values and goals which directly influence the argumentation and interpretation in the treaty arbitration. As argued by Roberts, Haas, Bianchi and Dezalay and Garth, the worldview adopted to engage with a question or inquiry directly influences the outcome that is proposed as a resolution.

For instance, with respect to the question of confidentiality, those sharing the episteme of ICA would argue that the proceedings should remain confidential as the underlying purpose of arbitration is to promote party autonomy and confidentiality. Conversely, those sharing the episteme of public international law would argue that the intention of treaty parties dominates and would determine the question of confidentiality. Furthermore, those sharing the public law episteme are likely to resolve the issue towards openness arguing that the proceedings have a direct bearing issues of public nature.

At the heart of the proposed outcomes proposed lie shared visions, assumptions and goals shared within that particular epistemic community of lawyers. To take another example of publication of arbitral award, those from background of ICA see the disputes as settlement of

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91 Andrea Bianchi, Supra n 18, at 576.
92 Andrea Bianchi, Supra n 18, at 579.
93 Andrea Bianchi, Supra n 18, at 580.
94 Andrea Bianchi, Supra n 18, at 584.
95 Andrea Bianchi, Supra n 20, at 162.; Andreas Kullick, Narrating Narratives of International Investment Law: History and Epistemic Forces, 41 in International Investment Law and History (R. Hoffmann et al. eds., 2018) presents an examination of historical descriptions of origins of international investment law as being tied to advancement of emphasis on particular aspects of international investment law.
96 Anthea Roberts, Supra n 50.
97 Anthea Roberts, Supra n 12.
98 Peter Haas, Supra n 38.
99 Andrea Bianchi, Supra n 18.
100 Dezalay and Garth, Supra n 4 argue that the world view adopted is a mix of ideals and business.
101 Anthea Roberts, Supra n 50, at 48.
102 Anthea Roberts, Supra n 50, at 84.
private disputes rather than as creation of jurisprudence and thus, most awards from ICA are not publicized.\textsuperscript{103} Conversely, those from the public international law background with emphasis on development and coherence of law see a value in publicized the award.\textsuperscript{104}

These debates around publication of an award within the investment treaty arbitration are premised on different assumptions and visions about investment treaty arbitration law as a whole. Its characterization as a private dispute in turn borrows the episteme of assumptions and goals from ICA with the results that mirror the outcomes from ICA. Conversely, its characterization as public would borrow the episteme of assumptions and goals from public international law and public law worldview with outcomes mirroring the goals coherent from that worldview.\textsuperscript{105}

This choice also has a strategic element to the extent that those with public international law background would stand to gain in recognition as well as promotion of their substantive doctrines should their worldview get adopted. Conversely, is true for those with background in ICA who in turn gain reputation and recognition should their worldview gains prominence.\textsuperscript{106}

It is not to suggest that this strategic element across a wide network of practitioners is a result of a pre-conceived planning. Rather, it is to emphasize that the training and being associated with the practitioners that share the particular worldview has an influence on the choices that are made.\textsuperscript{107}

In effect, the study of these assumptions, normative beliefs and goals in turn enables studying the episteme – the shared worldview – developed by a community of practitioners.\textsuperscript{108} Thus, pursuit of a common enterprise with clear outcomes for policy choices reveals presence of an epistemic community of professionals that operate to construct the practice of law.\textsuperscript{109}

To sum up, a community of professionals with a shared worldview makes an epistemic community. Professionals of ICA make up such an epistemic community by virtue of their shared worldview in having a shared set of principles and doctrines. This can be located in the

\textsuperscript{103} Anthea Roberts, \textit{Supra n 50}, at 62.
\textsuperscript{104} Anthea Roberts, \textit{Supra n 50}, at 62.
\textsuperscript{105} Anthea Roberts, \textit{Supra n 50}, at 63.
\textsuperscript{106} Dezalay and Garth, \textit{Supra n 4}, at 33.
\textsuperscript{107} Anthea Roberts, \textit{Supra n 50}, at 57.; Andrea Bianchi, \textit{Supra n 18}, at 587-588.
\textsuperscript{108} Andrea Bianchi, \textit{Supra n 18}, at 589 states that “By putting forward a common vision of the world, epistemic communities shape the perception of social agents and determine the fundamental tenets of the discourse.”
\textsuperscript{109} Andrea Bianchi, \textit{Supra n 18}, at 578.
body of knowledge that is termed as episteme. This episteme has a direct bearing on policy outcomes that are adopted transnationally.
EPISTEMIC COMMUNITY OF INTERNATIONAL COMMERCIAL ARBITRATION

This chapter commences by tracing the origins of ICA as presented by Dezalay and Garth\footnote{Dezalay and Garth, Supra n 4.} as well as Florian Grisel\footnote{Dezalay and Garth, Supra n 4.; Florian Grisel, Supra n 4.}. It thereafter proceeds to locate the episteme, the worldview, that is shared by its membership by looking at the examples of party autonomy, confidentiality and transnational legal order as examples of shared values and norms. In the last part, the chapter canvases the increase in membership of this community of professionals and its divergences with specializations as well as overlaps with Investment Arbitration. It continues thereafter to present the membership of the epistemic community as comprising arbitrators, lawyers, academics and arbitration institutions. This chapter forms the background to present how an epistemic community functions with a shared language and values and how in turn, the presence of this shared values reveals the coming together of this community.

Applying the conceptual lens of epistemic community to ICA presents a community of specialists and experts in the transnational business of private dispute resolution. This community has been subject of multiple sociological studies in an attempt to understand its origin, its values, goals and the methods by which it attempts to attain them.\footnote{Dezalay and Garth, Supra n 4.; Emmanuel Gaillard, Supra n 4. presents the broad understanding of various actors involved in the International Arbitration; Anthea Roberts, Supra n 50 studies the assumptions and worldviews of the three set of epistemic communities engaged in international investment law to locate the divergences between the outcomes and arguments.; Florian Grisel, Supra n 4. conducts empirical study of mid-twentieth century practitioners of ICA.; Joanna Lam and Mikhail Kaczmarczyk, Sociology of Commercial Arbitration: Tools for the New Times, 36 J. Intl. Arb. 693 (2019).} This professional community of experts has built a corpus of knowledge recognized as an authoritative guide to resolution of such disputes. The members of this community are specialists and experts capable of accessing this transnational business to resolve disputes.\footnote{Dezalay and Garth, Supra n 4., at 59 finds that “International Commercial Arbitration has to a great extent now been institutionalized as the generally accepted private legal process applicable to transnational business disputes.”}

I. ORIGINS OF EPISTEMIC COMMUNITY OF INTERNATIONAL COMMERCIAL ARBITRATION

Dezalay and Garth present the long-standing account of origin of ICA as a new field that developed because of interaction between grand old men and young technocrats.\footnote{Dezalay and Garth, Supra n 4., at 33-45.}
Old Men’, as Dezalay and Garth christened them, consisted of esteemed professors and high ranking judges within the arbitration community in Continental Europe as well as senior barristers or Queen’s Counsels from United Kingdom and senior partners from US law firms.¹¹⁵ These Grand Old Men by virtue of their profile and visibility provided the legitimacy to the new phenomenon.¹¹⁶ Dezalay and Garth also found that these men were not content with national hierarchies but willing to explore opportunities at the crossroads of law, politics and business.¹¹⁷ They shared the belief that “Arbitration is a duty, not a career” and that “The person who goes into this business as an arbitrator to make a living should not be encouraged.”¹¹⁸ The ‘Young Technocrats’ were those who had skills in procedure and had mastered the process of management of disputes. They saw themselves as trained in practical management of dispute resolution as opposed to academic theories and relied on their training and skills acquired from foreign educational institutions.¹¹⁹ They promoted their own procedural knowledge and technical competences as better method to resolve disputes.¹²⁰ This competition in turn transformed the ICA resulting in an episteme that combined continental legal theory along with adversarial method borrowed from US litigation.¹²¹ That eventually by 1990s, this community of specialists moved away from informal mode of resolving disputes towards a judicialized one with set procedures and doctrines centered around arbitral institutions.¹²²

This account of Dezalay and Garth as to the origin of ICA has been recently challenged for revision by Florian Grisel.¹²³ Grisel argued for a new narrative towards origin of ICA as resulting more from cooperation. To this end, Grisel relied on historical empirical data on arbitrators made available by International Chambers of Commerce, Paris from 1922 to 1973 totaling to 644 ICC cases. The cases after 1973 were not made available to Grisel on account of reasons of confidentiality.¹²⁴ His work focused on examination of the career trajectories of

¹¹⁵ Dezalay and Garth, Supra n 4, at 35.
¹¹⁶ Dezalay and Garth, Supra n 4, at 35 at footnote 6 states that “More generally, it is typically the case that when a new symbolic field is being constructed it requires the personal legitimacy of “grand old men” or their equivalent to provide it with sufficient legitimacy to survive.”
¹¹⁷ Dezalay and Garth, Supra n 4.
¹¹⁸ Dezalay and Garth, Supra n 4, at 34.
¹¹⁹ Dezalay and Garth, Supra n 4, at 37 presents the view of the close-knit community of professionals by quoting Jan Paulsson, “Once the delightful discipline of a handful of academic aficionados on the fringe of international law, it has become a matter of serious concern for great number of professionals determined to master a process because it is essential to their business. They labor, but not for love.”
¹²⁰ Dezalay and Garth, Supra n 4, at 40.
¹²¹ Dezalay and Garth, Supra n 4, at 60
¹²² Dezalay and Garth, Supra n 4, at 58.
¹²⁴ Florian Grisel, Supra n 4, at 798.
those arbitrators who obtained more than 10 appointments. He concluded that these men were “secant marginals”, that is, their legitimacy was weak in their domestic system. However, they had the ability to mediate between different judicial systems. Consequently, they came to wield legitimacy in this transnational space and relied on their skills to harmonize tensions between different legal systems. Thus, this interaction of different legal systems mediated by persons working to resolve these tensions led to emergence of arbitral procedures. These emerging procedures were harmonized from the transplants from different traditions. An example of this was the hybrid evidentiary system that blended civil law tradition with restrictive discovery with common law tradition and thus arriving at a middle point as part of this process.

What Dezalay and Garth and Grisel, however, have in common is the presence of a community of specialists. This community is in constant interaction to develop a common set of values, normative principles and common policy enterprise towards private business dispute resolution. The aspect of internal competition and cooperation and its extent does not in itself detract from the understanding that by being in interaction, such a common understanding for the discipline as a whole was being fashioned. Bianchi notes that the vision of the epistemic community lies in the conversation and interaction its members have with each other to produce the episteme of its field. The origins of ICA demonstrate this interactive process. These early practitioners that together as a community developed knowledge for resolving private disputes transnationally, that has come to be called ICA.

Since then, the transnational business for resolution of business disputes has centered around the members of this community. They have developed a professional vocabulary, embodying procedures and methods of law, that has become the discipline of ICA. It has a shared vocabulary, normative beliefs and common policy enterprise. Moreover, the current pool of practitioner emulates the characteristics displayed by these originators in form of combining academic writing with maintenance of close ties with business and connections with arbitral institutions.

125 Florian Grisel, Supra n 4, at 804.
126 Florian Grisel, Supra n 4 comments on the process of institutional bricolage as a mixture of various procedures and ideas put together to construct the ICA in the words as “This “institutional bricolage” led to the creation of a sui generis procedure, called “document production.” The system, widely used in ICA, has been described as “one of the most remarkable examples of a merger between different …. procedural approaches.” … In fact, they observed a middle point in an institution building process already underway.”
127 Dezalay and Garth, Supra n 4.
128 Florian Grisel, Supra n 4; Florian Grisel, Supra n 123.
129 Andrea Bianchi, Supra n 18, at 579
130 Florian Grisel, Supra n 4, at 821.
II. **EPISTEME OF THE INTERNATIONAL COMMERCIAL ARBITRATION**

ICA has been defined as “a means by which international business disputes can be definitively resolved, pursuant to the parties’ agreement, by independent, non-governmental decision-makers, selected by or for the parties, applying neutral judicial procedures that provide the parties an opportunity to be heard.”¹³¹ Several features have been identified as fundamental to ICA. These include, first, party autonomy¹³²; second, confidentiality of dispute resolution process¹³³; third, competence of tribunal¹³⁴ and fourth, binding decisions¹³⁵. This is not an exhaustive list of fundamental principles but it is one that the general epistemic community of ICA will readily recognize as part and parcel of the ICA. Moreover, each of these fundamental features informs the conduct of the proceedings, but are also taken as norms that make up the episteme. They are the shared assumptions and normative beliefs that each member of the community accepts even if he/she recognizes that there are disagreements as to each features’ scope.

The feature of party autonomy is a good example of this shared assumption and normative belief. This principle is seen as a core advantage of the ICA over the national courts. It is considered to inform the entirety of the proceedings with parties’ having the opportunity to tailor the proceedings and its procedures to suit their specific needs and purposes.¹³⁶ It is said to be at the heart of the powers endowing the arbitrator to carry out its duties and functions.¹³⁷ This feature has also been embodied in the UNCITRAL Model Law¹³⁸ that has been adopted as a guiding framework for developing countries to enact their own arbitration legislations.¹³⁹ The feature is considered so basic that it is taught as the underlying principle in the first classes of any teaching course on ICA. And yet, this feature is also part of ongoing debates within the community increasingly calling it into question.¹⁴⁰ In sum, the acceptance of the norm and

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¹³² Emmanuel Gaillard and John Savage, *Supra n 8*, at 31.; Id. at 84.; Kun Fan, *Supra n 19*, at 170.
¹³⁴ Gary Born, *Supra n 131*, at 80
¹³⁵ Julian Lew et al., *Supra n 133*, at 3 identifies four fundamental features, namely, “(a) An alternative to national court; (b) A private mechanism for dispute resolution; (c) Selected and controlled by parties and (d) Final and binding determination of parties’ rights and obligations.”; Emmanuel Gaillard and John Savage, *Supra n 8*, at 12.
¹³⁶ Emmanuel Gaillard and John Savage, *Supra n 8*, at 1.
¹³⁸ UNCITRAL Model Law on International Commercial Arbitration is referred here as UNCITRAL Model Law. UN Doc A/40/17, Annex 1.
¹³⁹ Gary Born, *Supra n 131*, at 136.
¹⁴⁰ Margaret Moses, *Supra n 137*, at 9.
belief of party autonomy as a shared value and as part of shared worldview constitutes episteme of the ICA. The continuity of the debates regarding its scope and extent reveals the importance of this principle as an organizing value and a shared project whose scope and extent is not merely a theoretical at the margins of the study but central to the understanding of the field by its own community.

Confidentiality of proceedings is again a good example of a shared value and norm that provides a shared worldview for its community of members. Confidentiality of proceedings is considered as a significant advantage that private proceedings of ICA has to offer when compared with national courts.\(^\text{141}\) This feature as a shared norm is seen in the procedure of the arbitration with almost all proceedings being closed off to public.\(^\text{142}\) This feature also informs the confidentiality of the submissions of evidence, written statements and oral arguments.\(^\text{143}\) Furthermore, it is considered a duty of the individuals who are involved in the proceedings to abide by the duty of confidentiality on behalf the parties they represent.\(^\text{144}\) Finally, the arbitral award is considered confidential. Though, this is not always the case because sometimes parties prefer the final decision is made available to the public\(^\text{145}\) and in some cases, the awards are published with redaction of the names of the disputant parties.\(^\text{146}\) The view that the proceedings should remain confidential has itself become subject of debate as questions of transparency and need for third party representation.\(^\text{147}\) Thus, again though exceptions and limitations of the scope exists, the feature of confidentiality is a shared norm and value that informs the community of specialists in not just representation of ICA to the external world but also to design and conduct the proceedings.

Rather, each of these features are considered fundamental to have led some scholars to argue strongly as to the existence of an autonomous field separate and distinct from the national legal traditions.\(^\text{148}\) This formulation finds expression in the representation of ICA as an autonomous transnational legal order.\(^\text{149}\) Gaillard has argued the case that this representation is one of the dominant methods of formulating ICA.\(^\text{150}\) Gaillard bases this formulation as originating from

\(^\text{141}\) Gary Born, Supra n 131, at 89.
\(^\text{142}\) Gary Born, Supra n 131, at 80-90.
\(^\text{143}\) Julian Lew et al., Supra n 133, at 8.
\(^\text{144}\) Julian Lew et al., Supra n 133, at 8.
\(^\text{145}\) Gary Born, Supra n 131, at 90.
\(^\text{146}\) Emmanuel Gaillard and John Savage, Supra n 4, at 188.
\(^\text{147}\) Lam and Kaczmarczyk, Supra n 112, at 705.
\(^\text{148}\) Emmanuel Gaillard and John Savage, Supra n 4.; Emmanuel Gaillard, The Arbitral Legal order: Evolution and Recognition, 555 in The Handbook of International Arbitration (Thomas Schultz eds., 2020)
\(^\text{149}\) Emmanuel Gaillard, Supra n 148, at 558.
\(^\text{150}\) Emmanuel Gaillard and John Savage, Supra n 4, at 3.
acknowledgement of large number of states recognizing the award and the arbitration proceedings provided certain conditions are met. As a consequence, the arbitrators may apply transnational rules that govern procedure, choice of law, substantive and public policy rules and that functional aspects of arbitral decision-making are seen largely independent of national legal systems.

An episteme is therefore this shared worldview of assumptions, values and norms. These get expressed in the promotion and formulation of concrete legal proposals. As can be noticed from the above discussed features of party autonomy or confidentiality or representation of autonomous transnational legal order, they are not just words and ideas but concrete policy and rule based outcomes that inform the proceedings and procedures of ICA. The existence of debates as to their scope, nature and extent indicates the presence of an epistemic community that shares this vocabulary, is concerned about its values and norms and is interested in shaping the future of outcomes. The presence of these shared values and underlying assumptions across a community of professionals engaging in conversation creates this shared worldview or episteme.

III. **Epistemic Community of International Commercial Arbitration**

The portrait of ICA canvassed by Dezalay and Garth from 1996 has since undergone series of changes. *Dealing in Virtue* was a work that brought to light the rise of ICA as a community of professionals with their own system of knowledge engaged in business of resolving transnational disputes. Since then, the community has grown across the world branching out to multiple jurisdictions and engaging in variety of different activities. Their presence has extended beyond the leading institutions in the West that were the focus of Dezalay and Garth and have proliferated across the world. The regionalization and competition of ICA community can be witnessed in China, Hong Kong and Singapore that competes in terms of case-load of arbitrations with its western counterparts.

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151 Emmanuel Gaillard, *Supra n 148* at 564 argues that most arbitration laws recognize the primary duty of arbitrators is towards the parties.; Gary Born, *Supra n 131*, at 128-129 argues that most major jurisdictions facilitate and promote arbitral procedures to maximally support international arbitration.

152 Emmanuel Gaillard, *Supra n 148*, at 559 argues for transnational legal order and states that “Arbitrators acting in a transnational legal order may apply transnational rules, including procedural, choice of law, substantive, and public policy rules.”

153 Dezalay and Garth, *Supra n 4*.

154 Emmanuel Gaillard, *Supra n 4*.

Gaillard, reflecting on this proliferation, argues that the last forty years have transformed ICA from a “solidaristic” to a polarized field. By solidaristic field, he refers to a community of professionals that is more closely knit and centered around “common set of shared values”. This formulation of shared values of an epistemic community could be seen in the petrodollar arbitration cases where presence of community of specialists versed in lex mercatoria enabled the disputing parties to communicate their cases better to the arbitration specialists. These specialists because of their knowledge of lex mercatoria shared similar vocabulary and assumptions as their counterparts who were part of the arbitration community. This in turn led to policy formulation and consequent resolution of disputes.

Gaillard suggestion of polarized model is that of a large number of members who are specialized in their roles with certain members emerging as “champions of certain causes” that are not shared by others within the community. This has also come with diversification by some members of community who are engaged beyond the confines of ICA.

As an illustration, this diversification has been noticed in the overlap between ICA and International Investment Arbitration. Grisel examined the overlap between the elites of Investment Arbitration with those from ICA background by studying the data of 42 arbitrators at ICSID who had more than nine appointments from the years 2005 to 2017. He found that there was a significant overlap with 41 of 42 arbitrators that were simultaneously recognized together make up for more than 50% of all cases registered in the year 2019 among the major arbitral institutions.

156 Emmanuel Gaillard, Supra n 4, at 13-14 lays down the contours of the closed-knit community of professionals as a ‘solidaristic model’ in the words, “By solidaristic model, I am referring to a model with a small number of occasional players, acting in turn in different capacities (advocate, arbitrator, expert) and possessing a strong common set of shared values. This model presents three characteristics: a limited number of repeat actors; lack of specialization of functions; and the fact that each social actor has a strong sense of the expected behaviour in each role”

157 Dezalay and Garth, Supra n 4, at 108-109 finds that “it is clear that the lex mercatoria, communicate by the leading academic supporters and inventors of the doctrine, facilitated the avoidance of local law in favor of principles favorable to the Western construction company.”

158 Emmanuel Gaillard, Supra n 4, at 14 in discussing the polarized model states that “I mean a model which comprises a large number of players; in which those players tend to occupy specific functions, as opposed to alternating between them; and in which certain social agents have become champions of certain causes which are not necessarily shared by other players in the field.”

159 Emmanuel Gaillard, Supra n 4, at 14 further comments on the polarized nature of the arbitration community as “In an arbitration world which counts thousands of actors, a strategy of diversification has been successfully implemented by some social agents.”

160 Florian Grisel, Marginals and Elites in International Arbitration, 261 in the The Handbook of International Arbitration (Thomas Schultz eds., 2020) at 270 presents his empirical data set: “In order to test this hypothesis, I have identified the ICSID arbitrators who obtained more than nine appointments between 2005 and 2017. This yielded a sample of 42 individuals, each of whom collected between nine and 57 appointments during this period. I then determined: (1) whether each of these individuals also appears in the ‘Who’s Who List of the Most-Highly Regarded Individuals in Commercial Arbitration (2015)’ and/or (2) whether they have had experience as commercial arbitrators.”
as top arbitration professionals within Commercial Arbitration.\footnote{Id. at 272 finds that being top commercial arbitrator is a common route towards being a top investment arbitrator.} Also, specialization has been seen in International Investment Arbitration with an ‘elite’ or club of ‘grand old men’ dominating the top appointments at ICSID. Puig studied a total of 1,468 appointments till the year 2014 to develop a list of repeat appointments that constituted a small network of elite arbitrators.\footnote{Sergio Puig, Social Capital in Arbitration Market, 25 Eu. J. Intl. L. 387 (2014) at 403 lays down his empirical method as “To map the network, I use all the appointments made in all ICSID Convention and ICSID’s Additional Facility arbitration proceedings until February 2014. The data contain specific details on 1,468 appointments, including any appointments made in subsequent stages of a case (i.e., resubmission, annulment, ‘second’ annulment, interpretation, and revision).”} He found that it reflected the Grand Old Men tradition of Dezalay and Garth replicating itself with those member with greater frequency of appointments gaining further more appointments.\footnote{Id. at 423 finds that network of international arbitration is dependent upon a small number of prominent top arbitration professionals.} To sum, the field of ICA has expanded beyond its initial moorings as a smaller community in constant interaction with each other.

This in itself does not suggest that the practitioners of ICA have given up the norms and values of the episteme but that there is an ongoing process of divergences alongside the complimentary pattern of harmonization.\footnote{Shahla Ali, Supra n 15, at 91; Kun Fan, Glocalization of Arbitration: Transnational Standards Struggling with Local Norms Through the Lens of Arbitration Transplantation in China, 18 Har. Neg. L. Rev. 175 (2013) argues strongly for certain localisms to become part of International Arbitration while emphasizing the shared convergence of principles and doctrines within ICA across the epistemic community; Gabrielle Kaufmann-Kohler, When Arbitrators facilitate Settlement: Towards a Transnational Standard, 25 Arb. Intl. 187 (2009) in her discussion on facilitation of settlements as part of the arbitration proceedings argues that the informality of mediation as a process and its place within arbitration is likely to become transnational standard with formalization of rules and practice predicating the argument that the standards in ICA converge even if some local divergences exist.}

This community of professionals therefore consists of a large set of individuals. These center around the arbitrators and arbitration lawyers. Arbitrators, of course, are at the center of the process being one of the three key participants in the arbitration proceedings without whom the no arbitration is possible.\footnote{Alec Stone Sweet and Florian Grisel, The Evolution of International Arbitration: Judicialization, Governance and Legitimacy, 20 (2017) argues for the the presence of “triad” consisting of parties and dispute resolver is natural outcome of formalizing the dispute resolution and this feature being present in arbitration.; Emmanuel Gaillard, Supra n 4, at 4 comments on shift in role of arbitration from being occasional to having become a socio-professional category.} Arbitration lawyers are the next key category usually constituting a multi-member team to provide support to the disputants.\footnote{Emmanuel Gaillard, Supra n 4, at 5.} Academicians or professors specializing in ICA also constitute an integral part of this community. Interestingly, nearly all
the leading professionals in this community have held all these positions in their professional
career.\textsuperscript{167}

Equally important are the Arbitral Institutions like International Chambers of Commerce (ICC,
Paris), London Court of International Arbitration (LCIA, London), Singapore International
Arbitration Centre (SIAC, Singapore) [hereinafter, SIAC], etc. These arbitral institutions\textsuperscript{168}
provide services to the disputing parties by pressing advantages in terms of location,
administrative support, flexible and accessible procedural rules and reduction of costs. These
institutions in turn compete with each other by regularly updating the best practices and
offering services to maximize their own influence as well as client base.\textsuperscript{169}

Thus, the professional members of this specialists are not located or concentrated at a particular
geographical place or even a formal organization. They are spread out both geographically as
well as in terms of their roles. Thus, what joins this disparate group of professionals are shared
values and policy goals of ICA.

To sum up, ICA as a community of professionals share a vocabulary with common set of
assumption, views and policy goals. This community of professionals has grown from a closed
small group to spreading across jurisdictions with a larger number of professionals spread
across multiple jurisdictions.

\textsuperscript{167} Florian Grisel, \textit{Supra n 160}; Dezalay and Garth, \textit{Supra n 4}.
\textsuperscript{168} Alec Sweet and Florian Grisel, \textit{Supra n 165}, at 45.
\textsuperscript{169} Dezalay and Garth, \textit{Supra n 4}, at 312.
MED-ARB AND EPISTEMIC COMMUNITY OF EAST ASIA

This chapter commences with the brief overview of Med-Arb, including its different definitions and conceptualizations. It presents the empirical data of the understanding of the arbitrator’s roles in both the West and East. This is followed by discussion on the debates surrounding the acceptability and credibility of such procedures and as to what it means for the practice of ICA. Thereafter, it proceeds to discuss the development in law with special focus on Med-Arb along with the rise of the arbitration profession in three East Asian jurisdictions of China, Hong Kong and Singapore.

How much influence does tradition or culture have on the development and formulation of law has been an enduring question of the last century. With fragmentation of international law, this question has assumed a center stage in discussion of international law. However, ICA has been generally conceptualized as a discipline that has overall resisted this pattern of fragmentation.170 The harmonization and convergence of its doctrines and principles has come to be recognized as its feature.

With the economic rise of East Asia in last three decades, its role in dispute resolution services has also increased. This importance has also brought in a community of specialists that has originated in East Asia. This rise is of significance because of increase in cases involving parties from these jurisdictions as well as development of practices of law. This is best exemplified by Med-Arb procedures that originate in China in the 1990s to be adopted by Hong Kong and Singapore by 2010s. This movement of specific policy prescriptions happened amidst strong debates challenging the reliability and credibility of such procedures.

I. MED-ARB AND INTERNATIONAL COMMERCIAL ARBITRATION

Med-Arb as a process has witnessed significant debate since its inception. The controversy surrounding its definition is illustrative of this debate with multiple definitions having being proposed as to what constitutes Med-Arb.171 Peter defines the ‘original Med-Arb’ where the same third party commences resolution of dispute first as a mediator and in case the mediation

170 Shahla Ali, Supra n 15 in her empirical study of arbitrator’s attitudes towards settlement finds that though divergences in attitudes exist in different jurisdictions but the law of ICA has not broken into separate fields; Gabrielle Kaufmann-Kohler, Supra n 164 in her discussion for facilitation of settlements as part of arbitration in context of ICA makes the similar observation as Shahla Ali expecting a broad convergence of principles seeing certain divergences as merely an early informal aspect part and parcel of ICA before it is formalized.

171 Dilyara Nigmatullina, Supra n 5, at 28 in her literature survey of combination of mediation with arbitration finds that Med-Arb is the most common term used in literature to describe combination of mediation with arbitration.
fails, he/she acts as an arbitrator to render a final award.\textsuperscript{172} Identical meaning has been adopted by various writers, including, Blankenship\textsuperscript{173}, De Vera\textsuperscript{174}, Ross and Conlon\textsuperscript{175}, Pappas\textsuperscript{176} (terming it as “same neutral Med-Arb”) and Hill\textsuperscript{177}. The Singapore International Mediation Centre [hereinafter, SIMC] has also adopted this definition with its Arb-Med-Arb Protocol by providing for seamless transition from one procedure to the other if the parties request so with parties having 8 weeks to mediate the dispute before transitioning to arbitration.\textsuperscript{178}

Stipanowich and Ulrich take an empirical view of Med-Arb as not necessarily being tied to a fixed sequencing of steps but being conditioned upon the tendency of the parties to shift to mediation on the basis of information of the other parties’ case as part of the arbitration.\textsuperscript{179} They suggest that mediation is likely to be postponed taking place during the arbitration proceedings.\textsuperscript{180} On the other hand, Ross and Conlon have also highlighted the presence of another variation which they term as “Arb-Med” which involves elaborate three steps with the first step leading to an award kept under sealed cover; followed by a second stage with mediation and; third stage, in case mediation fails to open the award kept under sealed cover and declare it as binding.\textsuperscript{181} Lew presents the broadest definition encapsulating the different variations as having many permutations and combinations with either mediation preceding the arbitration or taking place during the arbitration with both parties’ agreement or both.\textsuperscript{182} For

\begin{itemize}
\item\textsuperscript{172} James Peter, Med-Arb in International Arbitration, 8 Am. Rev. Intl. Arb. 83 (1997) at 90-91.
\item\textsuperscript{174} Carlos de Vera, Arbitrating Harmony: Med-Arb and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China, 18 Col. J. Asi. L. 149 (2004) at 156.
\item\textsuperscript{177} Richard Hill, Supra n 9, at 106.
\item\textsuperscript{180} Id. at 9.
\item\textsuperscript{181} William Ross and Donald Conlon, Supra n 175, at 418.; Donna Ross, Med-Arb/Arb-Med: A More Efficient ADR Process or an Invitation to a Potential Ethical Disaster?, 352 in The Fordham Papers 2012 : Contemporary Issues in International Arbitration and Mediation (Arthur W. Rovine ed., 2013) at 359 discussing the approach where the arbitration is conducted and tribunal drafts the award without disclosing it to the parties. This is followed by mediation and in case mediation fails, the award is immediately published.; Daniela Antona, Med-Arb: A Choice between Scylla and Charybdis, 69 Dis. Res. J. 101 (2014) at 114 discussing the sealed envelope approach.
\item\textsuperscript{182} Julian Lew, Supra n 6, at 423 discussing various permutations of Med-Arb.
\end{itemize}
Lew, the key aspect is that arbitration is seen as having an option to shift towards mediation at the choice of the parties involved and return back to arbitration in case it fails.

One of the earliest empirical surveys conducted to measure the attitude of arbitrators towards mediation was by Professor Bühring-Uhle.\textsuperscript{183} He conducted two surveys as part of his research. First, in the year 1994 where a total of 91 arbitration professionals from 17 countries responded with 67 of which were interviewed. The second survey was conducted during the period of 2001 to 2004 involving a total of 53 completed questionnaires that came from 14 countries. This group of respondents included in-house counsels, advocates and arbitrators/mediators with a total experience of over 2,500 arbitrations and over 600 mediations. Americans and Germans founded the largest two groups of the survey.\textsuperscript{184}

Buhring-Uhle found that 86% of respondents favored consensual solution and saw it as a function of arbitration. He further found that this view was universal among the German respondents as well as non-American respondents with Common Law background. The survey revealed that only a small minority of 26% American respondents and 15% of non-German Civil law respondents disagreed.\textsuperscript{185} On the question of timing of facilitating settlement, the opinion was more divided. The survey showed that only 29% of settlements occurred before the first meeting of the tribunal while 33% of settlements occurred during the written phase before the main evidence hearing. And the largest number of settlements occurred fairly late in the proceedings with about 37% after the taking of evidence or in post-hearing stage.\textsuperscript{186} What the survey, however, revealed was strong agreement within the arbitration community with slight divergences that arriving at a consensual outcome was part of the arbitral process.

A cautionary note is warranted here that the German approach to facilitating settlement is not mediation in the sense that it is defined earlier where the arbitrator at certain stage of arbitration conducts the proceedings of mediation, including caucusing with the parties.\textsuperscript{187} It was found that German mediators see facilitation of settlement as part of the job, which at some stage has to be discharged. The arbitrators saw from narrow evaluative process with emphasis on rendering an enforceable award.\textsuperscript{188} Having said so, the importance of resolution of disputes through settlement was seen as part of the arbitration process. That is, the study found that

\textsuperscript{183} Christian Bühring-Uhle, \textit{Arbitration and Mediation in International Business} (2d ed, 2006)
\textsuperscript{184} Id. at 107.
\textsuperscript{185} Id. at 110-111.
\textsuperscript{186} Id. at 114.
\textsuperscript{187} James Peter, \textit{Supra n 172}, at 109.
\textsuperscript{188} James Peter, \textit{Supra n 172}, at 111-112.
German arbitrator was comfortable with the norm that arbitration could lead to a settlement without needing a recourse to formal adjudication resulting in arbitral award. Similarly, the study found that the attitude of American arbitrator was positively disposed towards facilitating settlement as part of arbitration alongside a larger number, approximately 26%, dissenting from this view.\footnote{This research was continued by Shahla Ali who employed the same questionnaire for assessment of attitudes in East Asia.\footref{189} The findings of this research are discussed in greater detail in the Section III.1 of this chapter.}

II. **DEBATES AS TO MED-ARB**

One of the earliest expressions of Med-Arb in the literature is from Sam Kagel. Sam Kagel was a leading arbitrator with specialization in labor disputes from West Coast of United States. He became arbitrator in 1940s and gained prominence as the chief arbitrator between the Pacific Maritime Association and the ILWU.\footref{191} He was also a faculty member at UC Berkeley and was known for his promotion of technique called Med-Arb.\footref{192} He elaborated this technique in 1973 as Med-Arb process where the parties agree to both proceedings of mediation and arbitration with the same arbitrator shifting hats during the course of proceedings.\footref{193} The Labor dispute resolution mechanism in United States by 1980 had a significant proportion of Med-Arb proceedings with about a third of the community having participated in a Med-Arb proceedings by 1980s.\footref{194} This fact is important to the extent that there was a presence of Med-Arb proceedings in the West even if it was localized to certain subject domains like labor arbitration in the United States.

The above-mentioned discussion initiated as part of labor Med-Arbitration would become part of debates within the ICA community in 1990s when confronted with similar formulation from China. Peter quoted Kagel to argue that the weakness of the Med-Arb which he calls in turn ‘original Med-Arb’ lies in its inability to distinguish the ethical concern where he argues that the parties should have the opportunity to reject the person who served during the mediation stage and was privy to information that was given during that stage. Conversely, he argued that

\begin{footnotes}
\item[189] Christian Bühring-Uhle, *Supra* n 183, at 111.  
\item[190] Shahla Ali, *Supra* n 15; Shahla Ali, *Supra* n 27.  
\item[193] Sam Kagel, *Combining Mediation and Arbitration*, Mon. Lab. Rev. 62 (1973)  
\end{footnotes}
the possibility of the same person acting as mediator and arbitrator raised the problem of candor where the parties may not be willing to engage freely with the arbitrator. Ross similarly argued that one cannot “unring the bell” in case confidential information has been shared with the mediator as part of the mediation proceedings. Redfern and Hunter have also argued on the same basis as to the question of impartiality when the arbitrator during his/her earlier discussion as mediator had accessed private information from the parties during the mediation stage. Thurgood sums it up simply – “During the conciliation process the arbitrator is liable to learn of additional and confidential aspects of the dispute. If this information is received in private caucus the other party would not have had the chance to have it tested through some form of cross-examination. The information may later prejudice the arbitrator”. Kaufmann-Kohler also highlighted the same concern as to the possibility of non-sharing of information by the parties during mediation proceedings to be used during arbitration proceedings. This is one of the two key objections towards Med-Arb procedure. That is, there will be reluctance on the part of the parties to disclose their interests because it may influence the impartiality of the arbitrator in the subsequent arbitration proceedings.

Another concern is the possibility of overbearing arbitrators who may coerce parties into settlement on account of their awareness of the probable outcome of the arbitration proceedings. Mason argues this possibility of coercion could be a significant danger to the overall process of Med-Arb. He cites an instance involving a Brazilian-US arbitration where he was peripherally involved. In this case, the arbitrator acting as a mediator threatened the parties with punishment should they not settle the case. Eventually, as parties failed to settle the case, the arbitrator went ahead to carry out his threat through the award.

195 James Peter, Supra n 172, at 98-99.
196 Donna Ross, Supra n 181, at 360.
197 Alan Redfern and Martin Hunter, Redfern and Hunter on International Arbitration, 48 (2004) discussing the issue of unwillingness of the parties to engage freely in mediation in case the same person acts as mediator and arbitrator.
199 Gabrielle Kauffmann-Kohler, Supra n 164, at 198 finding that in her experience and empirical studies, she found that the parties did not hesitate discussing with the mediator their concerns when he was expected to act as an arbitrator. She stated that “This threat appears to be more perceived than real. Indeed, only one case was identified that removed arbitrators or set aside or refused to enforce an award on the ground that an arbitrator became involved in settlement, while there are many court cases that hold exactly the opposite — that the involvement of a judge in the settlement of his or her own cases is admissible. The same ought to apply to an arbitrator”
201 Id. at 550 discussing his personal experience where Med-Arb was invoked.
Blankenship sees the dangers of coercion as a possibility requiring a greater skill and tenacity from the mediator. He argues that the element of coercion exists because of the nature of Med-Arb and requires that the mediator-arbitrator be sensitive with respect to forcing the parties inappropriately. 202 This criticism also finds presence in the words of Kagel where he had argued that the presence of dual proceedings enabled the mediator-arbitrator to have “muscle” during the arbitration proceedings. 203 Pappas also argues that there is similarity to the judicial settlement procedures where there is a stronger tendency to push the parties towards settlement and thus, in case where mediator is expected to later act as arbitrator could endanger the perception of impartiality. 204

This is the second concern that has been advanced in relation to Med-Arb as that of coercion. The central idea here being that the person acting as mediator and arbitrator might during the mediation stage push parties towards a settlement that they might feel coerced into. Schneider cites a case from Germany where the German Supreme Court annulled a settlement on the ground that the lower court had pushed the party to adopt the settlement with the threat that its refusal would lead the court to pass the decision against the party. 205

These two key objections have formed the bedrock of debates argued by practitioners citing it as key difference between Western attitude towards Med-Arb. 206 Donna Ross characterized it in the following words “Certain detractors of Med-Arb/Arb-Med oppose it so fervently they consider it not only an ethical disaster, but heretical – a process that should be burned at the stake”. 207 The arguments taken together in effect recognized that the presence of the same person as mediator and arbitrator threatened the functioning of the arbitration proceedings as a

202 See John Blankenship, Supra n 173, at 36 discusses the concern of coercion.; Carlos De Vera, Supra n 174, at 201 argues that a very high degree of skill and expertise is need to conduct arbitration and mediation by the same person in the same proceedings.
203 Sam Kagel, Supra n 193, at 62.
204 Brian Pappas, Supra n 176, at 181 discusses the concern of pressurizing tactics that maybe employed by the same person acting as a mediator and arbitrator to force the parties into settlement.
205 Michael Schneider, Combing Arbitration with Conciliation, ICCA Seoul Arbitration Conference 57 (1996) at 84-85 comments on a case from German Supreme Court where the settlement proceedings were annulled because the Court had announced that if the defendant did not accept the settlement, a judgment would be rendered against the defendant.; Gabrielle Kaufmann-Kohler and Kun Fan, Supra n 15 recognized this concern among the Western practitioners and expected that the approach of Chinese arbitrators could be learnt in mixed panels.
206 Paul Mason, Supra n 200, at 551 states that the growth of Chinese commerce would require the Western practitioners to familiarize with the practice of Med-Arb as well as the need to adapt Med-Arb to ensure enforceability.; Julian Lew, Supra n 6, at 427, states that “In China, according to Tang Houzhi, awards are based solely on what is heard in arbitration, not in mediation. To western sensibilities, however, it seems impossible that an arbitrator can mentally disregard everything that he may have discovered during the mediation phase. Even if an arbitrator, believes he can, it seems unlikely that the parties would accept this, particularly when a finding is made against one of them.”
207 Donna Ross, Supra n 181.
whole. The dangers went to the core vision of the arbitrator as being a neutral third person committed to carrying out the arbitration without being influenced by one party or the other. The availability of confidential information during mediation proceedings posed the threat to this larger value.

As discussed in the previous chapter, the community constituting ICA is a closed knit community of specialists. It exists in an interactive environment where the participants engage in debates and conversations that becomes part of the shared norms and policies of the law of ICA. This community saw these shared norms sit uncomfortably with Med-Arb. The implications of these concerns also meant that the policy agenda around Med-Arb might not succeed.

III. EAST ASIAN JURISDICTIONS OF CHINA, HONG KONG AND SINGAPORE

An epistemic community shares certain values and norms as part of larger policy agenda. East Asia is an example of later entrant to the world of international commercial dispute resolution where ICA had roots from 1920s and had already come to be a field in its right by 1960s and 1970s. With the growing importance of East Asia in international commerce came also the need for international commercial dispute resolution. Simultaneously, it has led to a polarized field of arbitration specialists with large number of domestic practitioners joining the field of ICA. This polarization of the field is uneven as the discussion of the three jurisdictions of China, Hong Kong and Singapore would show. It also reveals that the development of Med-Arb procedures is relatively new phenomena taking off as a concerted policy enterprise only in last three decades.

III.1. China

China has an almost century long experience at international dispute resolution. China established its first arbitration regime as far back as 1906 by borrowing directly from the West. So and So conducted an historical study of Shanghai book industry in the early twentieth century to find use of litigation and arbitration by the local industry. They found that

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208 Florian Grisel, Supra n 123.; Florian Grisel, Supra n 4 at 821 states that the stable transnational legal profession of ICA had emerged by the end of the 1960s.
210 Emmanuel Gaillard, Supra n 4.
211 Kun Fan, Supra n 19., at 207.
the parties were increasingly willing to resort to arbitration for resolution of commercial disputes between Chinese parties and foreign parties and this decision was influenced by rational calculation of self-interest.\textsuperscript{212} It shows that the choice of dispute resolution does not have a historical continuities in case of China and is significantly influenced by choices of law and the political history of China in the twentieth century.

The open arbitration regime was developed in China after China opened its economy in the year 1978.\textsuperscript{213} This opening up was accompanied by a flurry of laws, rules and regulations that were transplanted from the West in the domains of property, trade and investment.\textsuperscript{214} As part of this process, the contemporary arbitration law was enacted in the year 1994 and was supplemented by changes in Civil Procedure Law.\textsuperscript{215} The Supreme People’s Court is also vested with powers to provide judicial interpretation of laws so as to provide guidance to the lower courts on the application as well as filling of gaps not addressed by the Arbitration Law.\textsuperscript{216} The way arbitration is conceptualized and practiced in China is different from the western counterparts because of being more top-down in nature on account of the political goals of the Chinese State.\textsuperscript{217} This is reflected in greater control over arbitral proceedings by limiting the scope of principle of severability of arbitration agreement, denying ad hoc arbitration and denial of jurisdiction of foreign arbitration institution in case the matter is wholly domestic and the choice of the parties is limited to closed panel of arbitrators who are selected on basis of statutory requirements.\textsuperscript{218}

The Chinese Arbitration Law also provides for recording of settlement during the arbitration proceedings.\textsuperscript{219} It specifically provides for an option for mediation after completion of

\textsuperscript{212} Billy So and Sufumi So, Commercial Arbitration Transplanted: A Tale of Book Industry in Modern Shanghai, 238 in Chinese Legal Reform and the Global Legal Order: Adoption and Adaptation (Yun Zhao and Michael Ng eds., 2017) at 255-256.


\textsuperscript{214} Kun Fan, Supra n 19, at 12.

\textsuperscript{215} Kun Fan, Supra n 19, at 12.

\textsuperscript{216} Kun Fan, Supra n 19, at 179


\textsuperscript{218} Articles 51 and 52 of the Chinese Arbitration Law, Chinese Arbitration Law (http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201312/20131200432698.shtml#:~:text =The%20China%20Arbitration%20Association%20shall%20formulate%20arbitration%20rules%20according%20to,and%20the%20civil%20procedure%20law.&text=Article%20%20An%20agreement%20for,or%20after%20a%20dispute%20occurs.) (MOFCOM.GOV.CN) (last accessed March 12, 2021)
arbitration and prompt publication of the arbitral award in case mediation fails. In practice, mediation occurs when both parties request the arbitrator to carry out the mediation. On the other hand, if the arbitrator that takes the initiative then, the mediation can occur only if both parties agree. In effect, the Chinese Arbitration Law provides a greater level of fluidity to the parties to combine mediation and arbitration without rigorously specifying procedures or methods and without any limits as to the timing or number of times mediation can be attempted. Chinese Arbitral Institutions have also taken significant steps towards developing dispute resolution methods tailored for One Belt One Road [hereinafter, OBOR] Initiative. Wuhan Arbitration Commission has set up a dedicated OBOR Arbitration Court. Other Arbitral Institutions like Beijing Arbitration Commission, Shanghai International Arbitration Center and Shenzhen Court of International Arbitration have set up China-Africa Joint Arbitration Center with Nairobi and South African arbitration institutions.

The Arbitration Law of China was passed to formalize and uniformize the framework and practice of arbitration in China by creation of China Arbitration Association to supervise domestic arbitration while the task of foreign arbitration was limited to certain institutions. However, these rules have been further liberalized. Under the 2019 Framework Plan, foreign arbitration and dispute resolution institutions are permitted to operate in Shanghai Pilot Free Trade Zone and conduct arbitrations involving civil and commercial disputes.

The most prominent of arbitration institutions in China is China International Economic Trade Arbitration Commission [hereinafter, CIETAC]. In last thirty years, it has become the world’s largest arbitral institution in terms of caseload.

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220 Id. at Article 51 reads: “The arbitration tribunal may carry out conciliation prior to giving an arbitration award. The arbitration tribunal shall conduct conciliation if both parties voluntarily seek conciliation. If conciliation is unsuccessful, an arbitration award shall be made promptly.”
221 Kun Fan, Supra n 19, at 165 discusses the practice of Med-Arb in as terms of the Chinese law as, “The Arbitration Law provides that the arbitral tribunal may carry out mediation prior to rendering an award. If the parties request mediation, the arbitral tribunal must carry out mediation proceedings. In practice, although not obligated to do so by law, Chinese arbitrators will systematically take the initiative of asking the parties if they wish the tribunal to assist them in reaching an amicable solution. If, and only if, the responses from both parties are positive, the arbitral tribunal will commence the mediation proceedings.”
at CIETAC between the years 1990 to 2000 found that almost half the cases had one foreign party.\textsuperscript{226} Since the year 2000, CIETAC has experienced even greater growth of total cases rising from about 633 cases in the year 2000 to about 3,333 cases in the year 2019.\textsuperscript{227} Further empirical research reveals that this growth has been substantially fueled by increase in domestic arbitrations which constituted about 20% of total cases in the year 2000 to about 80% by the year 2018.\textsuperscript{228} There has also been an increase in the number of foreign arbitrators alongside the increase in number of arbitrators but the pool of arbitrators continues to remain dominated by domestic Chinese arbitrators in CIETAC.\textsuperscript{229} A similar growth of cases and increase in domestic community of arbitration professionals has been noted with other arbitral institutions located in China. Beijing Arbitration Centre or Beijing International Arbitration Centre has also registered a steady increase in both number of cases as well as pool of arbitrators.\textsuperscript{230} It is important to note here that BAC though maintains about 22% professionals from outside China with a large number from neighboring jurisdictions like Hong Kong, Macau and Taiwan.\textsuperscript{231} In this way, a large community of Chinese arbitration professionals has developed in China.

In a survey conducted by CIETAC in September 2000 involving 56 Chinese arbitrators, it was found that the respondents were unanimous in their understanding that the role of arbitrator included facilitating settlement.\textsuperscript{232} A majority of the respondents agreed that the parties’ trust was the primary motivator behind the arbitrator to attempt mediation and that the parties’ consent was important. The survey found that 71% of the arbitrators believed in combination of mediation with arbitration. They also felt in the year 2000 (the year the survey was conducted) that the procedures for combination would gain acceptance beyond China.\textsuperscript{233} In another survey, Kaufmann-Kohler and Kun Fan further elaborated on the attitude of the arbitration professionals working within CIETAC, Beijing Arbitration Commission and Wuhan Arbitration Commission.\textsuperscript{234} They found that the combination of arbitration and mediation was more fluid with arbitrators attempting mediation at different stages and

\textsuperscript{227} CIETAC Statistics, Supra n 209.  
\textsuperscript{229} Id.  
\textsuperscript{230} Id. at 369.  
\textsuperscript{231} Id. at 369.  
\textsuperscript{232} Kun Fan, Supra n 19, at 164-165.  
\textsuperscript{233} Kun Fan, Supra n 19, at 164-165.  
\textsuperscript{234} Kauffmann-Kohler and Kun Fan
sometimes, multiple times during the arbitration before the award was rendered.²³⁵ This finding is close to the definition adopted in this thesis and that was advanced by Lew.²³⁶ In another empirical study involving 77 arbitration professionals from East Asia and 26 from the West, Shahla Ali found that there was significant emphasis on facilitating mediated outcomes among the East Asian practitioners.²³⁷ It found that 82% saw facilitation of settlement as one of the goals of Arbitration with 74% suggesting that arbitrator should actively engage in settlement when the request for settlement is made by both parties.²³⁸ Conversely, Shahla Ali, though having a smaller pool of Western professionals, found a different attitude towards facilitating mediated outcomes with only 62% regarding it mediation as part of the role of arbitrator.²³⁹ Kun Fan conducted an empirical survey of 38 Chinese arbitrators to find similar result with 89% of respondents agreeing that it is appropriate for the arbitrators to conduct settlement.²⁴⁰ Kun Fan further found that 61% of settlements occurred subsequent to the main hearing²⁴¹ with 64% also conducting caucusing²⁴², that is, meeting each of the parties privately as part of the mediation proceedings. In practice, therefore, mediation has come to be increasingly recognized as part of the arbitration practice with arbitrators having come to see conducting mediation and facilitating settlements as part of their role. What separates this community of professionals from their Western counterparts is their willingness to facilitate settlement and to see it as a natural part of their role as an arbitrator.

What the foregoing reveals that the community of international arbitration professionals in China has matured and developed. It is aware of its doctrines and principles while working within the limitations set by the Chinese State. For the purpose of this thesis, what is more relevant is not just the use of Med-Arb as part of a method of dispute resolution but the rise of professionals who are conversant and aware of the episteme of the ICA.

III.2. Hong Kong

²³⁵ Gabrielle Kauffmann-Kohler and Kun Fan, Supra n 15, at 487 discusses how multiple mediation proposals are made as part of an ongoing arbitration proceedings.
²³⁶ Julian Lew, Supra n 6, at 422 discussing in different approaches in Med-Arb where in a hybrid process, parties can go back and forth between mediation and arbitration multiple times.
²³⁷ Shahla Ali, Supra n 15.
²³⁸ Shahla Ali, Supra n 15, Appendix A.
²³⁹ Shahla Ali, Supra n 15, Appendix B.
²⁴¹ Id. at 795 discusses the preferred timing for the arbitrators to conduct mediation.
²⁴² Id. at 796 states the absence of hesitation among the Chinese arbitrators for private caucusing.
Hong Kong law is grounded in legal transplant from United Kingdom from mid-nineteenth century. Historically, a hybrid mechanism involving arbitration and mediation was absent in Hong Kong. Instead, the British government that ruled Hong Kong attempted to create dispute resolution framework of arbitration to resolve the disputes between the traders who lacked trust to resolve disputes among themselves.243 By 1970s and 1980s, the circumstances had changed with the British government increasingly involved in multiple disputes necessitating a reform in the law.244 This eventually led to establishment of Hong Kong International Arbitration Centre (HKIAC) in 1985245 and a Mediation Group was formed in 1993.246 However, Mason notes that though Med-Arb features were introduced in Hong Kong in the year 1989 but were rarely used.247

Hong Kong adopted the UNCITRAL Model Law for regulating arbitrations in the year 2010.248 The 2010 Ordinance sought to bring in changes to reflect the concerns of impartiality on account of revelation of information to arbitrators during the mediation stage.249 It provides for appointment the mediator as the arbitrator if the arbitration agreement provides for it.250 Also, the Ordinance expressly provided for arbitrator to act as a mediator after the arbitration has commenced should both parties give consent to the same person acting as a mediator.251 It further provides for safeguards for ensuring impartiality of the arbitrator by requiring the arbitrator to disclose to both parties all material information received during the mediation stage.252 Since then it has come long way with accepting 429 arbitrations in the year 2009 to 318 arbitrations in the year 2020.253 What sets apart Hong Kong from its Chinese counterparts is the significant proportion of these arbitrations are international in character with 72.3% of total arbitrations in the year 2020 being international.254 However, the Chinese and Hong Kong

245 Id. at 207.
246 Id. at 209.
247 Paul Mason, Supra n 200, at 549.
248 Kun Fan, Supra n 10, at 716.
249 Paul Mason, Supra n 200, at 549-550.
250 Section 32, Hong Kong Arbitration Ordinance (https://www.elegislation.gov.hk/hk/cap609)(ELEGISLATION.GOV.HK) (last accessed May 19, 2021)
251 Id. Section 33
252 Paul Mason, Supra n 200, at 549-550.
arbitration professionals have long history of working together with about a third of arbitrators in CIETAC (including those from Hong Kong) as far back as mid-1990s.\(^{255}\)

The issue of Med-Arb and its attendant controversies came to light in the leading case involving the questions of bias when arbitrators act as mediator in the case of *Gao Haiyan v. Keeneye Holdings Ltd & New Purple Golden Resources Development Ltd.*\(^{256}\) The matter originated from Xian Arbitration Centre where the arbitral tribunal had rendered an award in favor of the claimants. The respondents had challenged this award before the Xian Intermediate Court on the ground of “favouritism and malpractice” by the arbitral tribunal. The respondents argued that during the course of arbitration, it was agreed that mediation would be attempted to resolve the dispute. During the course of mediation, one of the members of arbitral tribunal secured assistance of a third party to “work on” the respondents. The respondents and later, the claimants both rejected the mediation proposal and the matter returned to the arbitration. The tribunal subsequently made an award which was different from the suggestions given during the mediation stage. The respondent’s challenge however failed before the Xian Intermediate Court. During the enforcement proceedings before the Hong Kong Court of First Instance, the respondent again challenged the award. Unlike, the Xian Intermediate Court, Hong Kong Court of First Instance accepted the challenge of respondent ruling against the enforceability of the award. The Court of First Instance reasoned that given the circumstances of the case where the tribunal had sought the assistance of a third party during an evening in a hotel would cast doubts as to the impartiality of the arbitrators. This more so in view that the mediation was not conducted as per the relevant rules.\(^{257}\) Subsequently, on appeal, the Hong Kong Court of Appeal overturned the decision of the Court of First Instance reasoning that the expression “work on” in China was commonly used term and should be given the meaning that is used in China. It further reasoned that mediation in China has scope of informality not seen in Hong Kong and the Court should defer to the findings of Xian Intermediate Court as it had already


\(^{257}\) Kun Fan, *Supra n 256*, at 546.
pronounced on this aspect.\textsuperscript{258} Hong Kong thus remains central to ICA but the concerns regarding Med-Arb procedures was heightened by Gao Haiyan saga.

\textbf{III.3. Singapore}

Like China and Hong Kong, Singapore too has emerged as a hub for ICA. A testimony to its growing importance is revealed in the 2020 Annual Report showed an almost doubling of cases from the year 2019 to a total of 1080 cases.\textsuperscript{259} Of the total cases, almost 94\% are international in nature.\textsuperscript{260} As in Hong Kong, the origins of arbitration law in Singapore lies in British colonialism with first legislation being passed in the year 1809 followed by an overhaul of the arbitration regime in the year 1953.\textsuperscript{261} The contemporary arbitration law, based on UNCITRAL Model Law, passed in the year 1994 with the explicit goal of making Singapore the centre for international arbitration.\textsuperscript{262} This law was further amended and reformed in the year 2002 to harmonize it with the prevailing international standards.\textsuperscript{263} Institutionally, Singapore government setup SIAC with the goal of developing Singapore as a centre for international arbitration services in the year 1990 and SIAC commended operations in the year 1991.\textsuperscript{264} These together form the framework of international arbitration in Singapore. Since these last thirty years, Singapore has grown into a leading jurisdiction to conduct international arbitration exploiting its long-standing position as a neutral venue for Americans, Chinese and Indian parties.\textsuperscript{265} This is reflected in the steady increase of cases with strong presence of cases of

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{258} Kun Fan, \textit{Supra} n 256, at 548.
\item \textsuperscript{260} Id.
\item \textsuperscript{262} Id. at 386 notes the role of the Singaporean government and its objectives to promote commercial arbitration.; Chan Leng Sun, \textit{Making Arbitration Work in Singapore}, 143 in The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia Pacific (Anselmo Reyes and Weixia Gu eds., 2018) at 144 notes the presence of large community of experts drawn from international bar, arbitrators, academics and legislative drafters in the Sub-Committee on Review of Arbitration Laws that brought in the changes in the Arbitration Law in Singapore.
\item \textsuperscript{263} Chan Leng Sun, \textit{Supra} n 262, at 145 notes the 2001 enactments in Singaporean arbitration law were aimed at harmonizing domestic arbitration with international arbitration regime.
\item \textsuperscript{264} Chan Leng Sun, \textit{Supra} n 262, at 145 role of the Minister for Trade and Industry in promoting Singapore as a centre for legal services.
\item \textsuperscript{265} Singapore Reports Record Number of cases (https://www.ft.com/content/5e647e8a-be1c-4145-9cb4-83e6296d9921) (Financial Times) (last accessed May 19, 2021); Chan Leng Sun, \textit{Supra} n 262, at 161 states the role of the government in promoting Singapore as a center for International Arbitration as “The goal of having a top-class arbitration infrastructure receives close attention from the Ministry of Law and the Attorney-General ‘s Chambers, which monitor judicial pronouncements and take the temperature of the private sector through consultations and conferences. Arbitrators and practitioners have ample opportunities to give feedback to law-makers. In some instances, it can even be said that the approach is pro-active in anticipating weaknesses before they become problems and in striving to calibrate functioning laws.”
\end{enumerate}
\end{footnotesize}
international nature. SIAC has in the last twenty years grown almost twenty times in terms of caseload (from 58 cases in the year 2000 to a total of 1080 in the year 2020).\footnote{SIAC Annual Report 2010, Supra n 259; SIAC Annual Report 2020, Supra n 259} Chinese parties have consistently used Singapore as a seat for ICA since 2010 with steady increase in their numbers as per an empirical study examining percentage of Chinese cases at SIAC.\footnote{SIAC Annual Report 2020, Supra n 259} In a 2015 survey, undertaken by Queen Mary University of London, the interviewed 763 arbitration professionals considered Singapore as one of the three most preferred locations as a seat for ICA.\footnote{Annie Li, Supra n 228, at 379.} The presence of significant number of international arbitrations is also reflected in diversity of arbitrators, with Singaporean nationals continue to remain the largest group with about 102 appointments out of 288 appointments in the year 2020.\footnote{SIAC Annual Report 2020, Supra n 259} At heart of success of Singapore is also a strong commitment from the Singaporean government, especially Ministry of Law, to promote Singapore as a hub for international arbitration through regular consultations.\footnote{Chan Leng Sun, Supra n 262, at 161.}

Med-Arb however makes a later entry in Singapore as compared to Chinese and Hong Kong Jurisdictions. SIAC in conjunction with SIMC launched the Arb-Med-Arb Protocol [hereinafter, AMA Protocol] in the year 2014.\footnote{VK Rajah, W(h)ither adversarial commercial dispute resolution?, 33 Arb. Intl. 17 (2017) at 32.} In brief, it is a \textit{sui generis} mechanism\footnote{Cheryl NG, Supra n 11, at 128 notes, “it is a “protocol” – a seemingly \textit{sui generis} innovation that appears to combine elements of both dispute resolution clauses and procedural rules.”} that provides for a three stage process where first, arbitration proceedings are commenced at SIAC, second, the arbitration proceedings are stayed at SIAC to be transferred to SIMC for mediation and third, the case is referred back to SIAC for either recording of consent award or resolution of the dispute.\footnote{Cheryl NG, Supra n 11, at 125.} To address the concern of impartiality of the arbitrator, AMA Protocol provides for separate mediator and arbitrator unless the parties agree for having a common mediator and arbitrator.\footnote{VK Rajah, Supra n 271, at 32.} Therefore, by providing an enabling mechanism, Singapore attempted to address the questions regarding impartiality of the arbitrator through reliance on party autonomy.

\begin{footnotesize}
\begin{enumerate}
\item Annie Li, Supra n 228, at 379.
\item QMUL Arbitration Survey 2015 (http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf) (QMUL) (last accessed May 20, 2021)
\item SIAC Annual Report 2020, Supra n 259.
\item Chan Leng Sun, Supra n 262, at 161.
\item VK Rajah, W(h)ither adversarial commercial dispute resolution?, 33 Arb. Intl. 17 (2017) at 32.
\item Cheryl NG, Supra n 11, at 128 notes, “it is a “protocol” – a seemingly \textit{sui generis} innovation that appears to combine elements of both dispute resolution clauses and procedural rules.”
\item Cheryl NG, Supra n 11, at 125.
\item VK Rajah, Supra n 271, at 32.
\end{enumerate}
\end{footnotesize}
In sum, the overall picture that appears has two key takeaways: first, that the arbitrators across the jurisdictions are comfortable with and see facilitation of settlement of disputes as part of their duties. This appears to be a long standing trend as the empirical studies from 1990s indicate. What has changed that is the rise of East Asia has brought a significant number of local practitioners to the field of ICA. These practitioners are spread across East Asia concentrating in Beijing, Hong Kong and Singapore. Moreover, these practitioners have a significant interaction both among themselves as part of the practice as well as with the epistemic community of ICA. As canvassed above, through the debates surrounding Med-Arb, they share common vocabulary and share similar concerns and assumptions regarding the practice of ICA. This is not to suggest that they have converged on the solutions to these debates. But rather that these problems, issues and potential solutions reflect an episteme.

East Asian jurisdictions also further show the interactive nature of this community where the cases increasingly travel between countries. As a result, the community is not a closed silos locked within their national boundaries but part of interactive process as they handle cases transnationally. This is well reflected in both Hong Kong and Singapore with substantial number of cases involving foreign parties.

Lastly, it confirms the polarized nature of the community of professionals as argued by Gaillard. The members of this community both converge doctrinally and professionally but also have significant divergences in practice of ICA. This has had implications for development of law as can be seen with Med-Arb procedures becoming common throughout the discussed jurisdictions with passage of time. It is important to note here that none of the jurisdictions had Med-Arb mechanism built in.

To sum up, East Asian jurisdictions of China, Hong Kong and Singapore have grown in ICA cases as a parallel development with increase in transnational trade. This has also come with the growth of domestic arbitral institutions with large number of domestic practitioners engaged in ICA. This community of professionals shares a common vocabulary, normative beliefs and policy agenda. This can be seen with the growth of Med-Arb procedures in these jurisdictions which were not built-in or part of their law since inception but has grown in the last thirty years as a response to the need for facilitation of settlement within arbitration.

275 Christian Bühring-Uhle.
276 Emmanuel Gaillard, Supra n 4.
277 Emmanuel Gaillard, Supra n 4.
This chapter commences by looking at the evolution of arguments and analysis presented by this community of practitioners through 1990s to 2010s in context of China, Hong Kong and Singapore as it sought to overcome the debates on Med-Arb. It opens with discussion on the leading figures within the community of professionals in China from 1980s who at that time promoted and argued for different set of procedures and methods for such a combination. It traces this evolution to what by 1990s came to be the hybrid Med-Arb mechanism. This is accompanied by discussion of specific arguments offered by leading members of the community. These arguments were canvassed to justify these proceedings in response to criticisms from within the larger community of ICA professionals. It thereafter, discusses the impact on Hong Kong and finally adoption of Med-Arb by Singapore where too similar arguments, including the cultural arguments, were made. This includes the discussion of the episteme that developed to both explain and justify Med-Arb to the members of the community.

Dezalay and Garth open their work *Dealing in Virtue* with an insightful statement: “ideas do not circulate and take hold by themselves. However powerful, an idea, like any new invention or technology, still requires carriers to promote it in a new context.”

The polarization of the community of practitioners of ICA is exhibited in the entry of practitioners from East Asia. They are trained in the law of ICA but also have to respond to the needs of respective local jurisdictions.

The discussion of Med-Arb shows that this eventual legal mechanism, as charted out in the previous chapter, was not present for most of the last century. It developed over the last three decades by this community of practitioners. In the process, they had to answer the resistance best exemplified in Donna Ross’ quote “[C]ertain detractors of Med-Arb/Arb-Med oppose it so fervently they consider it not only an ethical disaster, but heretical—a process that should be burned at the stake”.

These objections centered around maintaining the impartiality of the arbitrators who could use or employ information received during mediation.

Moreover, this community of specialists had to give explanations and reasons as to the cause of such divergence in their jurisdictions. As part of this explanation, they were further
compelled to argue for its acceptability as part of the arbitration mechanism so as to prevent it from being consigned to as an aberration.

I. HOW EPISTEMIC COMMUNITY CONCEPTUALIZED AND FORMULATED MED-ARB

1. China

Haas presented the concept of Epistemic Community to locate how professionals formulate specific policy solutions. In context of ICA, it refers to formulating specific mechanisms for resolving transnational business disputes. This has been a concern in East Asia for almost a century. The historical evidence from So and So shows that even a hundred years ago in the year 1904 when arbitration law was first introduced in China, Chinese traders were willing to engage in strategic arbitration against foreign parties when it suited their case. The business community was willing to work with the newly transplanted regime reposing its trust in it. The subsequent twentieth century in China was marked by civil war, Second World War and cultural revolution. It was only in 1978 did the economy open in China paving way for rise of market economy.

The key concern within the epistemic community of ICA that has shaped debates and policy responses has been the doubts over availability of remedies under ICA to foreign investors. The concern was whether ICA could resolve disputes in China. This concern is well-illustrated in an essay titled “Will China submit to arbitration?” in the year 1980, which centered around tendency towards a negotiated solutions and its impact on resolving transnational business disputes. The concern echoed in the remark that “only one foreign trade contract dispute was resolved through arbitration; ”twelve disputes were handled by mediation, and more than one hundred cases were resolved through friendly negotiations” till the year 1980. This

280 Peter Haas, Supra n 38.
281 Billy So and Sufumi So, Supra n 212, at 242, 252-253.; Kun Fan, Supra n 19, at 207
282 Billy So and Sufumi So, Supra n 212 at 253 notes that, “Legal proceedings and their outcomes, whether before the courts or tribunals, were seen as fair. The arbitrators elected to the Guild’s or Chamber’s arbitral tribunal, who were often themselves members of the companies involved in disputes, were unable to exercise undue influence over the dispute resolution process to ensure a finding in their favour. The arbitration system, which was equipped with appropriate impartial mechanisms, was received positively, and the system largely enjoyed credibility.”
283 Kun Fan, Supra n 19, at 217.; Thomas Hale, Supra n 4.
285 George Burke Hinman, Supra n 284.
286 George Burke Hinman, Supra n 284, at 74.
manifested into two key issues, first with respect to the question of certainty and predictability of dispute resolution in the absence of prevalence of ICA in China. Second, was the concern not so much against the idea of amicable resolution of disputes but lack of awareness and limited institutionalization of methods and techniques to do so. The essay noted that the “Chinese observation of arbitration techniques and procedures will help dispel their remaining uncertainties and demonstrate the benefits of arbitration. It is reasonable to assume that the Chinese, as they escape having to justify economic decisions in light of a narrow "party line," will view trade from a businessman's perspective, and the practical advantages to arbitration will become increasingly apparent. They then will come to appreciate and trust this efficient businessman's solution to commercial disputes.”

In effect, the common concern among the business community and the epistemic community of ICA was with respect to predictability and certainty of dispute resolution in China. Chinese on the other hand were acutely aware of the concerns of foreign investors and undertook series of reforms to address them. It involved expansion of jurisdiction of CIETAC as well as passage of 1982 Civil Procedure Law recognizing foreign arbitral awards as well as 1985 Economic Contract Law reaffirming the right to settle disputes through arbitration and finally, acceding to New York Convention in the year 1986. A key role was played by the epistemic community of arbitration lawyers networked around Tang Houzhi and Ren Jiaxin that led to the series of reforms culminating in the 1994 Arbitration Law.

Houzhi has been recognized as the “father” of modern arbitration began work with CIETAC in 1959 and would go on to serve as its Vice-Chairman. In his long career, he had also represented China at UNCITRAL. He had negotiated the terms for Model Law in 1985 on behalf of China. Thus, he was part of the larger epistemic community of ICA as also evidenced in membership of various arbitral bodies across the world.

In 1984, Houzhi, who was the then Deputy Secretary General of CIETAC, was aware of the concerns within this epistemic community around developing predictable and credible

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287 George Burke Hinman, *Supra n 284*, at 91.
289 Thomas Hale, *Supra n 4*, at 322. CIETAC was called Foreign Economic and Trade Arbitration Council (FETAC).
290 Thomas Hale, *Supra n 4*, at 322.
291 Thomas Hale, *Supra n 4*, at 348-349.
292 Thomas Hale, *Supra n 4*, at 346-347.
293 It was referred to as FETAC in 1984.
mechanisms for resolution of international commercial disputes in China. He was also aware of the tendency among the arbitration professionals and business in China for having a method for facilitation of settlement. Consequently, he presented a mechanism called as Joint Conciliation Method under which two disputes arising from US-China trade had earlier been resolved. He explained this method as where “In case of a dispute, the Chinese party applies to the Chinese arbitral institution and the foreign party applies to a corresponding arbitral body in his own country for joint conciliation. Upon such application, the Chinese arbitral institution and the corresponding arbitral body appoints one or more conciliators on an equal basis to conciliate the case jointly. If conciliation succeeds, the dispute is then solved. However, if conciliation fails, the dispute will be referred to arbitration in accordance with the arbitration clause specified in the contract.”

Joint Conciliation method was therefore presented as a reliable and credible method for dispute resolution that the larger epistemic community of ICA could rely upon. What it also revealed was that the Joint Conciliation method was a policy agenda that as attempted to be fashioned into arbitration proceedings so as to enable a mechanism that facilitated settlements. Houzhi was open about this preference and noted that an ordinary arbitral clause read as “In case of a dispute, it shall be first settled through friendly negotiation and if negotiation fails, it shall be submitted for arbitration.”

The view on Joint Conciliation method was echoed by Ren Jianxin, the then Vice President of Supreme People’s Court of the PRC. Ren Jianxin has also been considered one of the leading members of the arbitration community in China being a critical link between the Chinese government and the arbitral community. He was the Secretary General of Maritime Arbitration Commission in the 1970s. In 1983, he was promoted to the Supreme People’s Court, the highest court in China. Thereafter, he held the posts of the Vice President and subsequently, the President of the Supreme People’s Court till 1998. The common belief and policy goal that brought this community together was formulating and promoting a method for facilitation of settlement as part of the arbitration process. It also necessitated for this epistemic community

295 Id. at 522.
296 Id. at 520.
297 Supreme People’s Court of the PRC is the highest court of People’s Republic of China. It may be considered equivalent to Supreme Court of United States in that respect as being the final and highest dispute resolution body.
298 Thomas Hale, Supra n 4 at 347.
to justify and defend such a formulation to the larger epistemic community of ICA. However, at this stage this policy formulation did not mean Med-Arb but Joint Conciliation method.

By 1990s, however, the policy agenda for this growing epistemic community of arbitration professionals in China had changed from Joint Conciliation method towards a hybrid mechanism of Med-Arb. The references to Joint Mechanism which Ren Jianxin promoted in the 1980s gave way to a hybrid mediation option for arbitrators by 1990s. Houzhi writing in 1993, just prior to major arbitration law reform in China, described in detail a method involving the arbitrator acting in a dual role as a conciliator.299 He states that “If the parties request a conciliation after the formation of an arbitration tribunal, the case will be conciliated by the tribunal in the course of arbitration. If the parties request a conciliation in the course of an oral hearing, the tribunal will conduct conciliation during the hearing. Conciliation in the course of an oral hearing is usually conducted the following three ways: 1. the arbitration tribunal consults the two parties together; 2. the arbitration tribunal consults each of the parties separately; and 3. the parties consult with each other themselves.”300 As is noticeable that the term conciliation is used to refer to the process of mediation with the arbitrator acting in a dual capacity during the course of proceedings as a mediator and even carrying out individual consultation or caucusing. Houzhi also places indicates two safeguards in the measure, first, being that the person acting as a mediator could not force the parties to come to a resolution and second, the parties have complete autonomy to terminate such mediation proceedings at any point of time.301 Both these responses are crucial in addressing the concern regarding coercive criterion. Though, Houzhi mentions Joint Conciliation method but it no longer occupies the central place in discussion as it did a decade ago.302

This hybrid mechanism where the same person acted as an arbitrator and mediator at different times during the same proceedings also received attention from within the larger epistemic community of ICA. The response again highlighted the concerns regarding the state of arbitration in China. The two key concerns were the question of impartiality and second was lack of trust by the parties. Houzhi, who by then was the Vice-President of CIETAC, answered these questions directly. First, quoting one of the practitioners, who had challenged the

300 Id. at 272-273.
301 Id. at 271-273.
302 Id. at 271.
procedures of Med-Arb as “fraught with danger or ripe with opportunity,” had laid out the criticism as “private caucus meetings are problematic for lawyers, they can also pose a dilemma for the mediator-turned-arbitrator. How much reliance, if any, can be placed on what is said in caucus meetings (when some very frank comments might be made and when the other side may have no opportunity to rebut what is said, or to shed other light on them, or put them in a different context)?” The criticism was that of impartiality of arbitrator, that is, availability of information to the arbitrator might create a real or apparent bias. To put it differently, such caucusing might cause the one of the parties to lose confidence in the impartiality of the arbitrator. Houzhi responded to this criticism by suggesting that such private caucusing only occurred after obtaining full informed consent of the two parties. He couched his reasoning in the broad idea of transparency that “all the information obtained by the arbitrator-turned-conciliator from one party shall be fully disclosed to the other party, so that the other party may respond in the process of conciliation, or if any information can not be disclosed to the other party during conciliation proceedings, it shall be disclosed when the conciliation proceedings are terminated with an unsuccessful result.”

The second concern regarding whether the parties would trust the arbitrator-mediator with necessary information that later could harm their case. This concern was raised by the Chairman of Hong Kong International Arbitration Centre. He had argued that “It is unthinkable that an arbitrator, in the course of his or her arbitration, would switch hats to act as a conciliator and, should the attempt at conciliation fail, continue with the arbitration. Parties would be reluctant to put all their cards on the table before a conciliator knowing that the same person may, in the end, arbitrate their dispute.” Houzhi responded this argument on the basis of principle of impartiality countering it as “But I would say it is best to have him to arbitrate the case just because he has known everything of the case. The key point is that he must be impartial. The more he knows the case, the more impartial he can be if he is a person who really cherishes impartiality.” Implicit in the defense is the justification for the policy formulation of Med-Arb as a credible and reliable method for dispute resolution as part of ICA. The response of Houzhi is premised to ensure that the policy agenda in favor of Med-Arb continues.

303 Tang Houzhi, Supra n 9, at 11.
304 Tang Houzhi, Supra n 9, at 12.
305 Tang Houzhi, Supra n 9, at 12-13.
306 Tang Houzhi, Supra n 9, at 13.
307 Tang Houzhi, Supra n 9, at 13.
This trend towards Med-Arb continued to solidify by the year 2000. By then, the earlier policy agenda of Joint Conciliation Method had given way to hybrid Med-Arb proceedings. The response of Houzhi to the concerns being raised by the other members of the epistemic community was therefore centered around defending this policy proposal.\textsuperscript{308} This policy approach was put in place in the CIETAC Rules, 2000 which specifically provided for:

(a) The arbitration tribunal may conciliate cases in the manner it considers appropriate;
(b) The arbitration tribunal will close the case by making an arbitration award in accordance with the contents of the settlement agreement unless otherwise agreed by the parties;
(c) The arbitration tribunal shall terminate conciliation and continue the arbitration proceedings when one of the parties requests a termination of conciliation or when the arbitration tribunal believes that further efforts to conciliate will be futile.\textsuperscript{309}

The 2000s would witness both greater curiosity as well as sharpening of these concerns within the epistemic community of ICA. Richard Hill\textsuperscript{310} wrote reiterating the concern regarding impartiality, “Many practitioners express concern that a mediator may acquire sensitive and confidential information during a caucus and that this information may affect his or her subsequent arbitral award, even though the other party had no opportunity to rebut it.”\textsuperscript{311} Similar concern was raised by Gerald Philips\textsuperscript{312} where he argued “True, same-neutral Med-Arb raises ethical issues. For example, a key issue is that the arbitrator’s decision could be influenced by confidential information learned during private caucuses. Information disclosed during private discussions between a mediator and a party are confidential and may not be communicated to the adversary unless the disclosing party agrees. In addition, in a private caucus a party may tell the mediator something that would not be admissible in a subsequent litigation.”\textsuperscript{313} Russel Thirgood, a leading arbitrator and mediator\textsuperscript{314}, in his “Critique of Foreign

\textsuperscript{308} Tang Houzhi, Supra n 9.
\textsuperscript{309} CIETAC Arbitration Rules, 46-50 as quoted in Carlos de Vera, Supra n 174, at 183-185.
\textsuperscript{310} Richard Hill is an arbitration professional and arbitration educator. He has worked at multiple universities and organizations, like WIPO, teaching arbitration and mediation. He has also participated in various arbitrations and has been member of leading arbitration societies like Swiss Arbitration Association and American Arbitration Association. See Richard Hill’s CV (http://www.hill-a.ch/fullcv2.doc) (last accessed June 12, 2021)
\textsuperscript{311} Richard Hill, Supra n 9, at 107.
\textsuperscript{312} Gerald Philips was a full time mediator and arbitrator and held membership with American Arbitration Association. See Gerald Philips, Same Neutral Med-Arb: What does the future hold?, Dis. Res. J. 24 (May/July 2005)
\textsuperscript{313} Id., at 27.
\textsuperscript{314} Russel Thirgood has been a practicing mediator and arbitrator for over two decades having handled multiple multi-million dollar arbitration cases as well as being member of multiple arbitration associations. See Russell
Arbitration in China raised the identical concern stating, “During the conciliation process the arbitrator is liable to learn of additional and confidential aspects of the dispute. If this information is received in private caucus the other party would not have had the chance to have it tested through some form of cross-examination. The information obtained may later prejudice the arbitrator in the conduct of the later arbitration proceedings.”

These concerns were the continuing that Houzhi had encountered. But as Chinese market became important, these concerns also became widespread with the epistemic community of ICA based in Europe, America and Australia. In effect, they expressed concerns regarding impartiality of the person acting as mediator and arbitrator going to the core of shared normativity of ICA in China and thus, their long term reliability as part of ICA. In turn, it challenged the credibility and reliability of such proceedings. The Chinese members part of this larger epistemic community were part of this interactive environment. They were thus compelled to respond to these criticisms to maintain the Med-Arb hybrid mechanism being developed China while at the same time to promote it in other jurisdictions.

The defense and promotion of the policy agenda around Med-Arb in 2000s and 2010s would develop on the argumentation of these rules in terms of cultural explanation alongside the explanations offered by Houzhi. The epistemic community in China would continue the defense developed by Houzhi but more explicitly in cultural language. Wang Wenying, professor at Faculty of Law, University of Hong Kong as well as an arbitrator at CIETAC, argued that the “In traditional Chinese culture, the main concepts are praise of harmony (he wei gui), moderation in all things (zhong yong), concession or yielding (reng), and cease of litigation (xi song). All the principles of Confucianism and Taoism promoted a culture in which litigation was considered the last resort because it signified the breakdown of social harmony. This deeply influenced the method of dispute resolution selected by Chinese.”

Kun Fan has written at length on understanding the Chinese arbitration practice of Med-Arb strongly in cultural terms. In an co-authored empirical work with another leading arbitration

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315 Russell Thirgood, supra n 198.
316 Russell Thirgood, supra n 198, at 94.
317 Wang Wenying, supra n 213, at 441.
318 Kun Fan has been a prolific writer on arbitration in China having written 24 texts on arbitration since 2008 See Kun Fan’s Google Scholar Profile (https://scholar.google.com/citations?user=xLefM1UAAAAJ&hl=en&oi=sra) (Google Scholar) (last accessed June 12, 2021). She is an Associate Professor at University of New South Wales, Australia and has experience...
professional Gabrielle Kauffmann-Kohler, they state that, “Despite the divergences between these two, a merged system seems to work well in Asia, especially in China due to its legal culture that emphasizes mediation.” They put the cultural explanation succinctly as “Mediation afforded people a socially acceptable method of resolving disputes in light of Confucian morals, and it therefore became the main method of dispute resolution.” Further, relying on Houzhi’s speech at WIPO Conference on Mediation they answer the concern on impartiality as “If the parties have gained such strong confidence in the mediator during the course of the mediation that they actually would prefer to have him or her arbitrate the remaining issues despite any caucusing that might have taken place, this choice should be respected, notwithstanding concerns about the possible confusion of roles.” Thus, in effect fusing the earlier defense based on parrying the concerns around Med-Arb along side the cultural explanation. In this manner, the cultural explanation of Med-Arb became both a defense as well as justification for Med-Arb. The policy agenda of Med-Arb being predicated on shared causal explanation around culture.

Kun Fan continues this case for defense and promotion of Med-Arb hybrid mechanism both as a unique feature of Chinese arbitration as well as being part of the larger ICA culture. She stated that “From the experience of the transplantation of arbitration in China, we can see that that local tradition and culture still play a significant role in accepting and reshaping borrowed legal institutions, despite the general inevitable trend towards globalization of law.” She further elaborated this mixing of cultures by arguing that “In the process of transplanting arbitration into China, we can see that the borrowed concept was severely challenged by the native legal culture. The extra judicial nature of arbitration – a semi-formal institution with an adjudicatory function which produces a binding result – was incompatible with the ‘local soil condition’, which provided a foundation for the informal process of resolving disputes to restore harmony. … As a result of this ‘cultural translation’, the native tradition of mediation was integrated into the Western notion of arbitration. A new form of institution or process gradually came into being – the integration of mediation into arbitration. This practice remains

of working as both arbitrator and mediator besides being member of various Arbitration Associations. Kun Fan’s Profile (https://www.law.unsw.edu.au/staff/kun-fan) (UNSW) (last accessed June 12, 2021)

Gabrielle Kauffmann-Kohler has been recognized as one of the top arbitrators within the Arbitration community and is considered one of the two formidable women within the arbitration community at large.

Sergio Puig, Supra n 162.

Kauffmann-Kohler and Kun Fan, Supra n 15, at 479.

Kauffmann-Kohler and Kun Fan, Supra n 15, at 481.

Kauffmann-Kohler and Kun Fan, Supra n 15, at 492.

Kun Fan, Supra n 164, at 219.
one of the main features of the contemporary arbitration regime in today’s China.”324 It is important to point out here that Kun Fan recognizes that mere cultural explanation in and of itself is not a sufficient criterion to explain the divergence in China as the divergence has multiple causes to it.325 But what it provides is a shared vocabulary that relies on the cultural explanation as a cause and justification for Med-Arb.

Thus, in the manner that Houzhi had argued, she also argues that “Another justification for the arbitrators to facilitate settlement is based on the parties’ freedom of choice. Party autonomy is the essence of arbitration. If the parties want the arbitrators to carry out a conciliatory role, to use caucus in mediation, or to put their arbitration hats back on if the mediation fails, such choices should be respected.”326

An empirical study done by Kaufmann-Kohler of Chinese arbitration professionals from CEITAC and BAC further confirms this tendency within the community of professionals towards facilitating settlement.327 She found that this was being explained in the interviews in terms of Confucian culture. The interview shows that in more than 50% of cases, the persons appointed to conduct arbitration engaged in an attempt at mediation, including private caucusing, after securing the consent of the parties. The essential point underscored by Kaufmann-Kohler was that there was a strong tendency within the epistemic community to conduct Med-Arb proceedings and that the explanation was given in terms of Confucian values.

Hale in his interviews with Chinese practitioners in 2011 also concludes that Houzhi and Ren Jiaxin were at the center of this epistemic community by acting as bridge between the businesses and epistemic community of ICA on one hand and the Chinese State on the other hand.328 Furthermore, this epistemic community directly influenced the shaping of the law developing specific policy responses to the needs for having a combined hybrid proceedings, first in shape of Joint Conciliation method of 1980s and later, as Med-Arb hybrid mechanism. This epistemic community promoted and defended these specific hybridization methods as leading to greater efficiencies or in terms of party autonomy and only later by 2000s in strongly cultural language on basis of Confucianism. Though, the writers relying on cultural explanation had a caveat that culture is not argued as the sole causal explanation.329

324 Kun Fan, Supra n 19, at 211.
325 Kun Fan, Supra n 164, at 291-292.
326 Kun Fan, Supra n 9, at 140.
327 Gabrielle Kaufmann-Kohler, Supra n 164.
328 Thomas Hale, Supra n 4.
329 Kun Fan, Supra n 164, at 291-292.
In this way, this epistemic community specifically played in formulating definite policy of Med-Arb. The Med-Arb was a policy to bridge the need for facilitation of settlement with arbitration. The cultural vocabulary thus became a key fulcrum around which Med-Arb proceedings as a specific law and practice were justified and promoted. This epistemic community was organized around the shared belief that facilitation of settlement should be part of the arbitration proceedings. It is important to note that only by the 1990s this policy preference had narrowed down to Med-Arb. Consequently, the epistemic community of professionals both promoted it and defended it against various concerns and questions that were raised by the larger epistemic community of ICA and in this process developed a shared vocabulary of party autonomy and Confucian values.

II. Hong Kong

Hong Kong too embraced Med-Arb proceedings as part of the hybridization policy to resolve disputes. This again however was a gradual evolution. Chan and Suen in their empirical research in 2002 conducted with 40 experts in international dispute resolution involving arbitration identified with the assistance of HKIAC yielded a different response where only 3 percent of practitioners indicating a preference for Med-Arb proceedings in relation to international dispute resolution. This slow recognition of Med-Arb was most prominently seen in the case of Gao Haiyan v. Keeneye, discussed in previous chapter. The refusal of enforcement of the arbitral award on account of a failed Med-Arb proceedings caused concern within the epistemic community in East Asia. These concerns centered around possible difficulties for enforcement of awards where Med-Arb had been used in a manner that called impartiality of the mediator-arbitrator into question. The same was noted by Kun Fan in the words, “The Hong Kong court’s decision in Gao Haiyan sounded an alarm to arbitrators who act as mediators to be wary about the risks of apparent bias when wearing both hats in the same proceeding.” Kun Fan analyzed the Hong Kong Ordinance governing Arbitration to state

330 See Wang Wenyi, Supra n 213; Kun Fan, Supra n 19; Kun Fan, Supra n 164; Gabrielle Kaufmann-Kohler and Kun Fan, Supra n 15.
332 Kun Fan, Supra n 256.
that the law did provide a recognition for Med-Arb proceedings. She stated that Hong Kong Ordinance bars any challenge to an award on the ground that the arbitrator had served as mediator for the same dispute. In turn, she argues that Hong Kong recognized the combined practice of Med-Arb in the same manner as mainland China. With respect to *Gao Haiyan* case where the Court of Appeal recognized the award, she notes with caution that “This brings our attention to the importance of obtaining informed writ-ten consent of the parties before the arbitrator may start an arb-med process. Such informed consent will imply a waiver of the right to challenge the arbitrator or the award if settlement fails.”

Weixia Gu, Associate Professor at University of Hong Kong with multiple publications in various arbitration journals, observed in relation to *Gao Haiyan* case that “What is worth noting is that the legal issues such as bias, private caucus, confidentiality, and due process concerned in Med-Arb procedures, although challenged as problems in Hong Kong, have, however, been practiced for ages and never been considered as problems in [the] Mainland China dispute resolution context.” She also notes that “The judgment will provide both Mainland and Hong Kong practitioners with useful guidelines in dealing with new issues and concerns arising out of the Med-Arb proceedings. Moreover, institutionally, the discussion involved in the judgments at the two levels of the Hong Kong courts will be conducive for further improving the rules and practice of Med-Arb procedures, in both mainland China and Hong Kong. From the academic point of view, Hong Kong's closer economic relationship with the Mainland and rapid development of Med-Arb practice at both sides will demand further research on some controversial issues.” The clear emphasis at the time of *Gao Haiyan* is the presence of different approaches towards Med-Arb. This difference of approach was seen as an opportunity towards developing the practice to bring in greater certainty.

By the late 2010s, the situation had changed. The community of professionals associated with ICA recognized its availability under law while also recognizing the concerns. Weixia Gu, writing in context of belt and road initiative and its expected potential in transborder dispute resolution services, recognizes that while Hong Kong pays attention to conflict “inherently faced by an arbitrator who later becomes the mediator”, Hong Kong also allows the arbitrator...
to act as a mediator should all parties give consent in writing and that the person has to disclose all confidential information before resuming arbitration.339 Similarly, Shahla Ali, a practicing professional within the arbitration community as well as a leading academic340, notes that mediation as a form of alternative dispute resolution through various institutional bodies and that the Hong Kong Law specifically provides for the option of Med-Arb where arbitrator could act as a mediator with the permission of parties. She concludes that “As a Model law jurisdiction coordinating with China’s unique arbitration laws and given the ‘flexible structure of the international arbitration system based on a Model Rule framework which allows for countries to opt-in or out of particular provisions’ we see an example of a dynamic in which ‘procedural variation can coexist with a relatively high level of substantive legal uniformity across region.’”341 The discussion on Gao Haiyan case that was of much controversy a decade ago was now presented as the success of Hong Kong courts to apply “the usual strict policy of only allowing the refusal of enforcement of arbitral awards in exceptional circumstances.”342 She further recognizes that the arrival of BRI has changed the circumstances for the epistemic community of arbitration professionals in Hong Kong bringing with it challenge of other arbitral institutions with the words that “In addition to internal aspirations for greater market share among various arbitration and mediation service providers in Hong Kong, the arbitration community in Hong Kong as a whole consistently seeks to distinguish itself from other regional arbitral institutions”.343 The key emphasis being that Med-Arb is a policy mechanism that is the result of party autonomy.

The eventual integration and acceptance of Med-Arb in Hong Kong parallels the approach of the epistemic community towards Med-Arb. The doubts and criticisms around Gao Haiyan eventually gave way to acceptance within the community. They came to be recognized as an aspect of party autonomy, that is, if the parties were to decide so then it should be given recognition to.

339 Weixia Gu, Supra n 10, at 153.
340 Shahla Ali is the Professor and Associate Dean at Faculty of Law, University of Hong Kong and a registered arbitrator and mediator with various leading arbitral institutions. She is also member of Women in Arbitration section of HKIAC. Shahla Ali’s Profile (https://www.law.hku.hk/academic_staff/professor-shahla-ali/) (Hong Kong University) (last accessed May 21, 2021)
342 Id.
III. Singapore

Singapore is also a late-comer to the Med-Arb mechanism. It, like Hong Kong, too had to answer the resistance regarding impartiality of the same person acting as a mediator and arbitrator. Singapore has the benefit of a proactive government that is committed to promoting Singapore as the leader in providing transnational dispute resolution services and works very closely with the epistemic community of arbitration professionals.344

In 2014, as part of this proactive approach, SIMC was established and AMA Protocol created to respond to the concerns of impartiality. The Singaporean Minister for Law and Foreign Affairs K Shanmugam speaking at the International Bar Association promoted the Arb-Med-Arb protocol and establishment of SIMC. He stated that “The SIMC also presents parties with the unique option of the Arb-Med-Arb protocol, which is jointly administered by the SIMC and the SIAC. If parties are able to settle their dispute through mediation, their mediated settlement can be recorded as a consent award. The consent award is accepted as an arbitral award and enforceable under the New York Convention. If parties are unable to settle their dispute through mediation, they can of course continue with arbitration.”345 The Minister couches the AMA Protocol in the language of party autonomy. The concern regarding impartiality is directly addressed by VK Rajah, the then Attorney General of Singapore. He argued that “To meet one of the main concerns surrounding Med-Arb, that the neutral party qua arbitrator will be tainted by the confidential information he receives when acting as the mediator, the two processes will generally be conducted by different individuals under the SIAC-SIMC Arb-Med-Arb Protocol, unless the parties agree otherwise.”346 As part of the overall justification for the Arb-Med-Arb Protocol he stated that “China too, has a strong culture of mediation, reflecting the Confucian virtue of harmony, or He Wei Gui, that disputes among the people ought to be resolved, whenever possible, by ‘methods of discussion, of criticism, of persuasion and education, not by coercive, oppressive methods’”347 while at the same time quoting other countries like India to underscore the larger point of growth of mediation as an important mechanism for dispute resolution in Asia. Similar sentiment of support was expressed by Ms. Indranee Rajah, the then Senior Minister of State for Law and Finance where she again reiterated the government’s support behind the Arb-Med-Arb

344 Chan Leng Sun, Supra n 262, at 161.
346 VK Rajah, Supra n 271, at 32.
347 VK Rajah, Supra n 271, at 22.
The epistemic community also had to answer the concerns of impartiality. As the SMA Protocol provided for transfer of proceedings from arbitration to SIMC with the choice of mediator left entirely to parties, the arguments were couched in terms of party autonomy. Chanaka Kumarasinghe, a leading arbitration professional in Singapore,\textsuperscript{349} He argues that, “The arbitrator and mediator in the AMA proceedings are separate people. This enforces the impartiality of the arbitration and mediation proceedings. AMA protocol, however, does allow the parties to agree on the appointment of one individual to conduct the arbitration and mediation proceedings”.\textsuperscript{350} Herbert Smith Freehills\textsuperscript{351} also recognized the importance of AMA Protocol in the words, “The AMA Protocol represents another shot in the arm for ADR in Asia, and an example of dispute resolution institutions formally recognizing what is already a familiar practice in Asia. It is also further evidence of Singapore’s commitment to staying ahead of the curve as a leading one-stop dispute resolution venue.”\textsuperscript{352} The epistemic community based out of Singapore therefore saw the need for adoption of hybrid mechanism on the basis of both benefits in terms of providing services as well as maintaining the competitive edge of Singapore vis-à-vis other arbitral institutions. This competition between arbitral institutions also prompted recognition of party autonomy to include Med-Arb mechanism.

The formulation of AMA Protocol enables the parties to move from arbitration towards mediation with the choice of person acting as a mediator or arbitrator left largely to the parties. The epistemic community in Singapore developed around defending this position as part of the


\textsuperscript{349} Chanaka Kumarasinghe is deputy global head for HFW’s Energy and Resources Group and is a senior arbitrator and is recognized as a key individual for international arbitration in Singapore by Legal 500. Chanaka Kumarasinghe’s Profile (https://www.hfw.com/Chanaka-Kumarasinghe) (HFW) (last accessed May 28, 2021)


\textsuperscript{351} Herbert Smith Freehills is a leading international law firm with a dedicated dispute resolution practice in Singapore. HSF Arbitration Team (https://hsfnotes.com/arbitration/about/team/) (HSFNOTES) (last accessed May 28, 2021)

larger policy agenda of promoting hybrid mechanism. The shared goal thus being promotion and justification of Med-Arb mechanism.

What the foregoing reveals is that the hybrid mechanism to promote Med-Arb developed over thirty years time period. The epistemic community in response to the needs for facilitation of settlement as part of dispute resolution process developed a hybrid method called Med-Arb. It came to be recognized over a period of thirty years with the community of professionals interacting with each other as well as the larger community of ICA of which they are part of. The polarized field of Emmanuel Gaillard therefore is self-evident where the larger epistemic community is spread out and though is part of the larger community but is no longer the solidaristic model as it existed almost 30 years ago. The Med-Arb mechanism was presented as part of party autonomy as well as providing benefits of a streamlined procedure.

In this process, the proponents of Med-Arb had to face concerns from the larger community that revolved around the issue of impartiality of the person acting as mediator and arbitrator. The responses developed within the community have also been numerous commencing with reliance on the principle of party autonomy, where the proponents have argued that such a choice must be respected as the parties desire it as well as in terms of cultural preference. In these 30 years, this epistemic community has developed a shared vocabulary around the policy goal of providing hybrid mechanism in form of Med-Arb where the settlement could be facilitated as part of the arbitration proceedings.

II. THE SHARED EPISTEME

As can be deduced from the previous section, the vocabulary of the epistemic community was meant both as a formulation of Med-Arb as a practice as well as its subsequent justification. The epistemic community had to respond to the cultural need as well as tendency of practitioners in East Asia to be able to facilitate settlement as part of the arbitration proceedings. Jemielniak recognizes this preference for Med-Arb in the cultural traditions of East Asian jurisdictions of China, Hong Kong and Singapore as “National culture in this regard is also historically determined, with the shared traditional perceptions of social fabric and interactions still influencing contemporary strategies, adopted in the commercial context.”353 These strategies therefore, were aimed at developing a policy of Med-Arb that could be availed by the parties while being recognized by the epistemic community of ICA.

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In China, this took shape in the ideas of party autonomy and Confucian culture specific to China. Houzhi in response to specific inquiries by practitioners in the words, “conciliation like arbitration is private business. Its basis is the agreement of the parties and its essence is the parties’ autonomy (the free will and voluntariness of the parties). If the parties want conciliation to be conducted by arbitrators in the arbitration proceedings, if the parties agree to have “caucus” without disclosing from one party to the other party all the information received by the arbitration tribunal (the arbitrators-turned-conciliators) in the course of caucusing, if the parties wish to have the same person to act as an arbitrator and at the same time as a conciliator or first act as a conciliator and later as an arbitrator and vice versa, how could a third person (a lawyer, a law maker, a judge, a law professor, etc) say this is not appropriate and unfair to the parties”\(^\text{354}\). Here the logic of party autonomy becomes the narrative and the epistemic basis for promoting Med-Arb. The principle of party autonomy is already part of the shared episteme of ICA epistemic community. It emphasizes the norm that arbitration should be flexible recognizing the needs of the parties. Houzhi builds on this premise. In this manner, the promotion of Med-Arb is justified on the very basis of the existing epistemic concepts. Kun Fan, too like Houzhi, acknowledged the role of party autonomy arguing that “if the parties want the arbitrator to carry out a conciliatory role, to use caucus in the mediation, or to put their arbitration hats back on if the mediation fails, such choices should be respected.”\(^\text{355}\) In this narration, the epistemic community relied on a well-known concept within the episteme of ICA, that is, party autonomy to argue that the hybrid mechanism of Med-Arb is justifiable and acceptable. This idea therefore became a key response to the question of impartiality. By emphasizing it as a result of party autonomy, it was presented as parties’ choice well within the existing episteme of ICA.

However, Kun Fan also argued for strongly cultural explanation as a means of justifying the practice of Med-Arb. She argued that unlike the West, the Confucian values require the parties to eschew aggressive assertion of rights in favor of maintaining an ongoing relationship.\(^\text{356}\) In this argument, the policy formulation of Med-Arb and its justification is therefore a result of “interaction between local norms and global scripts” where “development of transnational arbitration will continue as a process of glocalization”\(^\text{357}\). These two arguments have since been

\(^{354}\) Tang Houzhi, Supra n 9, at 14.  
\(^{355}\) Kun Fan, Supra n 19, at 140.  
\(^{356}\) Kun Fan, Supra n 19, at 230.  
\(^{357}\) Kun Fan, Supra n 164, at 219.
repeated by Geixia Wu and Shahla Ali from Hong Kong and Rajah from Singapore in relation to China. In process, the success of the episteme being seen in the neat connection between the specific practice and policy of Med-Arb with that of principles of party autonomy and Confucian culture. The adoption of this shared assumption becomes the basis of promotion and defense of Med-Arb proceedings in different jurisdictions. The cultural explanation in this manner is – a shred norm and explanation – that is accepted as part of the policy formulation.

Weixia Gu in dealing with the concern of Gao Haiyan case recognizes the need for cross-border recognition of arbitration awards. However, she also implicitly accepts Med-Arb proceedings as being part of the arbitration both in China and Hong Kong with the caveat that the Chinese jurisdiction needing reforms. She stated in relation to China that, “In China, mediation is a product of its Confucian legal culture and the State governance imperative to promote social harmony. Confucianism favors less contentious means of resolving disputes with an emphasis on mediation, and views more contentious means such as litigation and arbitration to be less conducive to the maintenance of social harmony as predefined and constructed by the relationship between the individual and the community”. With respect to changes, she argues not against Med-Arb proceedings as a whole but seeking stricter standards for review by the local courts. This needs to be understood in the context of Gao Haiyan case where the award was challenged on the grounds of impartiality before the Hong Kong Court before the Hong Kong Court of Appeal came out in favor of enforcement of the award. In effect, the concern among the practitioners in Hong Kong is not against Med-Arb proceedings and see it as necessary part of the policy options that Hong Kong offers. Moreover, Gu recognizes Med-Arb with same person as an enabling provision within Hong Kong in case of disputes. Here following Houzhi, party autonomy becomes the shared norm to defend overall policy formulation.

Singapore in turn reflects a clear case of adoption of Med-Arb in 2014. This comes as part of both government policy with leading government ministers promoting these new changes as part of the competitive enterprise for Singapore to maintain its leadership in international arbitration. This change is supported again by the epistemic community in Singapore. Their
support is couched again in terms of keeping Singapore competitive with AMA Protocol offering such a policy option while countering the argument of impartiality on the basis of party autonomy. As Chanaka argues that “The arbitrator and mediator in the AMA proceedings are separate people. This enforces the impartiality of the arbitration and mediation proceedings. AMA protocol, however, does allow the parties to agree on the appointment of one individual to conduct the arbitration and mediation proceedings.”\footnote{365 The Best of Both Worlds, Supra n 350.} The emphasis on the choice of the parties is central to the question of impartiality.

The community of arbitration professionals in East Asia is part of the larger epistemic community of ICA. But it no longer solidaristic as had been studied by Dezalay and Garth\footnote{366 Dezalay and Garth, Supra n 4.} or Grisel\footnote{367 Florian Grisel, Supra n 4.} but has become polarized with East Asian jurisdictions being in constant interaction with each other. This interaction is seen in formulation, adoption and justification of Med-Arb. This practice originating in China in 1990s spread first to Hong Kong and then to Singapore. Its adoption comes with sharing of episteme first developed and promoted in China around party autonomy and later, cultural vocabulary of Confucian values. The purpose of this episteme is to provide and preserve policy of Med-Arb as part of the arbitration proceedings.
CONCLUDING REMARKS

I. Med-Arb and the issue of cultural affinities

Med-Arb as a policy to respond to needs of facilitation of settlement as part of and within arbitration was developed by an epistemic community of ICA professionals in East Asia. It was not a foregone conclusion with cultural preference on its own translating into a concrete policy. The preference for such a facilitation of settlement was mediated, that is, identified and solved, by the professional community into the hybrid mechanism of Med-Arb. This is revealed in the historical trajectory of its development. Med-Arb as a concrete policy was developed only in the 1990s, with Houzhi promoting it as a method that enables facilitation of settlement alongside the possibility of arbitration. The historical evidence from early twentieth century also corroborates this point – that Med-Arb is not like rivers or mountains, that is, a permanent and timeless part and parcel of Chinese arbitration law and practice on account of cultural affiliation. It should be characterized as a development of legal practice in response to the needs of the business community operating out of China. This is amply borne out by the fact that in the 1980s when Chinese economy opened up, Chinese professional community of arbitration espoused Joint Conciliation Method as a hybrid method combining facilitation of settlement with arbitration proceedings. It is only later that Med-Arb as a policy response developed.

At the outset, it is restated that this does not detract of the logic of culture and traditions on evolution of law. East Asian cultures are recognized to have greater affinity towards the group with members of the group are expected to have a group responsibility. Also, East Asian cultures are known to have a long-term orientation with belief that truth is dependent on situation and context. Empirical research on the attitudes of the arbitrators also reveal that culture and background training plays a key role in their disposition towards facilitation of settlements as part of the arbitration proceedings.

But, culture and traditions are like terrains which may indicate where trees are likely to grow while at the same time enabling sufficient latitude to the gardeners to decide where to plant the tree in those areas. In other words, while there is a cultural affinity in East Asia for facilitation

368 Tang Houzhi, Supra n 9.
371 Shahla Ali, Supra n 15.; Kun Fan Supra n 240.
of settlement but its concretization into a policy framework of Med-Arb with set of rules and laws required a professional community to formulate a solution to the problem of facilitation of settlements within arbitration proceedings. It is important to note here that Med-Arb is a specific policy that envisages availability of mediation as a route that may be taken by the parties as part of the arbitration proceedings. This emphasis on specificity of the policy gains relevance in view that Med-Arb as a policy was not a given or pre-determined outcome because of cultural preference in East Asia.

This limitation of cultural explanation is recognized by Kun Fan in her own assessment of role of culture to explain development of Med-Arb practice. She recognizes that affinity within a society towards a particular cultural behavior does not explain all outcomes that come to embody the law. Such assumptions also are in danger of being reductionist in relation to dispute resolution involving entities from different jurisdictions or where the entities themselves are transnational corporations operating in multiple jurisdictions.

To put it differently, the cultural affinity in East Asia towards facilitation of settlement, as exhibited in attitudes of arbitrators, did not have a predetermined path leading up to Med-Arb. The choice of Joint Conciliation method that was developed in the 1980s was available as well to respond to the needs of having settlement facilitation as part of the arbitration proceedings. The same was also employed in two instances in the 1980s involving disputes between entities from United States and China. This alternate remedy was eventually discarded in favor of Med-Arb as Med-Arb was recognized within the community of professionals by the 1990s as providing greater flexibility to the arbitrators and parties in terms of choosing when to mediate as well as number of times to attempt mediation.

II. Role of the epistemic community in developing the episteme in favor of Med-Arb

It is here, as the thesis contends, that the concept of epistemic community of professionals assists in explaining development of a policy proposal. Koskenniemi is the author on report on fragmentation of international law on behalf of International Law Commission. The report recognized that the informal activities of lawyers, diplomats and, pressure groups play a key role in emergence of specialized law regimes like ICA. This is in line with what Dezalay and

372 Shahla Ali, Supra n 15.; Gabriele Kauffmann-Kohler, Supra n 164.
373 Kun Fan, Supra n 164 at 290.
375 Tang Houzhi, Supra n 9.; Ren Jiaxin, Supra n 369.
376 International Law Commission, Supra n 1, at 84-85.
Garth and later, Florian Grisel uncovered, namely, that the development of ICA owes substantially to community of professionals sharing an episteme and working towards development of law and practice of ICA.\textsuperscript{377} Hale on the basis of his empirical research in China also located similar epistemic community operating in China working towards development of ICA. He specifically found that Tang Houzhi and Ren Jiaxin were at the center of development of procedures and principles of ICA throughout 1980s towards 2000s.\textsuperscript{378} This epistemic community of professionals was guided by shared beliefs in normative principles that constituted ICA, most notably, the principle of party autonomy. This principle was employed as a justification against the detractors of Med-Arb, a defensive tool for promoting Med-Arb mechanism. It also continues for Med-Arb with the argument being that if the parties consent towards Med-Arb proceedings with the same person acting as the mediator and arbitrator, then, the proceedings as well as the outcome must be recognized. This was a novel use of the principle of party autonomy that the detractors of the Med-Arb in the larger epistemic community of ICA were well acquainted with, even if they had not used it in the same manner. This is well-born out by the defense given by Houzhi who responded to the criticisms and doubts with respect to Med-Arb by relying on this principle.\textsuperscript{379}

The reliance on party autonomy was strategic to the extent that given its recognition within the existing body of ICA, it served also as a causal belief and truth test. So, Houzhi in response to the question of bias of the arbitrator acting as a mediator justifies that such proceedings should be commenced by taking consent of both the parties.\textsuperscript{380} Similarly, Wenying argues that Med-Arb is available to parties only on the basis of their consent and their withdrawal of the consent would revert the proceedings back to arbitration.\textsuperscript{381} Shahla Ali found similar emphasis by the arbitrators, who had conducted Med-Arb in East Asia, as part of her empirical research. The arbitrators in her study emphasized that the route to mediation is not mandatory and is dependent upon the parties.\textsuperscript{382} The emphasis was on the approval of the parties to allow mediation to be conducted by the arbitrator and, in its absence to proceed ahead with the arbitration proceedings. What the above canvases is that the episteme of party autonomy, that is, justifying and defending the practice of Med-Arb as the result of approval or consent of the

\textsuperscript{377} Dezalay and Garth, Supra n 4.; Florian Grisel, Supra n 4.
\textsuperscript{378} Thomas Hale, Supra n 9 at 346-349.
\textsuperscript{379} Tang Houzhi, Supra n 9.
\textsuperscript{380} Tang Houzhi, Supra n 9, at 12.
\textsuperscript{381} Wang Wenying, Supra n 213.
parties by the members of the epistemic community. This principle is well-known and recognized by the broader epistemic community of ICA. Therefore, the reliance on this principle as a normative belief, causal explanation and more importantly, as a truth test by the members of this community ensures a stronger reception and acceptability of the Med-Arb in the larger ICA epistemic community.

The principle of party autonomy as a shared normative belief, causal belief as well as truth test was witnessed in context of Hong Kong too. The 2010 Ordinance enacting particular provisions specifically recognized the arbitration agreements that envisaged Med-Arb proceedings where the arbitrator was to act as a mediator. Similarly, the parties could have Med-Arb proceedings with same person acting as an arbitrator as a mediator where the parties gave a written consent. The emphasis on the parties’ consent was also argued by Kun Fan in her discussion of Gao Haiyan case, reiterating the importance of the written informed consent (with the informed consent acting as a waiver to challenge the arbitrator or the award on the ground that the person acted as a mediator during the proceedings). Thus, again as in China, the principle of party autonomy where the parties decide to appoint the same person as a mediator and arbitrator to carry out Med-Arb proceedings assumes the role of truth test to justify Med-Arb. It is also argued as a causal construct to lead to waiver of any challenge to the resulting award or against the arbitrator if such written informed consent is given by the parties.

Singapore adopted a different version of Med-Arb with its AMA Protocol institutionalizing the practice through SIAC and SIMC. Yet, the shared episteme is visible in Singapore as well where the government functionaries promoting Med-Arb in Singapore along with the arbitration practitioners emphasize that the AMA Protocol can be employed only on the basis of the consent of the parties. The Attorney General of Singapore as well as arbitration practitioners repeat this formulation. The AMA Protocol was justified as to be in conformity with the larger body of ICA principles and practice. This was done on the basis of reference to party autonomy. Thus, the original defense, as developed by Houzhi, came to be employed to act as a shared norm as well as shared truth test.

III. Shared Policy Agenda and responses to criticism

383 Section 32(3) of Hong Kong Ordinance, Supra n 250.
384 Kun Fan, Supra n 256.
385 VK Rajah, Supra n 271.
The Joint Conciliation method developed in the 1980s, as well as the later practice of Med-Arb, faced constant criticism and expressions of concerns from the members of ICA epistemic community. These criticisms focused on tendency in China towards facilitation of settlements rather than securing outcomes through adversarial proceedings. These critiques were expressions of concerns in view of uncertainty as well as unfamiliarity with the Med-Arb practice, as it developed from 1990s onwards. The professionals composing the epistemic community in China were aware of these concerns and responded to them to defend the policy of facilitation of settlements in built in arbitration proceedings. It is this shared agenda that guided their arguments and reliance of variety of different principles and arguments to support them.

Tang Houzhi and Ren Jiaxin both in the 1980s espoused the Joint Conciliation method as an approach that fused facilitation of settlements with that of arbitration proceedings. The espousal of this approach was predicated on successful implementation in two cases involving American and Chinese companies and was set up as a blueprint for the further resolution of disputes. This positive experience allowed to alleviate the concerns from the larger epistemic community regarding certainty of procedure and its predictability.

This shared agenda was witnessed again in the 1990s, when Med-Arb procedure is promoted. Again the goal was recognition and the defense of facilitation of settlements as part of the arbitration proceedings. The mechanism that was espoused was no longer the Joint Conciliation method but Med-Arb. This was also seen in the enactment of laws and changes in rules of procedure of CIETAC. The Arbitration Law of China, enacted in the year 1994, gave a broad leeway in determining the procedure for facilitation of settlement as part of the arbitration proceedings. The CIETAC Rules, 2000 catalyzed this approach into the policy of Med-Arb as discussed in in Section I.1 of Chapter 4.

The epistemic community of professionals growing in China was aware that these innovations into the larger body of ICA were at that time unique to China. The community was also aware of the challenges that the larger ICA epistemic community posed towards these innovations, and understood that their global reception as part of ICA would need justification.

386 George Burke Hinman, Supra n 284.
387 Articles 51 and 52 of the Chinese Arbitration Law, Supra n 219.
388 Tang Houzhi responds to two critiques specifically in Tang Houzhi, Supra n 9.
This back-and-forth argument between those that defended the Med-Arb and those who opposed it, remained a fixture throughout the 2000s.\textsuperscript{389}

The members of the epistemic community therefore responded to these criticisms on the basis of principle of party autonomy and later, in terms of Confucian culture as part of the broader defense of the Med-Arb practice altogether. The strongest proponent of influence of Confucian culture, Kun Fan argued that the process of transplantation of arbitration law into China fused together with the local culture leading to development of Med-Arb.\textsuperscript{390}

The goal of these arguments was to secure recognition of Med-Arb practice developed in China as part of ICA law. This was witnessed in response of the commentators when \textit{Gao Haiyan} judgment came out.\textsuperscript{391} Weixia Gu and Zhang, responding to the impact on cross-border arbitration between China and Hong Kong, stressed the needs for further development of practices within both China and Hong Kong to ensure that the awards from Med-Arb proceedings are enforceable in Hong Kong.\textsuperscript{392} The key argument regarding the need for greater safeguards, espoused by the authors, again fitted into the broader goal of promoting Med-Arb proceedings. Kun Fan also argued for recognizing safeguards like proper intimation to parties as part of the Med-Arb proceedings in response to the \textit{Gao Haiyan} case.\textsuperscript{393} Her argument aimed to ensure that the results of Med-Arb are seen with proper safeguards. It also fitted with the arguments advanced by Weixia Gu and Zhang to continue to promote Med-Arb but, with greater emphasis on procedures.

Singapore represents the concerted attempt by the government functionaries as well as arbitration professionals more clearly. Within two years of enactment of AMA Protocol, multiple government ministers at the various fora actively promoted AMA Protocol as an enabling mechanism that provided the parties an option to employ mediation as part of the arbitration proceedings. This is the result of the proactive stance taken by Singaporean government over the last three decades since 1990s to promote Singapore as a hub for ICA.\textsuperscript{394} Though AMA Protocol is different from the Med-Arb practice in China and Hong Kong in

\textsuperscript{389} Section II of Chapter 3 captures the debates and the opinions of various writers against the practice of Med-Arb.
\textsuperscript{390} Kun Fun, Supra n 19, at 211.
\textsuperscript{391} Section 2.II of Chapter 4
\textsuperscript{392} Wexia Gu and Xianchu Zhang, Supra n 338, at 27-31.
\textsuperscript{393} Kun Fan, Supra n 256.
\textsuperscript{394} Section 2.III of Chapter 4
terms of doctrine, the shared goal of the members of epistemic community to promote hybrid mechanism for facilitating settlements as part of the arbitration proceedings was clear.

The promotion of Med-Arb as a concrete policy, that can be adopted and seen as part of ICA practice, was the goal of this community. The goal is pursued in part through the tacit alliance as well as in part through the shared assumptions, norms and causal beliefs in the necessity for facilitation of settlement as part of the arbitration proceedings. As these assumptions came to be shared by the epistemic community of Hong Kong and Singapore, the consequent policies also came to be adopted by the respective jurisdictions.

It was this shared agenda of giving parties the option to facilitate settlement within the arbitration proceedings that brought the members of this community to argue, defend and promote Med-Arb. The circumstances of their defense and promotion varied as can be seen in different experiences in China, Hong Kong and Singapore.

**IV. Fragmentation and Convergence as a Result of Growth of Epistemic Community**

This insight is at the core of understanding the larger question of how fragmentation and divergences take place in international law. Tai Cheng\(^{395}\) argued that reference to culture in and of itself is a weak argument to explain divergences within ICA and as the preceding discussions of historical evolution in China, Hong Kong and Singapore reveal, that, culture on its own does not lead to a specific law or practice being adopted. The adoption of a particular policy agenda requires presence of a community of professionals that can respond to the needs within the business and at the same time, justify and promote that policy to the larger community. The interactive nature of this exercise could be seen throughout the promotion of Med-Arb commencing from 1990s to 2010s in Singapore. The initial proponents of Med-Arb in China took the challenges and questioning from their peers seriously and sought to justify their version of Med-Arb as part of ICA on principles of party autonomy. Later commentators from China continued the same defense but also included a strongly cultural argument as a justification for the Med-Arb practice. In Hong Kong, when controversy around Gao Haiyan broke out, the community of professionals reiterated the importance of cross-border enforcement of awards as well as the need for safeguards, while at the same time maintaining the possibility of Med-Arb as part of arbitration proceeding.

\(^{395}\) Tang Hai Cheng, *Supra n 374*. 

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This community of professionals has thus adopted the larger ICA principles and doctrines, while at the same time remaining confident about their local versions and innovations within ICA. Kun Fan, relying on the Santos’ approach of globalized localism and localized globalism, argued this point as glocalization of ICA. She argued that the global proliferation of ICA is a localized globalism of the West and its spread may involve innovations and local influences. She argued that as part of the process, the responses of various local innovations also become embedded into these processes becoming a ‘globalized localism’ that is, a local practice that has gained global recognition. To this end, she relied on the innovation of Chinese version of Med-Arb into ICA as an illustration. This formulation explains the doctrinal development, but its carriers at the core are the members of professional community of arbitration practitioners and academics from East Asia. Paraphrasing Dezalay and Garth, it is this community joined by a common agenda and sharing a common value that carried the ideas developed in the 1990s and popularized it as a doctrine compatible with ICA.

The trajectory of spread of Med-Arb mechanism attests to this expansion of ICA to East Asian jurisdictions. It coincides with the growth of the community of professionals in these jurisdictions who are trained in ICA doctrines but at the same time are responding to the needs of business. Their response to these changing circumstances is not straightforward and even, but adapts to the circumstances. While the early response to the need of facilitation of settlement was the Joint Conciliation method, it was given a short shrift by 2000 in favor of Med-Arb. Finally, the divergences in the law are explained by the growth of the epistemic community that could formulate these concrete policies, develop a shared vocabulary and finally, promote it as part of ICA practice.
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